CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 38/16

In the matter between:

MINISTER OF HOME AFFAIRS	First Applicant
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Applicant

and

LAWYERS FOR HUMAN RIGHTS	Intervening Party

In re:

LAWYERS FOR HUMAN RIGHTS	Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
MINISTER OF POLICE	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
BOSASA (PTY) LIMITED t/a LEADING PROSPECTS TRADING	Fifth Respondent

and

PEOPLE AGAINST SUFFERING, OPPRESSION AND POVERTY	Amicus Curiae

Neutral citation: *Ex parte Minister of Home Affairs and Others* [2023] ZACC 34 *In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22

Coram: Zondo CJ, Maya DCJ, Kollapen J, Majiedt J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ

Judgments: Majiedt J (Zondo CJ, Maya DCJ, Kollapen J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ concurring)

Heard on: 25 May 2023

Decided on: 30 October 2023

Summary: Immigration Act 13 of 2002 — unconstitutionality of section 34(1)(b) and (d) — invalid

Ex parte application for "revival" of a lapsed suspension of invalidity — legally incompetent — Constitutional Court is empowered to supplement its previous order under section 172(1)(b) of the Constitution

---

ORDER

On application for revival of the order of this Court dated 29 June 2017, the following order is made:

1. Subject to and pending the enactment of legislation outlined in paragraph 2, as from the date of this order, and pending remedial legislation to be enacted and brought into force within 12 months from the date of this order, the following provisions, supplementary to those contained in paragraph 4 of this Court's order of 29 June 2017, shall apply:

(a) An immigration officer considering the arrest and detention of an illegal foreigner in terms of section 34(1) of the Immigration Act 13 of 2002 (Act) must consider whether the interests of justice permit the release of such person subject to reasonable conditions, and must not cause the person to be detained if the officer concludes that the interests of justice permit the release of such person subject to reasonable conditions.

(b) A person detained in terms of section 34(1) of the Act shall be brought before a court within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.

(c) The Court before whom a person is brought in terms of paragraph (b) above must consider whether the interests of justice permit the release of such person subject to reasonable conditions and must, if it so concludes, order the person to be released subject to reasonable conditions.

(d) If the Court concludes that the interests of justice do not permit the release of such person, the Court may authorise the further detention of the person for a period not exceeding 30 calendar days.

(e) If the Court has ordered the further detention of a person in terms of paragraph (d) above, the said person must again be brought before the Court before the expiry of the period of detention authorised by the Court and the Court must again consider whether the interests of justice permit the release of such person subject to reasonable conditions and must, if it so concludes, order the person to be released subject to reasonable conditions.

(f) If the Court contemplated in paragraph (e) above concludes that the interests of justice do not permit the release of such person,

the Court may authorise the person's detention for an adequate period not exceeding a further 90 calendar days.

(g) A person brought before a Court in terms of paragraph (b) or (e) must be given an opportunity to make representations to the Court.

2. If remedial legislation is not enacted and brought into force within the said 12-month period, the provisions in paragraph (1) above shall continue to apply until such remedial legislation is enacted and brought into force.

3. Subject to paragraphs 4 and 5, the applicants must pay the intervening party's costs, including the costs of two counsel.

4. The first applicant must pay 10% of the costs referred to in paragraph 3 in his personal capacity.

5. The second applicant must pay 25% of the costs referred to in paragraph 3 in his personal capacity.

6. The fees of the applicants' former legal representatives, referred to in this judgment, are disallowed.

JUDGMENT

MAJIEDT J (Zondo CJ, Maya DCJ, Kollapen J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ concurring):

Introduction and background

[1] On 3 February 2016, the High Court of South Africa, Gauteng Division, Pretoria (High Court), declared section 34(1)(b) of the Immigration Act[1] (Act) unconstitutional and invalid to the extent that it requires a detainee to request that their detention be confirmed by a court, rather than granting an automatic right that such detention be confirmed by the detainee appearing in person in court. The High Court also declared section 34(1)(d) of the Act unconstitutional and invalid to the extent that it provides for an extension of the period of detention, without affording the detainee the right to appear in court in person at the time the request is made.[2]

[2] As interim relief, the High Court made a severance and reading-in order. That part of its order reads:

> "2 Section 34(1)(b) is to be read as though it provides as follows:
>
> > '(b) must be brought before a Court in person within 48 hours of his or her detention, in order for the Court to determine whether to confirm the detention, failing which the foreigner shall immediately be released.'
>
> 3 The words 'a warrant of a Court which' in section 34(1)(d) are severed from the section and the words 'appearing in Court in person, which Court' are to be read into the section."

[1] 13 of 2002.

[2] *Lawyers for Human Rights v Minister of Home Affairs* 2016 (4) SA 207 (GP).

[3] Lastly, the High Court held the Minister of Home Affairs (Minister) and the Director-General: Department of Home Affairs (Director-General) liable for the costs.

[4] The matter came to this Court for confirmation of the orders of invalidity. On 29 June 2017, this Court delivered a unanimous judgment in favour of Lawyers for Human Rights (LHR), the present intervening party, declaring section 34(1)(b) and (d) of the Act inconsistent with the Constitution and invalid (the 2017 judgment and order).[3] It suspended the declaration of invalidity for 24 months so that Parliament could remedy the constitutional defects. That period of suspension expired on 29 June 2019.

[5] In confirming the order of invalidity, this Court held that the impugned provisions limited the constitutional rights enshrined in sections 12(1) and 35(2) of the Constitution, and that this limitation was unjustifiable – thus making the provisions inconsistent with the Constitution. On remedy, this Court held that severance and reading-in were inappropriate to remedy the defects in both section 34(1)(b) and (d) of the Act. This Court ordered in paragraph 4:

> "Pending legislation to be enacted within 24 months *or upon the expiry of this period*, any illegal foreigner detained under section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days."[4] (Emphasis added.)

[6] Parliament failed to meet the deadline to enact the requisite corrective legislation before the suspension period expired. Now, in 2023, six years after the 2017 order, Parliament has still not enacted corrective legislation. The Minister, the first applicant, and the Director-General, the second applicant, approached this Court on an ex parte basis by way of an urgent direct access application for what is termed

[3] *Lawyers for Human Rights v Minister of Home Affairs* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC) (*2017 judgment*).

[4] Id at para 73.

in the notice of motion a "revival" of the 2017 order. It bears mention at this early stage that the Director-General deposed to the founding affidavit in this Court. In that affidavit, the Director-General says that he is "also [launching] this application on behalf of the [first applicant]" (that is, the Minister). As will appear later, this is of considerable importance as it may have a bearing on costs and broader issues of accountability. LHR has been admitted as an intervening party in these ex parte proceedings.

[7] The Minister launched an urgent ex parte application in the High Court in an attempt to revive the 2017 order. On 21 June 2022, the High Court granted an order directing that the 2017 order would remain operative pending the finalisation of this application by the Minister in this Court, alternatively, pending the enactment of the necessary legislative amendments to the Act, in the event that such amendments are effected before the hearing of the application in this Court.

Unconstitutionality of section 34(1)

[8] Section 34(1) provides:

> "Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned—
>
> (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
>
> (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and

(e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."

[9] In the 2017 judgment, this Court described the powers vested in immigration officials under this section as "drastic".[5] The Court identified three constitutional defects in the section. First, the Court held that section 34(1)(b) was unconstitutional since it did "not require an automatic judicial review of a detention before 30 calendar days expire".[6] Second, it held that section 34(1)(d) was unconstitutional because it did not require the appearance of the detainee in person before any decision to extend the detention for a further 90 days. The Court held that the Minister's concession in his submissions that a detainee must be entitled to appear in person and the undertaking by the Minister that a detainee who wished to appear in person would be afforded the opportunity to do so, did not cure the defect in the section.[7] Third, it held that section 34(1) was unconstitutional, because it conferred a power to detain without any objectively determinable conditions or guidance for how that power is to be exercised. Regarding this defect, the Court held:

> "Notably, section 34(1) authorises an immigration officer to arrest and detain an illegal foreigner, pending his or her deportation. The exercise of this power is not subject to any objectively determinable conditions. Nor does the section lay down any guidance for its exercise. There can be no doubt that in present form section 34(1) offends against the rule of law by failing to guide immigration officers as to when they may arrest and detain illegal foreigners before deporting them. More

[5] 2017 judgment at para 47.

[6] Id at para 52.

[7] Id at paras 56-7.

so because this power may be exercised without the need for a warrant of a court. The detention is quintessentially administrative in nature”.[8]

Post-2017 situation

[10] Parliament has not only failed to pass any legislation, but also failed to ask this Court for an extension of the original order before it expired. Instead, it waited three years after expiry, and then approached the High Court on an ex parte basis, even though that Court has no competence to vary an order of this Court which sits at the apex of South Africa’s judicial system. Troublingly, after the 2017 order until now, courts have taken divergent positions on the legal effects of the lapsed suspension of the declaration of invalidity. In *Okafor*,[9] it was held that section 34(1)(b) “no longer forms part of the Immigration Act”.[10] This position was reaffirmed in *O A*[11] and *Nwankwo*.[12]

[11] This perceived lacuna has created further undesirable consequences. LHR reports in its papers that some Magistrates are unwilling to confirm detentions beyond 30 days. This leads to near-automatic releases from detention, even in cases where deportation should occur. As a consequence, deportees are likely to abscond, rendering their deportation impossible. The alternative to release is equally problematic, as some immigration officers simply detain an immigrant beyond 30 days without bringing the detainee before a court, further violating their rights to liberty. Clearly, this is a most undesirable state of affairs.

[12] LHR explicates in its papers the difficulties caused by the failure to pass legislation envisaged by the 2017 order. They state that the failure to pass legislation within the 24-month period allowed by this Court in 2017 has caused considerable

---

[8] Id at para 48.

[9] *Okafor v Minister of Home Affairs* [2020] ZAGPJHC 383 (*Okafor*).

[10] Id at para 27.

[11] *O A v Minister of Home Affairs* [2019] ZAGJHC 470 at para 25.

[12] *Nwankwo v Minister of Home Affairs; Anyacho v Director General: Department of Home Affairs; Onwuakpa v Director General: Department of Home Affairs* [2020] ZAGPJHC 377 at para 65.

uncertainty and prejudice. In this regard, there are some High Court judgments that have concluded that the provisions of section 34(1)(b) and (d) of the Act are invalid and any detention in terms of those provisions has been rendered unlawful. LHR cites two High Court judgments, *Okoye*[13] and *Okafor*.[14]

Parties' submissions

Applicants' submissions

[13] In their notice of motion, the applicants seek the following relief:

> "1. Permitting the Applicants direct access to the Constitutional Court as provided for in terms of Rule 18 of the Constitutional Court Rules;
> 2. Ordering the *revival* of the order of this Court dated 29 June 2017 under Case Number: CCT38/16 for a further period of two years or such other time period as the Honourable Court may deem it meet, for purposes of permitting the Applicants and Parliament to effect the legislative amendments to Section 34(1)(b) and Section 34(1)(d) of the Immigration Act No. 13 of 2002, as provided for in the said order.
> 3. That the Court issue such further directives as it may deem necessary, for purposes of giving effect to the above;
> 4. Further and/or alternative relief." (Emphasis added.)

[14] Despite the relief sought in paragraph 2 of the notice of motion, the applicants contend that they do not really seek a "revival" of the suspension order as LHR claims, but rather a fresh order allowing for the practical implementation of the necessary legislative amendments in order to give effect to the 2017 order. The applicants deny that the High Court order of 21 June 2022 is incompetent and argue that LHR had an opportunity to apply for the rescission of that order, since it had been a party in the application that resulted in the 2017 order.

[13] *Okoye v Minister of Home Affairs* [2020] ZAGPJHC 382 at para 50.

[14] Id at para 30.

[15] In the Director-General's founding affidavit, the applicants outline the steps taken and events since the 2017 order. In brief, these were:

(a) The Draft Immigration Amendment Bill was published on 11 June 2018.

(b) A resolution was passed by the Parliamentary Portfolio Committee on Home Affairs (Portfolio Committee) on 4 September 2018 calling for further engagement between the Department and the Departments of Justice, Safety and Security and Correctional Services regarding the proposed amendments to section 34.

(c) After October 2018, parliamentary activity was drastically reduced as a consequence of the national elections scheduled for 22 May 2019.

(d) Then, in March 2020, the global Covid-19 pandemic hit South Africa's shores and "had a further debilitating effect on the plans to reintroduce a Parliamentary Bill, and this is particularly so when regard is had to the fact that the previous Bill had not been saved".

(e) The devastating fire in buildings at the parliamentary precinct also "had an adverse effect on the workings of Members of Parliament, in particular, the Parliamentary Portfolio Committee".

(f) A directive by a Senior Johannesburg Court Magistrate that Magistrates should no longer entertain section 34 enquiries into the detention of "illegal foreigners", "had the effect of increasing the urgency in the need to reintroduce the Bill . . . as from the end of January 2022".

(g) On 24 April 2022, the Minister addressed a letter to the Chairperson of the Portfolio Committee, requesting the reintroduction of the Amendment Bill.

(h) A meeting between departmental officials and the Chairperson of the Portfolio Committee ensued where discussions centred on whether to introduce an Executive or Committee Bill. Ultimately, in the interests of time, the decision was to introduce a Committee Bill.

(i) In June 2022, the Minister approved the process for the development of a Committee Bill.

(j) Finally, the applicants approached the High Court to seek the revival of the 2017 order and, on 21 June 2022, obtained an order in those proceedings.

[16] The applicants submit that it is the sole prerogative of the Minister to determine the correctness of a finding that a person is an illegal foreigner, when entertaining an appeal in terms of section 8(1)(b) of the Act. Accordingly, Magistrates have no authority to question the correctness of an immigration officer's finding in this regard. They argue that persons appearing before Magistrates for purposes of confirmation of their warrants of detention under section 34 have already been investigated by the immigration authorities and have already been found not to have the required documentation. Any attempts by Magistrates to extend the section 34 enquiries to investigations concerning the correctness of the findings of immigration officers that a person is an illegal foreigner, would constitute an overreach of Magistrates' statutory powers.

[17] According to the applicants, the sole objective of the section 34 enquiry is to establish whether, for purposes of deportation, the detention is justified. The section 34 enquiry should not be seen as a "second bite at the cherry" for illegal foreigners to attempt justifying their stay in the country. They would already have had the opportunity to do so during the section 41 enquiry.[15] Section 41's limited period of detention makes plain that there is an obligation on immigration officers to ensure that the potential illegal foreigner is afforded an opportunity to make available

---

[15] Section 41 reads:

> "(1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.
>
> (2) Any person who assists a person contemplated in subsection (1) to evade the processes contemplated in that subsection, or interferes with such processes, shall be guilty of an offence."

relevant documentation. A further consideration is that the systems employed by the Department would reveal whether that person has in fact previously been issued with documentation.

[18] The applicants accept that some Magistrates are unwilling to entertain any form of enquiry under section 34 of the Act. The applicants further concede that there are persons being charged under section 49,[16] but submit that this is an entitlement of the

---

[16] Section 49 provides:

> "(1) (a) Anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.
>
> (b) Any illegal foreigner who fails to depart when so ordered by the Director-General, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years.
>
> . . .
>
> (3) Anyone who knowingly employs an illegal foreigner or foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding three years without the option of a fine.
>
> (4) Anyone who intentionally facilitates an illegal foreigner to receive public services to which such illegal foreigner is not entitled shall be guilty of an offence and liable on conviction to a fine.
>
> (5) Any public servant who provides false or intentionally inaccurate or unauthorised documentation or benefit to an illegal foreigner, or otherwise facilitates such illegal foreigner to disguise his or her identity or status, or accepts any undue financial or other consideration to perform an act or to exercise his or her discretion in terms of this Act, shall be guilty of an offence and liable on conviction to imprisonment not exceeding eight years without the option of a fine: Provided that if such public servant is employed by the Department, such offence shall be punishable by imprisonment not exceeding 15 years without the option of a fine.
>
> (6) Anyone failing to comply with one of the duties or obligations set out under sections 38 to 46, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years.
>
> (7) Anyone participating in a conspiracy of two or more persons to conduct an activity intended to contravene this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding seven years: Provided that if part of such activity is conducted or intended to be conducted in a foreign country, the offence shall be punishable by imprisonment not exceeding eight years without the option of a fine.
>
> (8) Anyone who wilfully or through gross negligence produces a false certification contemplated by this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three years.
>
> (9) Anyone, other than a duly authorised public servant, who manufactures or provides or causes the manufacturing or provision of a document purporting to be a document

issued or administered by the Department, shall be guilty of an offence and liable on conviction to imprisonment not exceeding 10 years without the option of a fine.

(10) Anyone who through offers of financial or other consideration or threats, compels or induces an officer to contravene this Act or to breach such officer's duties, shall be guilty of an offence and liable on conviction—

(a) to a fine or to imprisonment not exceeding five years; or

(b) if subsequently such officer in fact contravenes this Act or breaches his or her duties, to imprisonment not exceeding five years without the option of a fine.

(11) Anyone guilty of the offence contemplated in section 34(10) shall be liable on conviction to a fine or to imprisonment not exceeding three years.

(12) A court may make an order as to costs in favour of the Department to the extent necessary to defray the expenses referred to in section 34(3) against—

(a) any illegal foreigner referred to in section 34(3);

(b) any person who contravened section 38 or 42;

(c) any person who conveyed into the Republic a foreigner without the required transit visa; or

(d) any person who committed an offence contemplated in subsection (5), (7), (8) or (10),

which order shall have the effect of a civil judgment of that court.

(13) Any person who pretends to be, or impersonates, an immigration officer, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding eight years.

(14) Any person who for the purpose of entering or remaining in, or departing from, or of facilitating or assisting the entrance into, residence in or departure from, the Republic, whether in contravention of this Act or not, commits any fraudulent act or makes any false representation by conduct, statement or otherwise, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding eight years.

(15) Any natural or juristic person, or a partnership, who—

(a) for the purpose of entering the Republic, or of remaining therein, in contravention of this Act, or departing from the Republic, or of assisting any other person so as to enter or so to remain or so to depart, utters, uses or attempts to use—

(i) any permanent residence permit, port of entry visa, visa, certificate, written authority or other document which has been issued by lawful authority, or which, though issued by lawful authority, he, she or it is not entitled to use; or

(ii) any fabricated or falsified permanent residence permit, port of entry visa, visa, certificate, written authority or other document;

(b) without sufficient cause has in his, her, or its possession—

(i) any stamp or other instrument which is used or capable of being used for purposes of fabricating or falsifying or unlawfully recording on any document any endorsement under this Act or required to be submitted in terms of this Act;

(ii) any form officially printed for purposes of issuing any permanent residence permit, port of entry visa, visa, certificate, written authority or other document under this Act or required to be

criminal justice system. The argument is further that if LHR has any difficulties with the way in which the Magistrates are applying section 34, there are remedies available to address those issues.

[19] The applicants submit that the remedy proposed by LHR to the effect that, in considering whether to exercise the power of detention, the immigration officer must consider whether the interests of justice require that detention be discontinued and that appropriate alternative conditions instead imposed, is impractical and inappropriate as it would do away almost entirely with the notion of detention for purposes of deportation. This, in turn, interferes with the discretion of Magistrates whose function, during such enquiries, is limited to the issue of whether detention is justified, solely for purposes of deportation. The applicants contend that there are provisions of the Act that are sufficient to protect a person who wishes to challenge the lawfulness of a decision finding that the detainee is an illegal foreigner.

[20] Lastly, according to the applicants, regard must also be had to the dual obligation on both the Minister and on the illegal foreigner, in terms of section 32 of

---

submitted in terms of this Act, or any reproduction or imitation of any such form;

(iii) any passport, travel document, identity document or other document used for the facilitation of movement across borders, which is blank or reflects particulars other than those of the person in whose possession it is found; or

(iv) any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders, or

(c) has in his or her or its possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported passport, travel document or identity document of another person in furtherance of a crime, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years without the option of a fine.

(16) Any person who—

(a) contravenes or fails to comply with any provision of this Act, if such contravention or failure is not elsewhere declared an offence, or if no penalty is prescribed in respect of an offence; or

(b) commits any other offence under this Act in respect of which no penalty is elsewhere prescribed,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding seven years."

the Act, to ensure that an illegal foreigner leaves the country or is deported.[17] By retaining the discretion of a Magistrate in determining whether detention for purposes of deportation is justified, the purpose and intent of the Act, that persons who are not entitled to be in the Republic of South Africa should be deported, remain intact. Ultimately, the applicants seek a fresh order granting a further suspension by 24 months.

Intervening party's submissions

[21] LHR refers to this as an "extraordinary application". It contends that the applicants' pleaded case is patently untenable in law. This Court has on at least four occasions[18] held that, while it can extend a suspension period before that period expires, it has no power to do so after the expiry of that period.

[22] LHR urges that, notwithstanding this fatal shortcoming that would ordinarily be the death knell of this type of application, this Court must decide the application in order to provide clarity on what the effect of the inaction by Parliament and the Minister is, and to grant a remedy that protects the constitutional rights of persons who are subject to section 34 of the Act.

[23] In respect of the interpretation of the 2017 order, LHR argues that the interpretation of a court order requires the application of the same principles that operate for other documents. There is, however, an important rider to be added, as

---

[17] Section 32 provides:

> "(1) Any illegal foreigner shall depart, unless authorised by the Department to remain in the Republic pending his or her application for a status
>
> (2) Any illegal foreigner shall be deported."

[18] *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) (*Cross-Border Road Transport Agency*) at para 42; *Ex Parte Minister of Social Development* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) (*Minister of Social Development*) at para 38; *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) (*Zondi*) at para 42; *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) (*Ntuli*) at para 38.

enunciated in *SOS Support Public Broadcasting Coalition*,[19] that as a point of departure in the interpretation exercise, court orders are intended to provide effective relief and must be capable of achieving their intended purpose. LHR contends that, properly interpreted, paragraph 4 of the 2017 order postulates two operative regimes in different circumstances:

(a) first, until legislation was enacted during the period of suspension of 24 months; and

(b) second, if no legislation was enacted during the period of suspension of 24 months, from that point on.

[24] According to LHR, the effect of paragraph 4 of the order, was that whether Parliament did its job or not, illegal foreigners detained under section 34(1) would be brought before a court within 48 hours of their arrest. This Court's intention in paragraph 4 was not that in the event of a failure by Parliament to enact legislation, section 34(1)(b) and (d) would disappear from the statute books. Rather, the intention was that the order will continue to operate, as is the case where this Court has granted an interim reading-in order and directed that in the event of Parliament failing to act the reading-in will continue to operate. In this instance, in the event that Parliament failed to enact legislation, the 48-hour order in paragraph 4 will continue to operate.

[25] On this approach, contends LHR, the correct construction of the 2017 order is this:

(a) Sections 34(1)(b) and (d) are constitutionally invalid and the declaration is suspended for 24 months.

(b) During this limited period, the adequate constitutional safeguard was the 48-hour procedure. If Parliament felt the 48-hour procedure was too cumbersome or needed alteration, it was open to Parliament to seek an amendment.

---

[19] *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation Limited* [2018] ZACC 37; 2019 (1) SA 370 (CC); 2018 (12) BCLR 1553 (CC) (*SOS Support Public Broadcasting Coalition*) at para 52.

(c) After this limited period, if Parliament did not enact new legislation, both section 34(1)(b) and (d) and the 48-hour procedure would continue. The 48-hour procedure would, in effect, be read-in to section 34(1)(b) and (d).

[26] On remedy, LHR submits that this Court should clarify matters and remove the prevailing uncertainty and confusion by explaining this construction by way of a declaratory order. In addition, this Court should direct that when a judicial officer is to consider whether to extend a detention in terms of section 34(1)(d) of the Act, the detainee must appear in person. That order ought to be unobjectionable, as it would accord with the undertaking that was previously given to this Court in the 2017 proceedings and would plainly fall within this Court's powers to grant just and equitable relief under section 172(1)(b) of the Constitution.[20]

[27] In respect of the absence of objectively determinable conditions and guidance for the exercise of the section 34 detention power, identified by this Court in the 2017 order as a constitutional defect, LHR submits that there ought to be an order remedying this shortcoming. LHR argues that Parliament has had two years to do so and now, six years later, this Court must grasp the nettle. This Court must itself provide guidance by directing that, in considering whether to exercise the power of detention, the immigration officer or judicial officer must consider whether the interests of justice require that detention be discontinued and that appropriate alternative conditions instead be imposed.

---

[20] Section 172(1) reads:

> "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."

[28] Lastly, LHR contends that, given the state's inordinate delay and inaction, and since it is plainly desirable that legislation be enacted to deal with the problem once and for all, a supervisory order is warranted. This Court should direct the Minister to file a report within two months of its order indicating a plan for the enactment of legislation and to report to this Court at three monthly intervals thereafter.

Jurisdiction

[29] The applicants seek a variation of the 2017 order, to have the period of suspension extended. The High Court on 21 June 2022 already purported to vary the 2017 order, impermissibly so. As this Court held in *Zondi*, the variation of orders is a constitutional matter, within this Court's jurisdiction.[21] The extension of a suspension period imposed by it engages this Court's constitutional jurisdiction as it is a just and equitable remedy under section 172(1) of the Constitution.[22]

Merits

[30] The legal question is what, under the circumstances, would qualify as a just and equitable order? To determine this, we must adopt the approach set out in *Ntuli*, *Zondi*, *Minister of Social Development* and *Cross-Border Roads Transport Agency*, where this Court considered:

(a) the nature of the constitutional defects;
(b) the harm caused by the failure to pass remedial legislation; and
(c) the remedies proposed by the parties.

Nature of constitutional defects

[31] I have already set out the constitutional defects in the impugned provisions identified by this Court in the 2017 order. This Court agreed with LHR's submissions that the safeguards in section 34(1)(a) to (e) that purport to ensure that the detention of

[21] *Zondi* above n 18 at para 36.

[22] *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* [2015] ZACC 16; 2015 (10) BCLR 1129 (CC) at para 11.

an illegal foreigner takes place in appropriate circumstances and for an appropriate time were inadequate. That inadequacy related to two fundamental constitutional shortcomings:

(a) First, in respect of section 34(1)(b), this Court accepted LHR's contentions that this measure was constitutionally inadequate, because it did not ensure that a detainee was automatically brought before a court within 48 hours of his arrest, thus permitting detention for up to 30 days without any warrant being issued and without any guarantee of automatic judicial oversight.

(b) Second, in respect of section 34(1)(d), this critical safeguard which provides that no person may be held for longer than 30 days without a warrant issued by a court, and that any such warrant may not extend the detention period by more than 90 days, was also inadequate. It did not guarantee the detainee the right to appear in person in court to make representations before the court made a decision about whether to grant the warrant for extended detention.

Harm caused by the failure to pass remedial legislation

[32] The harm caused by the failure to enact legislation to remedy the constitutional shortcomings enunciated in the 2017 order includes the confusion and uncertainty manifested in judgments of courts set out earlier. There appears to be a misapplication of the 2017 order in some Magistrates' Courts as the onus to justify an arrest has been shifted from the immigration officers to detainees who are now required to prove the lawfulness of their documentation status. This is an incorrect application of the 2017 order.

[33] On the common cause facts, some Magistrates are unwilling to entertain any form of enquiry under section 34. This is highly unsatisfactory. As stated, the unwillingness of some Magistrates to confirm detentions beyond 30 days leads to releases from detention almost as a matter of course, even in cases where deportation

should occur. That results in deportees likely absconding, rendering their deportation impossible. On the other hand, some immigration officers as a matter of course detain an immigrant beyond 30 days without bringing that detainee before a court, further violating their rights to liberty. This, too, is unsatisfactory. Furthermore, a senior Magistrate in Johannesburg has instructed Magistrates not to handle section 34 applications at all. Again, the harm is self-evident.

[34] These wide-ranging adverse consequences necessitate this Court's intervention. LHR submits that clarity is required in respect of the proper interpretation of paragraph 4 of the 2017 order. That should be in the form of a declaratory order. The applicants' sole response to this submission is that it was never part of LHR's pleaded case and came to the fore for the first time in LHR's written submissions in this Court.

Remedies

[35] It is convenient to commence with the proposed declaratory order. I agree with LHR that this Court must address the incertitude and indecision brought about by the inaction and failure by the state to enact remedial legislation. The solution is, however, not by way of interpretation as LHR suggests. It is true that there is an interpretation that section 34(1)(b) and (d) of the Act simply fell away on 29 June 2019, the deadline imposed by this Court in the 2017 order. This view appears to be gaining traction in the courts. As stated, LHR contends that this interpretation controverts the plain meaning of the order granted by this Court. LHR correctly submits that the interpretation of a court order is not dissimilar to the well-known rules relating to the interpretation of other documents. In *Firestone*, the Appellate Division held:

> "The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. [A]s in the case of a document, the judgment or order and

> the court's reasons for giving it must be read as a whole in order to ascertain its intention."[23]

[36] This Court endorsed that approach in *Eke*.[24] There is, however, an important qualification that, as a point of departure in the interpretation exercise, court orders "are intended to provide effective relief and must be capable of achieving their intended purpose".[25]

[37] The argument advanced by LHR is attractive, but I take a different view. This Court, in the 2017 order, declared section 34(1)(b) and (d) unconstitutional, and that declaration was suspended for 24 months. It is not possible to interpret the 48-hour decree in paragraph 4 as incorporating a necessarily implied term that, if Parliament has not enacted corrective legislation within 24 months, the regime for a first and subsequent appearance by a detainee will similarly be in accordance with section 34(1)(b) and (d). That interpretation would mean that the implied term effectively causes section 34(1)(b) and (d) to operate not as statutory provisions, but as part of a judicial decree. The difficulty with that interpretation is that it does not pass the test for necessary implication. The order of statutory invalidity that this Court made is plain and unequivocal and is not capable of an interpretation that it kept section 34(1)(b) and (d) alive in the event of Parliament failing to enact remedial legislation. That meaning can also not be implied.

[38] Court orders must not only grant effective relief, they must be clear and certain in their operation.[26] To leave so much to implication may be contrary to the rule of law. As stated, at least one of the constitutional defects identified in the 2017 order

---

[23] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A); [1977] 4 All SA 600 (A) at 304.

[24] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29.

[25] *SOS Support Public Broadcasting Coalition* above n 19 at para 52.

[26] *Qwelane v South African Human Rights Commission* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) at paras 148-150; *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 22; and *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108.

cannot be remedied simply by an interpretation of the 2017 order, namely the absence of guidelines in exercising the detention power.

[39] Section 172(1)(b) affords this Court the power to grant just and equitable relief. The ambit of that power is wide and flexible. In *Economic Freedom Fighters II*, this Court expressed it thus:

> "The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution".[27]

[40] Read in its own terms and properly understood, the judicial decree in paragraph 4 continues to operate despite the lapsing of section 34(1)(b) and (d). This Court has the power, through section 172(1)(b), to order supplementary just and equitable relief to provide certainty on the current status and effect of sections 34(1)(b) and (d). As stated, this Court cannot revive statutory provisions after the lapsing of the period of suspension. But there is nothing in our law that precludes us from ordering amplified just and equitable relief to supplement the 2017 order. An amplification of paragraph 4 by adding a modified version of the invalid paragraphs (b) and (d) of section 34(1) is not a reading-in or severance of an existing statutory provision following upon a declaration of their invalidity. Instead, it is a free standing judicial remedy in terms of section 172(1)(b).

[41] A remedy of this nature in terms of section 172(1)(b) is not uncommon. In *Women's Legal Centre Trust*,[28] this Court declared the Marriage Act[29] and the

---

[27] *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) (*Economic Freedom Fighters II*) at para 211.

[28] *Women's Legal Centre Trust v President of the Republic of South Africa* [2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC) (*Women's Legal Centre Trust*).

[29] 25 of 1961.

Divorce Act[30] inconsistent with sections 9, 10, 28 and 34 of the Constitution in that they failed to recognise marriages solemnised in accordance with *Sharia* law (that is, Muslim marriages) which have not been registered as civil marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.[31] The Court suspended the declarations of invalidity for a period of 24 months to enable the President and Cabinet, together with Parliament, to remedy the defects by either amending existing legislation, or initiating and passing new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes and to regulate the consequences arising from the recognition.[32]

[42] Further to the declarations of invalidity and the order of suspension, this Court in *Woman's Legal Centre Trust* also made the following order:

> "Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, it is declared that Muslim marriages subsisting at 15 December 2014, being the date when this action was instituted in the High Court, or which had been terminated in terms of *Sharia* law as at 15 December 2014, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:
>
> (a) all the provisions of the Divorce Act shall be applicable, save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary; and
>
> (b) the provisions of section 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.
>
> (c) In the case of a husband who is a spouse in more than one Muslim marriage, the court:

[30] 70 of 1979.

[31] *Women's Legal Centre Trust* at para 1.1 of the order.

[32] Id at para 1.6 of the order.

> (i) shall take into consideration all relevant factors, including any contract or agreement between the relevant spouses, and must make any equitable order that it deems just; and
>
> (ii) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings."[33]

[43] This is the type of order that I propose making here to supplement the 2017 order in terms of this Court's section 172(1)(b) powers.

[44] The second consideration in respect of remedy is the absence in section 34(1)(d) of an in-person appearance by a detainee when a court is considering whether to extend the detention beyond the initial 30 days. This Court made no order in this regard in 2017, possibly due to the undertaking given by the applicants at that time. If I understand their argument correctly, the applicants had no objection to an order remedying this constitutional shortcoming.[34] An order to cure this defect is apposite. Six years have now elapsed and, as LHR correctly says, it is constitutionally intolerable for the right of detainees to appear in person to have to depend on an undertaking. That order would be just and equitable relief contemplated in section 172(1) of the Constitution.

[45] The third proposed order, to provide guidance through objectively determinable conditions for the exercise of the section 34 detention power, to cure the constitutional defect identified by this Court in the 2017 order, elicited fierce criticism from the applicants. The main objection is that the remedy is impractical and inappropriate as it would do away almost entirely with the notion of detention for purposes of deportation. This, in turn, it is contended, interferes with the discretion of Magistrates whose function, during such enquiries, is limited solely to the issue of whether, for purposes of deportation, detention is justified. According to the applicants, there are

---

[33] Id at para 1.7 of the order.

[34] Identified as a constitutional defect at para 56 of the 2017 judgment.

provisions of the Act that provide adequate protection to a person who wishes to challenge the lawfulness of a decision finding the detainee to be an illegal foreigner.

[46] That protest is misconceived. The Constitution requires in section 38 that courts order effective relief.[35] This order is necessary given the complete lack of objectively determinable conditions or guidance for the exercise of the detention power, an issue which this Court recognised in the 2017 judgment as a constitutional shortcoming. It is apposite to order that, in considering whether to exercise the power of detention for purposes of deportation, an immigration officer or a court must consider whether the interests of justice permit that detention be discontinued and appropriate alternative conditions be imposed.

[47] The interests of justice criterion is well known in our law. It appears in section 35(1)(f) of the Constitution:

> "Everyone who is arrested for allegedly committing an offence has the right . . . to be released from detention if the interests of justice permit, subject to reasonable conditions."

[48] It is appropriate here because section 49 of the Act creates various criminal offences. Providing guidance in this fashion, namely by introducing a criterion as guidance for the exercise of a power, is not unusual in our law. Thus, in *Dawood*, where this Court inserted a "good cause" criterion for the exercise of the power in section 26(3) and (6) of the Aliens Control Act,[36] O'Regan J said:

---

[35] Section 38 reads:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

[36] 96 of 1991. That Act was repealed with effect from 12 March 2003 by the Immigration Act 13 of 2002.

> "It is true that in providing a test of 'good cause' for the exercise of the section 26(3) and (6) discretions, *this Court is providing guidance to the decision-makers as to how to exercise their powers.* This is occasioned by the need to avoid further unjustifiable limitation of constitutional rights pending Parliament's amendment or replacement of the legislative provisions found to be unconstitutional. *This route seems the best way in which to avoid usurping the function of the Legislature on the one hand without shirking our constitutional responsibility to protect constitutional rights on the other*."[37] (Emphasis added.)

[49] *Dawood* concerned section 25(9) of the Aliens Control Act. That provision required applicants for immigration permits to be outside South Africa when their permits were granted but exempted spouses, permanent same-sex life partners, dependent children and destitute, aged or infirm family members of South African citizens and permanent residents from this requirement. Those categories of persons could remain in the country pending the outcome of their applications, provided they had valid temporary residence permits. This exemption was subject to sections 26(3) and (6) of that Act, in terms of which the immigration officials and the Director-General had a discretion to grant, extend or refuse temporary permits.

[50] This Court held that the legislation provided no guidance for the exercise of that discretion as to the circumstances in which it would be appropriate to refuse to issue or extend a temporary residence permit. The absence of any guidance as to the factors relevant to the refusal, grant or extension of such permits introduced an element of arbitrariness. Even section 56(1)(f) of the Act which empowered the

---

[37] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (8) BCLR 837 (CC); 2000 (3) SA 936 at para 68. See also *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 103 where this Court held that "[t]here needs to be clear parameters on the exercise of discretion" on the part of the Director of the Office for Interception Centres under section 35(1)(f) of the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002.

See also: *Janse Van Rensburg v Minister of Trade and Industry* [2000] ZACC 18; 2001 (1) SA 29; 2000 (11) BCLR 1235 (CC) at para 25:

> "[T]he constitutional obligation on the legislature to promote, protect and fulfil the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised."

Minister to "make regulations relating to . . . the conditions subject to which such permits or certificates may be issued", could not save the provision. Accordingly, section 25(9)(b) was declared unconstitutional and invalid.

[51] I am satisfied that the proposed order provides appropriate guidance, without offending the separation of powers doctrine. We cannot wait for Parliament to eventually do so, given the deplorable lethargy exhibited in this case. That said, I readily accept that not every decision-maker under section 34(1) will be a judicial officer. For the immigration officer, an "interests of justice" test may well present interpretive challenges, the kind of challenge this Court has alluded to in *Dlamini*:

> "The term 'the interests of justice' is of course *well known to lawyers*, especially students of South African constitutional law. It is a useful term denoting in broad and evocative language a value judgment of what would be fair and just to all concerned. *But while its strength lies in its sweep, that is also its potential weakness*. Its content depends on the context and applied interpretation. *It is also, because of its breadth and adaptability, prone to imprecise understanding and inapposite use*."[38] (Emphasis added.)

[52] While the "interests of justice" standard does create the risk of uneven application, any rule conferring discretion to the decision-maker would be vulnerable to this criticism. At least, "interests of justice" is a standard drawn directly from the Constitution. If this standard is too lax for the Minister, he has had more than five years to introduce legislation to resolve the problem in a different fashion and has lamentably failed to do so. This Court must grant effective relief and this order meets that requirement. *Dlamini* is instructive as to how this criterion is to be applied.[39]

---

[38] *S v Dlamini, S v Dladla; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) (*Dlamini*) at para 46.

[39] See, for example, id paras 47-9.

[53] Next, the supervisory order proposed by LHR drew no objection from the applicants. I am nonetheless disinclined to impose such an order on the applicants. The 2017 order did not oblige Parliament to pass remedial legislation; it merely imposed a temporary solution until legislation was passed or the suspended declaration of invalidity period expired. That order was in the usual form, affording Parliament the opportunity to pass remedial legislation. Generally, it is the order of this Court that determines what happens if Parliament fails to avail itself of the opportunity to pass remedial legislation – either the impugned section falls away or a reading-in becomes final. Supplementing and clarifying the 2017 order as just and equitable relief, as I propose doing, falls within this Court's remit. There is no need nor, for that matter, any basis in law to compel Parliament to pass remedial legislation. A supervisory order of the nature proposed by LHR assumes that Parliament was obliged to pass remedial legislation.

[54] Supervisory orders are usually issued where serious consequences will flow in the event of a non-compliance with a court order. They are usually in the form of a mandamus together with some form of supervision by the court. As Professor Sandra Liebenberg correctly points out, courts must guard against intruding into policy areas where they issue mandatory orders.[40] This implicates the "institutional legitimacy, competence and respect for the separation of powers doctrine".[41] These are further considerations why a supervisory order is not appropriate here.

---

[40] Liebenberg "The Art of the (Im)possible? Justice Froneman's Contribution to Designing Remedies for Structural Human Rights Violations" (2022) 12 *Constitutional Court Review* 137 at 150:

> "[T]he difficulty confronting the courts is that certain kinds of mandatory orders may run the risk of being over-prescriptive in circumstances where there is a legitimate realm of policy choice that should be accorded to the other branches of government or be opened to democratic deliberation."

[41] Ibid. Liebenberg cites Sturm "A Normative Theory of Public Law Remedies" (1991) 79 *The Georgetown Law Journal* 1355 at 1362–3.

Costs

[55] Lastly there is the issue of costs. Quite apart from the fact that LHR is entitled to the costs incurred to help resolve the appalling state of affairs brought about by the egregious remissness of the Minister and Parliament, there are the issues whether:

(a) the applicants' legal representatives should be denied raising any fees to convey this Court's displeasure at the dreadful manner in which this litigation has been conducted; and

(b) for the same and additional reasons, the applicants should be ordered to pay LHR's costs from their own pockets.

Conduct of the legal representatives

[56] As to the legal representatives' conduct, it is necessary to recount how the litigation unfolded. This is germane, since axiomatically the applicants as lay persons in legal matters, relied upon and acted pursuant to advice and guidance received from their lawyers. First, the applicants approached the High Court on an urgent ex parte basis for an order that, pending this application to this Court, or the enactment of remedial legislation envisaged in the 2017 order, the provisions in section 34(1)(b) and (d) remain operative. LHR was not cited as a party, nor were the papers served on it. The applicants based their urgent ex parte application solely on the fact that Magistrates were refusing to hear section 34 applications. The High Court granted the relief as prayed.

[57] There are three fundamental difficulties with the High Court application and order. First, it is inexplicable that the application was brought ex parte and that LHR was not joined. As the original *dominus litis* (master of the lawsuit) in the proceedings that culminated in the 2017 order, it was plainly a necessary party with a direct and substantial interest in the matter.[42] The failure to serve the papers, even later, exacerbated matters. Under similar circumstances in *Minister of Social Development*, this Court explained why the initial applicant in that case, a receiver of

[42] *South African Riding for the Disabled Association v Regional Land Claims Commissioner* [2017] ZACC 4; 2017 (5) SA 1 (CC); 2017 (8) BCLR 1053 (CC) at paras 9-10.

social grants, had an interest in the litigation and should have been cited and that the application should not have been brought ex parte.[43]

[58] Secondly, there was no mention at all of the fact that the deadline for the enactment of remedial legislation had expired. Nor was the High Court's attention drawn to the four judgments of this Court cited above that stood in the way of the extension of a deadline that has expired. Again, this was either as a result of troubling ignorance on the part of the lawyers or, if those lawyers were aware of the quartet of cases, even more troubling, a failure to alert the Court to them. It is well established that an ex parte applicant must act in the utmost good faith and are duty bound to disclose all relevant facts and law to the court.[44] This the applicants lamentably failed to do.

[59] The third and most fundamental problem is that the High Court has no power to make an order, even *pendente lite* (pending further litigation), that a lapsed suspension order "remains operative". The fact that the order purported to breathe life into a lapsed order of the highest court in the land, makes matters worse. In the language of *Minister of Social Development*, the High Court ventured into the realm of "revival and resuscitation".[45] As stated, even this Court does not have any power to extend the deadline of a suspension after the deadline has expired. This is now the fifth time that this Court says so.

[60] Then followed the ill-conceived "revival" application in this Court, also brought ex parte and without citing the original *dominus litis*, LHR. Inexplicably,

---

[43] *Minister of Social Development* above n 18 at para 21.

[44] *Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 102; *Power N.O. v Bieber* 1955 (1) SA 490 (W) at 503-4:

> "And of course the rule as to complete candour and disclosure on the part of the applicant in ex parte proceedings is well known . . . . The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the Court; so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, the Court has a discretion to set the order aside on the ground of non-disclosure."

[45] *Minister of Social Development* above n 18 at para 38.

having at least served the papers on LHR in these proceedings, the applicants then vigorously opposed LHR's application to intervene. The basis for the opposition was that "the issue concerning non-compliance of the two-year period . . . [is] of an executive/legislative nature, in which LHR has no role to play". Worse still, the applicants in their affidavit castigated LHR for pointing out that this Court's four decisions regarding the legal impossibility of the order sought were not placed before the High Court. They felt "affronted" by this, said the Director-General on behalf of the applicants and he added that LHR was not even a party to those proceedings, so the basis for such a "damning statement" was "inconceivable". As a demonstration of the "affront", "the applicants [had] asked the State Attorney to investigate the conduct of Mr Ncube, the deponent to the LHR affidavits".

[61] The same criticisms in respect of the earlier High Court application apply here and more. The last mentioned reaction to Mr Ncube's affidavit is astonishing and a further aggravating factor. Bizarrely, the inexcusable failure to join LHR as a party to the application is used against it through the contention that LHR was not party to the proceedings and had no standing to make "damning statements". Moreover, this application was again not motivated by the fact that the deadline to pass constitutionally compliant legislation had expired, but by the fact that Magistrates were refusing to hear section 34 applications on the mistaken premise that the section is no longer of any force and effect.

[62] This Court emphasised in *Minister of Social Development*:

> "*Ntuli* and *Zondi* make clear that the boundary of a court's power lies at the expiration of the suspension order. Before the expiration of the suspension order, the provision has not yet been declared invalid and a court retains its power under section 172(1)(b)(ii) to make a just and equitable order suspending the declaration of invalidity or extending an existing suspension. *However, once the suspension period lapses, the provision is invalid and a court's suspension power under section 172(1)(b)(ii) has ended. The time of suspension and extension ceases, and the realm of revival and resuscitation begins. In short, the Constitution grants a court*

> *the power to suspend an order of constitutional invalidity. It does not grant a court the power to revive a law that has already become invalid.*"[46] (Emphasis added.)

[63] The applicants, assumedly on the advice of their legal representatives, approached the application in this Court as if the extension of an expired deadline and the "revival" of an invalid provision were a mere formality. They went as far as to audaciously suggest in their founding affidavit in this Court that the matter can be finalised here without oral argument. It is troubling that the legal representatives were not aware or, if they were aware, chose to ignore, that "once the suspension period lapses, the provision is invalid and a court's suspension power under section 172(1)(b)(ii) has ended . . . the time of suspension and extension ceases, and the realm of revival and resuscitation begins".[47] There was no appreciation at all of the four judgments of this Court that find application here – *Ntuli*, *Zondi*, *Minister of Social Development* and *Cross-Border Roads Transport Agency*. All of this amounts to extraordinarily lax, and arguably even foolhardy, litigating.

[64] When LHR drew the applicants' attention to the correct state of our law and to this quartet of cases, the applicants' response[48] was that they were merely calling for a "fresh suspension of the declaration of invalidity [of the 2017 order]" and that this did not constitute a revival of the original order. "LHR does not fully comprehend this distinction", said the applicants. Yet, revealingly, the applicants did concede that the order sought "would, effectively, constitute an extension to parts of the original order".

[65] It will be recalled that the Director-General in his affidavit feebly sought refuge for the inordinate delay in the enactment of remedial legislation, in the Covid-19 pandemic and the fire at Parliament, events that occurred long after the deadline of 24 months had passed. These subsequent events were held up as part of the reason for

---

[46] *Minister of Social Development* above n 18 at para 38.

[47] Id.

[48] The Director-General deposed to the affidavit.

the abysmal failure to take steps to approach this Court for an extension before the expiry of the deadline in June 2019, at least after October 2018 when, according to the Director-General, parliamentary activity was drastically curtailed in order to start preparations for the 2019 national elections.

[66] The Covid-19 pandemic and resultant national lockdown occurred in 2020. The suspension of invalidity, however, expired almost a year earlier, on 29 June 2019. The devastating fire at Parliament erupted on 2 January 2022, nearly 18 months after the expiry of the deadline. The explanation that MPs became preoccupied from October 2018 with the looming national elections of 2019 and were unable to attend to passing the remedial legislation, is disconcerting. It is a grim acknowledgment, on the face of it, that campaigning for re-election was far more important to the Members of Parliament than meeting the deadline for the enactment of remedial legislation.

[67] Lastly, there is not even the remotest hint of an apology by the Minister and the Director-General in the papers for the deplorable state of affairs in this matter. Their counsel appeared perplexed when this was raised with him during the hearing, almost as if the very idea of an apology was utterly unthinkable. Quite to the contrary, counsel startlingly suggested that the Minister and the Director-General should be commended for approaching this Court to address the conundrum that has arisen due to the Magistrates' refusal to hear section 34 applications. This is an egregious aberration. In *Kirland* this Court enjoined the state as "the Constitution's primary agent" to do right and to do it properly.[49]

[68] To conclude on this aspect regarding the applicants and their legal representatives' conduct, it is difficult to conceive of a more egregious instance of neglect of a constitutional duty in the sphere of enacting corrective legislation pursuant to the striking down of legislation, coupled with an opportunity to remedy the defects in that legislation. This Court in *Kirland* pointed out:

[49] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at para 82.

> "[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights . . . . Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline."[50]

[69] During the hearing, counsel for the applicants was asked to make submissions on the manner in which this litigation has been conducted, taking into account all the factors enumerated, as a potential basis for ordering that the applicants' legal representatives be denied their fees in this matter. Counsel vigorously contended that there was no basis for such a drastic order. More about this presently.

Possible costs order against the applicants in their personal capacities

[70] Mindful of the fact that the applicants, the Minister and the Director-General, have been cited in this application in their official capacities, the Chief Justice directed them on 7 June 2023 to show cause on affidavit why they should not be joined to the proceedings in their personal capacities and why they should not be ordered to pay the costs of the application out of their own pockets. This accords with the procedure adopted in *Black Sash II*, where this Court joined the Minister of Social Development for this purpose.[51]

[71] The Minister's affidavit in response to these directions contains troubling allegations. In contending that he should not be joined in his personal capacity or be ordered personally to pay costs, the Minister explains the background of the matter. According to the Minister:

(a) He had no knowledge whatsoever of this application. When he first became aware of it through an article in *Daily Maverick* of

---

[50] Id. See also: *Khumalo v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at para 51.

[51] *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (*Black Sash II*) at paras 72-5 and para 13 of the order. Compare also: *Member of the Executive Council for Health, Gauteng v Lushaba* [2016] ZACC 16; 2017 (1) SA 106 (CC); 2016 (8) BCLR 1069 (CC) at paras 17-9.

25 May 2023, he immediately demanded a report from the Director-General and the Department's legal services division.[52]

(b) He was very angry as he had never instructed senior counsel who appeared for the applicants in this Court "to launch any application in the Constitutional Court on [his] behalf and the [Department]".

(c) The directions issued by the Chief Justice, were "another shocking development". This prompted him to instruct the Director-General to have the applicants' senior counsel's mandate terminated forthwith and to take "the extraordinary step of addressing a letter to the Solicitor-General and State Attorney (Pretoria) terminating the mandate of the State Attorney". The Minister had a private firm of attorneys appointed to act further in this matter for both applicants, since he took the view that the State Attorney was conflicted in this case.

(d) His experience is that government officials "adopt a cavalier and contemptuous attitude towards court orders" and this attitude is "prevalent in the [Department]". This caused him to develop a communication protocol for the Department during October 2020.

(e) Neither he, nor the Director-General, were party to, nor were they informed of the instructions to senior counsel to advise the Department on the appropriate legal route to deal with legal challenges arising from the position adopted by some Magistrates after the lapsing of the 24 months within which legislative amendments had to be effected by Parliament to give effect to the 2017 order. They were also unaware of the opinion by senior counsel that an ex parte application be brought in the High Court, and also thereafter that an ex parte application be brought in this Court, seeking an order to "revive" the lapsed order of this Court. All of this was known only to some senior officials in the Department and officials in the legal services division. None of these

---

[52] The article is Hawker, "Hell Affairs: Zondo questions 'pathetic dereliction of duty' after Home Affairs ignores Concourt order for three years" *Daily Maverick* available at https://www.dailymaverick.co.za/article/2023-05-25-zondo-questions-pathetic-dereliction-of-duty-after-home-affairs-ignores-concourt-order-for-three-years/.

officials had authority to accept this legal opinion and to furnish instructions for this application to be launched on his behalf in this Court. Disciplinary measures have been taken against these officials.

(f) Even though the Director-General in his founding affidavit states that he "also lodges the application on behalf of the [Minister]", the Director-General did not consult with the Minister or show him the affidavit.

(g) Having read the papers in this application, he is "astounded" by the fact that the application was brought on an ex parte basis, since even he as a lay person in law knows that LHR ought to have been cited as a party. A further troubling fact is that LHR's "justified complaint of its exclusion is brushed aside in the replying affidavit". The affidavits filed on behalf of the applicants leave much to be desired regarding the steps taken to comply with the 2017 order. The steps taken by him and the Department to effect legislative amendments are not set out in great length, which "has led to this Court forming the wrong impression that [he and the Department] have dismally failed to perform the constitutional and statutory duties bestowed upon [them]". In particular, "they have shown this Court a middle finger and disregarded the Court Order", which does not reflect the correct position.

(h) Concrete steps were taken to meet the deadline to enact the remedial legislation and these steps are outlined by the Minister.

(i) As far as he is concerned, the drafting of the Executive Bill by the drafting section of the Department was underway and he was not aware that the process was halted due to "a spurious application launched in this Court". Instead of the officials in the drafting section starting with the process initiating an Executive Bill, they "were on [a] frolic of their own". In the process, a period of more than a year has been lost. In the circumstances, he agrees with the case as pleaded by LHR that the relief sought by the Minister is incompetent. This Court has no power to resuscitate and extend a suspension of invalidity once it has lapsed. He

extends "a sincere apology to the Chief Justice, all judges of the High Court and Constitutional Court, the President of the Republic of South Africa, Minister of Finance, LHR and its legal representatives and people of South Africa for the mess created by officials of the Department of Home Affairs".

(j) Lastly, the Minister alludes to an instruction given to his (new) legal representatives in respect of a proposed withdrawal of this application with a concomitant costs tender.

[72] The Director-General also responded to the directions by way of affidavit. He also avers that he should not be joined in his personal capacity or be held liable for the costs. The Director-General largely confirms the salient facts outlined by the Minister. In addition, the Director-General states that, after reading the *Daily Maverick* report and the affidavits filed in this Court, he "realised that there were difficulties in the nature of the application and the contents of the affidavits deposed to by [him]". According to the Director-General, in hindsight he now realises that he should "have applied [his] mind fully" to the facts in his founding and replying affidavits and that an application of this nature ought to have been sanctioned by the Minister. When he received this Court's directions, he instructed that senior counsel's mandate be terminated (it is noted that he does not say that the Minister asked him to do so, as the Minister asserts in his affidavit). He also agreed with the Minister that the State Attorney's mandate be terminated.

[73] The Director-General now accepts that bringing the applications in the High Court and this Court on an ex parte basis without joining LHR was wrong. He concedes that he did not consult the Minister or show him the papers in this application, and that this application is ill-conceived for the reasons advanced by the Minister. Lastly, the Director-General extends the same apology in exactly the same terms and to the same persons as the Minister.

[74] The applicants made further submissions as required by the directions issued by the Chief Justice. The applicants recapitulate the points made in their affidavits. They submit that, because "[t]he Minister was not aware of both *ex parte* applications and the Director-General accepted the advice of counsel without applying his mind properly . . . [t]he test for personal costs as laid down [in *Reserve Bank*][53] has not been met". According to the applicants, the facts in *Black Sash II* are distinguishable, since in that case, the Minister of Social Development was found to have misled Parliament and she also filed an affidavit in this Court. LHR's reliance on *Black Sash II* is thus misplaced.

[75] In conclusion, the applicants contend that they ought not to be joined in their personal capacities and that they ought not to be held liable for costs personally. Lastly, they ask that this Court exercise its wide discretion and grant leave to the applicants to withdraw the proceedings, notwithstanding LHR's opposition for them to be permitted to do so. This Court should allow the withdrawal for the following reasons:

(a) It would be in the interest of all parties concerned to do so; and

(b) It is in the interests of justice to do so in order to avoid injustice.

[76] As regards the remedy, the applicants ask that the Chief Justice "issue new directions which will grant the Minister and Director-General an opportunity to address the issue of appropriate remedy".

[77] In its further answering affidavit LHR makes the following pertinent submissions in response to the Minister's averments:

(a) LHR notes the Minister's allegations that both ex parte applications in this Court and the High Court had been brought without his knowledge and in disregard of existing instructions and policies, and that

[53] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) (*Reserve Bank*).

disciplinary measures are being taken against the officials responsible for this imbroglio.

(b) Notwithstanding this, LHR points out that section 92 of the Constitution provides that Ministers bear responsibility for the powers and functions of the executive assigned to them and Members of Cabinet are accountable to Parliament for the exercise of their powers and the performance of their functions.[54]

(c) The ultimate primary responsibility to fulfil the objectives of a department rests on the Minister, and not departmental officials. It is the Minister who is ultimately accountable for the actions or failures of officials. LHR cites *Black Sash II* where this Court held:

> "The Minister bears the primary responsibility to ensure that SASSA fulfils its functions. She appoints its CEO. There is little the CEO can do without her direction. Attempts to obtain evidence of what steps she took after *AllPay 2* to ensure that beneficiaries would continue to be well catered for drew a blank . . . . Given this chain of responsibility, there may thus be no grounds, in the end, for considering whether any individual officials of SASSA should be mulcted, personally, in costs. The office-holder ultimately responsible for the crisis and the events that led to it is the person who holds executive political office. It is the Minister who is required in terms of the Constitution to account to Parliament. *That is the Minister, and the Minister alone*."[55] (Emphasis added.)

---

[54] Section 92 reads:

> "(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.
>
> (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
>
> (3) Members of the Cabinet must—
>
> (a) act in accordance with the Constitution; and
>
> (b) provide Parliament with full and regular reports concerning matters under their control."

[55] *Black Sash II* above n 51 at paras 73-4.

(d) No approach has been received from the Minister's legal representatives for a withdrawal of the matter. In any event, withdrawal is not apposite since:

(i) the failure to pass remedial legislation has caused inconsistency in the application of the law in respect of the operation of section 34(1)(b) and (d) of the Act;

(ii) this Court must intervene and remove the prevailing uncertain and confusing legal position and must remedy the constitutional defects that the Minister and Parliament had failed to address; and

(iii) even if LHR were to acquiesce to a withdrawal, rule 27 of this Court's Rules leaves that decision to the Chief Justice. If withdrawal would result in constitutionality not being fully considered, this Court may refuse the withdrawal.[56]

(e) LHR takes issue with the Minister's averments regarding the reasons for failing to enact remedial legislation. According to LHR those reasons are untenable.

[78] LHR responds to the Director-General's affidavit by noting that he admits to gross negligence in several respects:

(a) not fully applying his mind to the contents of the affidavits, despite confirming their correctness under oath;

(b) failing to inform and consult with the Minister prior to attesting to an affidavit on his behalf; and

(c) advancing wholly unsustainable reasons for the failure to pass remedial legislation, namely the national lockdown pursuant to the Covid-19

---

[56] *Phillips v Director of Public Prosecutions* [2003] ZACC 1; 2003 (3) SA 345; 2003 (4) BCLR 357 at para 8:

> "A thorough investigation of the constitutional status of a legislative provision is obligatory in confirmation proceedings. This is so even if the proceedings are not opposed, or even if there is an outright concession that the section under attack is invalid. As the judgments in this case show, the issues in this case are not straightforward. Issues that come before this Court seldom are."

pandemic and the fire at Parliament, events that happened long after the deadline for the enactment of remedial legislation had passed.

[79] LHR persists in seeking the order it proposed in its original oral and written submissions in this Court. In its further written submissions pursuant to the Chief Justice's directions, LHR points out that in response to the Chief Justice's directions, the Minister seeks relief which is contradictory – on the one hand, he seeks the withdrawal of these proceedings and on the other hand, that he be allowed an opportunity to address the issue of an appropriate remedy. LHR submits that there is no basis for the matter to be withdrawn in circumstances where oral arguments have been heard by this Court and, for the extensive reasons already advanced, there is a need for an appropriate remedy.

[80] In any event, contends LHR, it is not in the interests of justice for any of the relief sought by the applicants to be granted by this Court. The Minister and Parliament have failed to pass corrective legislation and this has resulted in an inconsistency in the application of section 34(1)(b) and (d) in instances where persons are detained for purposes of deportation. This inconsistency leaves room for the violation of the rights of detainees. Secondly, despite the passing of almost six years since the 2017 order, there have been no concrete steps by the Minister and Parliament to effect corrective legislation. While the Minister assumed office in May 2019, one month before the expiry of the deadline imposed by the 2017 order for the passing of corrective legislation, he only took some form of action almost three years later. This was inadequate. LHR submits that the Minister should not be provided with a further opportunity to delay clarity and guidance being provided on the operation of section 34(1)(b) and (d).

[81] According to LHR, if this Court were to grant the relief claimed, it would amount to a second bite at the cherry for the applicants in circumstances where they ignored a court order for a period of six years. The delay is inordinate, and it would be prejudicial to LHR's clients. It is desirable that legislation be enacted to deal with

the problem. The applicants are empowered to pass corrective legislation at any time even if the Court grants the order proposed by LHR in order for this matter to be brought to finality. Accordingly, contends LHR, the Minister does not need an opportunity to make further submissions on the remedy.

[82] As the applicants had terminated the services of their previous legal representatives (the State Attorney and Mr Bofilatos SC), a letter was sent by the Registrar to these legal representatives, attaching the parties' further affidavits and written submissions on costs. Their attention was drawn to the applicants' averments in respect of the conduct of the litigation and the advice received from their legal representatives, as set out above. The legal representatives were invited to comment upon and to make written submissions in respect of the averments contained in the further affidavits. They were asked, in particular, to address the question whether their conduct warrants an order for costs against them *de bonis propriis* (costs which a party is ordered to pay out of her own pocket as a penalty for improper conduct) or an order precluding them from recovering fees from the applicants both in this Court and the High Court.

[83] Written submissions were made by Mr Bofilatos SC pursuant to the Registrar's letter. In brief, Mr Bofilatos SC explains that the ethical rules of his profession precluded him from making an affidavit in pending litigation without his professional body's consent, hence the written submission. He explains further that he had been engaged as counsel with work from the Department from at least the year 2000 and has consequently "been exposed to litigation canvassing almost the full spectrum of legislation which falls under the control and administration of the Department".

[84] Mr Bofilatos SC contends that the Minister's rejection of the reasons set forth in the founding papers for the failure to timeously comply with the initial 24-month period as well as for the period of approximately three years thereafter, "cannot be sustained". He submits that the officials responsible and the legal representatives had

at all times "acted in a *bona fide* and transparent manner in taking steps to rectify what was obviously a precarious position being faced by the [Department]". This precarious position was caused by certain Magistrates refusing to undertake section 34 enquiries. There was a serious challenge within the Department, according to Mr Bofilatos SC, as the primary official in the Legal Services Directorate (the Director: Drafting, who later acted as Acting Chief Director: Legal Services), was not made available for consultations. This was one of the major causes of the non-compliance, as the Legal Services Directorate is central to all stages of drafting legislation, a fact which Mr Bofilatos SC says the Minister fails to mention.

[85] According to Mr Bofilatos SC, the initial orders obtained ex parte "were not, *stricto sensu* [in a strict sense] 'ex parte' in nature in that, at all times, officials who were the subject matter thereof, through their representative body, were aware of the existence of the applications before orders were obtained". He opines that there is a breakdown in communication between the office of the Minister on the one hand, and line function officials on the other, notwithstanding the Minister's Communication Protocol dated 27 October 2020.

[86] Mr Bofilatos SC emphasises that the Department's primary concern in lodging the initial applications in the High Court was to ensure that Magistrates once again commenced with their section 34 enquiries. This was because deportations are virtually impossible without physical control over the deportee and without such persons being in possession of travel documents. Accordingly, the sole purpose of detention under the Act is to secure the removal of the person from the country, and their release thereafter upon being accepted by their country of nationality.

[87] Mr Bofilatos SC explains that the two applications brought in the High Court were aimed exclusively at the Magistrates' incorrect interpretation of

paragraphs 2 and 4 of the 2017 order.[57] The orders obtained in these two applications "were intended to be of only a temporary operation until such time that the current application in this Court had been lodged and finalised". Like the applicants, Mr Bofilatos SC also proffers a belated apology and does so if they as the legal representatives were remiss in not having secured an apology, in advance of the hearing, from the Minister and Director-General.

[88] In conclusion, Mr Bofilatos SC takes issue with the applicants insofar as they seek to place blame on the legal representatives for the shambolic litigation. He submits that neither the State Attorney nor he had at any stage conducted themselves in a manner warranting punitive costs, nor is there any suggestion on the part of the applicants that they be visited with personal costs orders. He says this is also reflected in the attitude adopted by LHR who "simply calls for the matter to be disposed of on the basis of costs, simpliciter, being awarded against the applicants". Mr Bofilatos SC contends that "there cannot be any accusation of negligence in a serious degree levelled against the applicants or the applicants' legal representatives". At worst, there was "a mere error of judgment which, in itself, does not warrant any visitation of punitive or personal cost orders". Lastly, Mr Bofilatos SC alludes to the integrity of the relevant legal practitioner at the State Attorney's office and says that any exposure by her to personal costs, "would constitute . . . a grave injustice".

[89] The Minister filed a replying affidavit in response to Mr Bofilatos SC's written submissions on costs. The Minister says the submissions contain material that "cannot go uncorrected". This Court did not in the directions authorise a replying affidavit and there was no substantive application for its admission. The only motivation for its admission proffered by the Minister is to answer some of Mr Bofilatos SC's averments. That is not sufficient reason to permit the affidavit and it is disallowed.

[57] It appears that there was an earlier High Court application where an order was granted by Haupt AJ on 28 June 2022. In terms of that order, Magistrates were apparently directed to continue hearing section 34 enquiries.

Conclusion on costs

[90] To err is human. All of us are fallible. But, what we have here goes far beyond human error and good faith mistakes. I have been at great pains to describe in detail the flaws and the unsatisfactory manner in which the litigation has been conducted. This is because of the serious implications an order depriving the legal representatives of their fees and a personal costs order against the Minister and the Director-General may have.

[91] It can hardly be disputed that this litigation has been conducted in a dreadful manner. It is deserving of a punitive costs order.[58] This Court has made plain, in both the majority and minority judgments in *Reserve Bank,* that imposing punitive costs on the one hand and costs on a personal basis are two different issues.[59] As was pointed out, the imposition of costs on an attorney and client scale is an additional punitive measure and can be viewed as "double punishment". The tests for these two costs orders may overlap and there must be an independent, separate enquiry in respect of each order. They are "extraordinary in nature and should not be awarded 'willy-nilly', but rather only in exceptional circumstances".[60]

[92] Punitive costs serve to convey a court's displeasure at a party's reprehensible conduct.[61] A punitive costs order is justified where the conduct concerned is extraordinary and deserving of a court's rebuke.[62] In *Reserve Bank*, the consideration for confirming the punitive costs order was, amongst others, the higher standard

[58] *De Lacy v South African Post Office* [2011] ZACC 17; 2011 (9) BCLR 905 (CC) (*De Lacy*) at paras 116 and 118.

[59] *Reserve Bank* above n 5353.

[60] Id at para 220.

[61] Id at para 221.

[62] *Reserve Bank* above n 53 at para 226, citing *SS v VV-S* [2018] ZACC 5; 2018 JDR 0275 (CC); 2018 (6) BCLR 671 (CC) (*SS v VV-S*) at para 41; and *Ka Mtuze v Bytes Technology Group South Africa (Pty) Ltd* [2013] ZACC 31; 2013 JDR 1998 (CC); 2013 (12) BCLR 1358 (CC) (*Ka Mtuze*) at para 3.

expected from public officials.[63] The primary consideration in *SS v VV-S* was the extraordinary conduct of compromising the best interests of a minor child and the Court's integrity by failing to comply with an order of this Court.[64] It was the conduct of the applicant, an attorney, in *Ka Mtuze* that justified a costs award against him on an attorney and own client scale, *de bonis propriis*.[65] In addition, it was ordered that the Registrar send the judgment and the papers in the matter to the relevant Law Society, because the High Court took the view that the applicant had conducted himself in a manner that warranted possible disciplinary action by the Law Society.

[93] As stated, an enquiry separate from that of punitive costs is necessary where a personal costs order is contemplated. An order to pay costs in a litigant's personal capacity is made where the litigant's conduct demonstrates a gross disregard for their professional responsibilities, and where they acted inappropriately and egregiously. The assessment of the gravity of the conduct is objective and lies within the discretion of the court.[66] In *SASSA* this Court affirmed the test for personal costs orders against public officials:

> "It is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation."[67]

[94] The principle that a public official who acts in a representative capacity may be ordered to pay costs out of their own pockets in certain circumstances was affirmed by this Court in *Reserve Bank*.[68] It made plain that the purpose of a personal costs order

---

[63] *Reserve Bank* above n 53 at para 237.

[64] *SS v VV-S* above n 6262.

[65] *Ka Mtuze* above n 62 at para 3.

[66] *Reserve Bank* above n 53 at para 146.

[67] *South African Social Security Agency v Minister of Social Development (Corruption Watch (NPC) RF Amicus Curiae)* [2018] ZACC 26; 2018 JDR 1451 (CC); 2018 (10) BCLR 1291 (CC) (*SASSA*) at para 37.

[68] *Reserve Bank* above n 53 at para 153.

against a public official is the vindication of the Constitution. This Court pointed out that such orders are not inconsistent with the Constitution and that they are required for its protection, because public officials who flout their constitutional obligations must be held to account. "[W]hen their defiance of their constitutional obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer", said the Court.[69]

[95] A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. That emanates from the Constitution itself, since the Constitution regulates all public power and public officials are required to act in accordance with the law and the Constitution.[70]

[96] A personal costs order on a punitive scale of the High Court was confirmed in *Ka Mtuze*.[71] Applying the well-established principles outlined in a number of cases in this Court, it seems to me that a similar order is warranted here. The applicants' legal representatives must take the major share of the blame for the deplorable state of the litigation. Mr Bofilatos SC's submissions have not persuaded me to the contrary. He deflects blame and apportions it to various other persons and surrounding circumstances. That deflection is ill-conceived. An aspect of grave concern is that nothing at all is said in his submissions about the deafening silence, here and in the High Court, regarding the quartet of cases in this Court that renders an application of this kind a complete non-starter. This failure can be ascribed to only two possible reasons: ignorance or deliberate omission. About that, we are still none the wiser, even after further affidavits and submissions were filed. But it bears emphasis that mere ignorance of the law is certainly not the reason why this Court holds the legal representatives accountable here. It is the egregious fashion in which the litigation has been conducted, as set out earlier.

---

[69] Id.

[70] Id at para 155. See also: *Kirland* above n 49 at paras 64-5, 82 and 88.

[71] *Ka Mtuze* above n 62.

[97] The applicants' legal representatives have abysmally failed in their duty to represent their clients in the manner required by their professional rules. To recap, they:

(a) inexplicably approached the High Court on an urgent ex parte basis for an order that, pending the application to this Court, or the enactment of remedial legislation envisaged in the 2017 order, the provisions in section 34(1)(b) and (d) remain operative;

(b) then approached this Court, again on an ex parte basis, for an order "reviving" the 2017 order;

(c) in both instances, failed to join the original applicant, LHR, and then failed to serve the papers on it;

(d) troublingly failed or, worse, deliberately omitted, to mention the four decisions of this Court that unequivocally held that, while this Court can extend a suspension period before that period expires, it has no power to do so after the expiry of that period; and

(e) stridently opposed LHR's intervention application in this Court and then bizarrely used the inexcusable failure to join LHR by contending that LHR was not party to the proceedings and had no standing to make "damning statements".

[98] Costs orders *de bonis propriis* against legal representatives appear to be far more frequent than those depriving them of their fees. Nonetheless, there is much guidance to be gained from the former types of cases. The applicable principles for orders of costs *de bonis propriis* have been clearly enunciated by this Court in *Reserve Bank*.[72] I reiterate only a few of them germane to this case. In that case the Court pointed out that it has ordered costs:

(a) against individuals in their personal capacities where their conduct showed a gross disregard for their professional responsibilities; and

[72] *Reserve Bank* above n 53 at paras 45 and 146.

(b) where the individuals acted inappropriately and in an egregious manner. The Court noted that the assessment of the gravity of the conduct is objective and lies within the discretion of the court.[73]

[99] In *Stainbank*, this Court held that "costs will only be awarded on this basis where a practitioner has acted inappropriately in a reasonably egregious manner".[74] The Court stated that—

> "there does not appear to be a set threshold where an exact standard of conduct will warrant this award of costs. Generally, it remains within judicial discretion. Conduct seen as unreasonable, wilfully disruptive or negligent may constitute conduct that may attract an order of costs *de bonis propriis*."[75]

[100] In *De Lacy*, this Court declined an invitation by the respondent, the Post Office, to order part of the punitive costs it imposed against the applicants to be paid *de bonis propriis*.[76] That decision was made on the basis that, although the legal representatives' conduct "was not without blemish", an order of that nature would only be justified where the conduct of a legal representative, that is not attributable to a litigant, calls for the court to express its displeasure, which was not the case there.[77]

[101] A limited deprivation of fees was ordered by the Appellate Division in *Venter*.[78] That order was made on the basis of the shockingly poor quality of the appeal record. The Court held that an appellant's attorneys had a duty to read the record and correct errors. In that case, they had grossly neglected that duty and the

---

[73] Id at para 146.

[74] *Stainbank v South African Apartheid Museum at Freedom Park* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) at para 52. See further: *Engen Petroleum Ltd v Moodley N.O.* [2017] ZAGPJHC 78 paras 51-2; *Mahlangu v Mahlangu* 2005 (1) SA 451; [2017] ZASCA 81 paras 20-1; and *Webb v Botha* 1980 (3) SA 666 (N).

[75] Id.

[76] *De Lacy* above n 58.

[77] Id at paras 119 and 121.

[78] *Venter v Bophuthatswana Transport Holdings (Edms) Bpk* [1997] 2 SA 257 (A).

Court was of the opinion that a punitive costs order in this regard was justified. The Court thus made an order that the appellant's attorneys would not be entitled to claim any costs from their client for the perusal of the appeal record. The Appellate Division pointed out that both attorneys and advocates bear responsibility for maintaining the high standards that are ultimately the guarantee of legitimacy of our legal system. The Court cautioned that the time would come when counsel would be held liable with their attorney for a poor record, as counsel has a duty to have a poorly transcribed record corrected when, in the course of preparing heads of argument, they note serious shortcomings in the record.[79]

[102] It is well-established that a party may be deprived of costs in certain instances, including unconscionable or excessive demands; failure to curtail or limit proceedings; a vexatious defence or claim; misconduct; unnecessary litigation and negligence.[80] The conduct of legal practitioners may in certain circumstances lead to a successful party being deprived of costs, either wholly or in part. Considerations may include unauthorised conduct, wastefulness or prolixity.[81] Recently, in *Chueu*, the Supreme Court of Appeal deprived the successful appellant, the Limpopo Provincial Council of the Legal Practice Council, of its costs in that Court. The basis of the order was the poor state of the record on appeal.[82]

[103] Legal practitioners are an integral part of our justice system. They must uphold the rule of law, act diligently and professionally. They owe a high ethical and moral duty to the public in general, but in particular to their clients and to the courts. In *Jiba*, this Court stated:

---

[79] Id at 267c-e.

[80] Dendy "Costs" in *LAWSA* 3 ed (2017) vol 10 at paras 263-9; Cilliers et al *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 961-8.

[81] Dendy above n 80 at para 271; Cilliers et al above n 80 at 968.

[82] *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys* [2023] ZASCA 112 (*Chueu*) at paras 37-8. In the High Court, the appellant (the applicant for leave to appeal in that Court) was refused leave to appeal with costs on an attorney and client scale because it had "used a personal and emotional attack in its notice of application for leave to appeal against the respondents and the court".

> "Legal practitioners are a vital part of our system of justice . . . . As a result, the law demands from every practitioner absolute personal integrity and scrupulous honesty."[83]

[104] In *Kekana*, the Supreme Court of Appeal held:

> "Legal practitioners occupy a unique position. On the one hand they serve the interests of their clients, which require a case to be presented fearlessly and vigorously. On the other hand, as officers of the court, they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence. Both professions have strict ethical rules aimed at preventing their members from becoming parties to the deception of the court. Unfortunately, the observance of the rules is not assured because what happens between legal representatives and their clients or witnesses is not a matter for public scrutiny. The preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part."[84]

[105] In an instructive article concerning the ethical considerations in presenting an utterly unmeritorious case, my Colleague Rogers J alludes to rule 3 of the General Council of the Bar's Rules of Conduct.[85] That rule requires of counsel to present their client's case as best they could by employing "every argument and observation, that can legitimately, according to the principles and practice of law, conduce to this end".[86] My Colleague points out that there is nothing wrong in

---

[83] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at para 1.

[84] *Kekana v Society of Advocates of SA* [1998] ZASCA 54; 1998 (4) SA 649 (SCA). See also: *Chueu* above n 82 at para 4.

[85] Rogers "The ethics of the hopeless case" (2017) 30 *Advocate* at 46.

[86] Rule 3 of the Uniform Rules of Professional Conduct of the General Council of the Bar reads:

> "According to the best traditions of the Bar, an advocate should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person. Counsel has the same privilege as his client of asserting and defending the client's rights and of protecting his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation, that can legitimately, according to the principles and practice of law, conduce to this end; and any attempt to restrict this privilege should be jealously watched."

arguing a weak case. I agree – after all, that is why clients engage lawyers to put to use their forensic skills to present the client's case to the best of their ability. But, as my Colleague correctly argues in the article, different considerations arise where a case is utterly hopeless. He points out that in England, the ethical rules governing solicitors and barristers now explicitly state that it is improper for a legal representative to make a submission which they does not regard as properly arguable.[87] The article refers to a number of useful foreign cases; I will refer to only a few.

[106] In the Privy Council case of *Sumodhee* the grounds for appeal were ultimately shown to be plainly without any merit at all.[88] In a postscript to the dismissal of the appeal, Lord Hughes emphasised that counsel's professional duties are to both his client and the court. There ought to be no conflict between these duties, but it is axiomatic that the duty to the court is the overriding one. Part of counsel's duties to his client included not advancing unarguable points.[89] In *Steidl Nominees*, Davies JA in the Queensland Court of Appeal in Australia held that it was improper for a lawyer to present a case which they know is bound to fail. Counsel had to determine whether a case is arguable at all and, if not, to refrain from doing so. Improper conduct will more readily be ascribed to counsel where it concerns law rather than fact, although the overriding principle is the same. "If the case is plainly unarguable it is improper to argue it", held Davies JA.[90]

[107] In Canada, the Court of Appeal for British Columbia held in *Lougheed* that in an adversarial system the usual approach of judicial non-intervention presupposes that

---

[87] Rogers above n 85 cites Rule IB 5.7(a) of the Solicitors' Code of Conduct 2011; Rule C9(2)(b) of the Code of Conduct contained in the Bar Standards Handbook 3 ed April 2017 and *Buxton v Mills-Owen* [2010] EWCA Civ 122; [2010] WLR 1997 (CA) at para 43.

[88] *Sumodhee v State of Mauritius* [2017] UKPC 17.

[89] Id at paras 22 and 23.

[90] *Steidl Nominees v Laghaifer* [2003] QCA 157 at paras 24-27.

counsel will do their duty, not only to their client but to the court in particular.[91] That duty, said the Court, entails:

> "to do right by their clients and right by the court . . . . In this context, 'right' includes taking all legal points deserving of consideration and not taking points not so deserving. The reason is simple. Counsel must assist the court in doing justice according to law".[92]

[108] My Colleague states in his article that the rules of professional conduct of the law societies of Canada contain provisions supporting a conclusion that it is improper to advance a hopeless case.[93]

[109] In his article, Rogers J concludes, amongst others, in respect of the ethical duties of counsel (which, self-evidently are of equal application to attorneys; the emphasis is my own):

(a) Pleadings and affidavits must be scrupulously honest. Nothing should be asserted or denied without reasonable factual foundation.

(b) It is improper for counsel to act for a client in respect of a claim or defence which is hopeless in law or on the facts.

(c) A necessary correlative is that counsel must properly research the law and insist on adequate factual instructions.

(d) In principle counsel may properly conclude that a case is hopeless on the facts though in general counsel cannot be expected to be the arbiter of credibility.

(e) There is an ethical obligation to ensure that only genuine and arguable issues are ventilated and that this is achieved without delay.

(f) Misconduct of this kind must be assessed subjectively – the question is whether counsel genuinely believes that the case is not hopeless and is thus properly arguable.

---

[91] *Lougheed Enterprises Ltd v Armbruster* 1992 CanLII 1742 (BCCA); (1992) 63 BCLR (2d) 317 (CA) at 324.

[92] Id at 325.

[93] Rogers above n 85 at 49.

(g) *In addition, or as an alternative to disciplinary proceedings, a court could make a costs order penalising the advocate.* This would not necessarily have to be an order that the advocate pay the other side's costs. Where the litigant himself is at fault, it might be more appropriate to make a special costs order against the litigant and a further order that counsel may not recover any fee.[94]

[110] The legitimacy of our judicial system, particularly the courts, will fall into disrepute if the shockingly poor conduct of litigation as in the present instance is allowed to continue unchecked. The egregiousness and multiplicity of the shortcomings in the conduct of the legal practitioners in the present instance warrant an exceptional order that they be deprived of their fees. Having given careful consideration to the applicable legal principles and the facts, I am satisfied that, in order to mark this Court's displeasure, an order depriving the legal practitioners of their full fees is warranted. They failed in their professional duties to properly and fully advise the applicants. I need not repeat their aberrations, having already expounded them at least twice. Rarely does one come across lapses of the extraordinary range and gravity seen in this case. The manner in which this litigation has been conducted, both in this Court and the High Court, ineluctably point to careless litigating. It borders on a callous disregard of legal rules and principles and of ethical and professional duties. The apology that was proffered by Mr Bofilatos SC appears to me to be a grudging acceptance that things had gone badly awry with the litigation, rather than a sincere expression of contrition.

[111] I accept that, as far as the Minister and the Director-General are concerned, they were largely dependent on the advice of their lawyers. But that does not absolve them from culpability for the shambles in this case. There is little difference between their apologies and that proffered by Mr Bofilatos SC. It is a classic case of "too little, too late". The Minister is ultimately accountable for the fulfilment of the objectives of

[94] Id at 50-1.

his Department and for the actions or failures of his officials.[95] And it is the Minister who bears responsibility for the powers and functions of the executive assigned to him. As a Member of Cabinet, he is accountable to Parliament for the exercise of his powers and the performance of his functions.[96] Apart from the Minister's constitutional responsibilities and accountability, an important further consideration is that a higher standard of conduct is expected from public officials.[97]

[112] I am prepared to accept that, as troubling a fact as that may be, the Minister was in the dark about this litigation and about the shoddy manner in which it was conducted. I have no reason to doubt the Minister's averments in that regard. On that basis, I take the view that the Minister should be held liable in his personal capacity for 10% of LHR's costs. In light of what I have said, there is, however, no basis to order that the costs to be paid personally must be on a punitive scale. There is no evidence of reprehensible conduct in the litigation by the Minister himself.[98]

[113] The Director-General is in a different position in respect of degree of culpability. On his own version under oath, the Director-General admits to gross negligence inasmuch as he failed to:

(a) fully apply his mind to the contents of the affidavits, despite confirming during deposition their correctness under oath; and

(b) failed to inform and consult with the Minister prior to attesting to an affidavit on his behalf.

[114] Furthermore, the Director-General advanced wholly unsustainable reasons for the failure to pass remedial legislation, namely the national lockdown pursuant to the Covid-19 pandemic and the fire at Parliament, events that happened long after the deadline for the enactment of remedial legislation had passed. These are serious

[95] *Black Sash II* above n 51 at paras 73-4.

[96] Section 92 of the Constitution.

[97] *Reserve Bank* above n 53 at para 237.

[98] Compare: Id at para 221.

aberrations. The Director-General is the most senior official in a government department and is its accounting officer. They are expected to lead by example. The conduct displayed in this case is unacceptable and deserving of censure. The personal costs order that will follow is a mark of this Court's displeasure at the Director-General's conduct. On these facts, his culpability for this shambolic litigation plainly exceeds the Minister's. In my view the Director-General must be held personally liable for 25% of LHR's costs. Again, though, there is no basis to mulct the Director-General in punitive costs as his conduct cannot be described as reprehensible.

[115] In their further written submissions, the applicants have asked that they be permitted to withdraw this application. At the same time, inexplicably, they asked that they be permitted to make further submissions on remedy. Both of these contradictory requests are untenable. There has been more than enough delay in this case. This matter must be finalised post haste. In any event, there is no basis for the matter to be withdrawn as this Court has already heard full oral argument and extensive further written submissions have been received. This case cries out for an appropriate remedy to be granted without any further delay.

[116] Accountability is one of the cornerstones of our Constitution. Section 1(d) lists one of the founding provisions as "a multi-party system of democratic government, *to ensure accountability*, responsiveness and openness" (Emphasis added).[99] I have alluded to section 92 which unambiguously enunciates the accountability and responsibilities of members of the executive. The appalling state of affairs brought about by the laxity of the applicants requires that they be held accountable as contemplated in the Constitution.

[117] The applicants have ignored an order of this Court for a period of six years. A further delay would be seriously detrimental to the interests of justice and highly

---

[99] Other references to accountability can be found in sections 57(1)(b), 70(1)(b), 92, 116(1)(b), 133, 199(8) and 215(1) of the Constitution.

prejudicial to LHR's clients and other similarly placed individuals. Corrective legislation must be enacted without any further delay. The applicants have had more than enough time to address this Court on remedy. Instead of doing so, they have embarked on this lamentable, ill-conceived legal route.

Order

[118] I make the following order:

1. Subject to and pending the enactment of legislation outlined in paragraph 2, as from the date of this order, and pending remedial legislation to be enacted and brought into force within 12 months from the date of this order, the following provisions, supplementary to those contained in paragraph 4 of this Court's order of 29 June 2017, shall apply:

    (a) An immigration officer considering the arrest and detention of an illegal foreigner in terms of section 34(1) of the Immigration Act 13 of 2002 (Act) must consider whether the interests of justice permit the release of such person subject to reasonable conditions, and must not cause the person to be detained if the officer concludes that the interests of justice permit the release of such person subject to reasonable conditions.

    (b) A person detained in terms of section 34(1) of the Act shall be brought before a court within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.

    (c) The Court before whom a person is brought in terms of paragraph (b) above must consider whether the interests of justice permit the release of such person subject to reasonable conditions and must, if it so concludes, order the person to be released subject to reasonable conditions.

(d) If the Court concludes that the interests of justice do not permit the release of such person, the Court may authorise the further detention of the person for a period not exceeding 30 calendar days.

(e) If the Court has ordered the further detention of a person in terms of paragraph (d) above, the said person must again be brought before the Court before the expiry of the period of detention authorised by the Court and the Court must again consider whether the interests of justice permit the release of such person subject to reasonable conditions and must, if it so concludes, order the person to be released subject to reasonable conditions.

(f) If the Court contemplated in paragraph (e) above concludes that the interests of justice do not permit the release of such person, the Court may authorise the person's detention for an adequate period not exceeding a further 90 calendar days.

(g) A person brought before a Court in terms of paragraph (b) or (e) must be given an opportunity to make representations to the Court.

2. If remedial legislation is not enacted and brought into force within the said 12-month period, the provisions in paragraph (1) above shall continue to apply until such remedial legislation is enacted and brought into force.

3. Subject to paragraphs 4 and 5, the applicants must pay the intervening party's costs, including the costs of two counsel.

4. The first applicant must pay 10% of the costs referred to in paragraph 3 in his personal capacity.

5. The second applicant must pay 25% of the costs referred to in paragraph 3 in his personal capacity.

6. The fees of the applicants' former legal representatives, referred to in this judgment, are disallowed.

For the First and Second Applicants:	Instructed by Denga Incorporated (present legal representatives)
	M Bofilatos SC Instructed by the State Attorney Pretoria (former legal representatives)
For the Intervening Party:	S Budlender SC and B Mkhize Instructed by Lawyers for Human Rights