CONSTITUTIONAL COURT OF SOUTH AFRICA

Ex parte Minister of Home Affairs and Others
In re Lawyers for Human Rights v Minister of Home Affairs and Others

CCT 38/16

Date of hearing: 25 May 2023
Date of judgment: 30 October 2023

MEDIA SUMMARY

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

Today the Constitutional Court handed down judgment in an ex parte application to revive a previous order of this Court dated 29 June 2017 (2017 Order) in the matter *Lawyers for Human Rights v Minister of Home Affairs* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC).

In the 2017 Order, the Court declared that section 34(1)(b) and (d) of the Immigration Act 13 of 2002 (the Act) is inconsistent with sections 12(1) and 35(2)(d) of the Constitution and therefore invalid. The Court identified three constitutional defects in the section. First, the Court held that section 34(1)(b) was unconstitutional as it did not require an automatic judicial review of a detention of an illegal foreigner before the expiry of 30 calendar days. 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. 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 to exercise that power.

Further, in the 2017 Order, the Court afforded Parliament 24 months, that is, by 29 June 2019, to correct the defect in the Act, during which time the declaration of invalidity was suspended. To protect the rights of detainees in the interim, the 2017 Order provided that, pending the enactment of corrective legislation within 24 months or upon the expiry of this period, illegal foreigners detained under section 34(1) of the Act shall be brought before a court in person within 48 hours from the time of arrest.

Parliament failed to meet the 29 June 2019 deadline to enact the corrective legislation before the suspension period expired. Now, in 2023, six years after the 2017 Order, Parliament has still not enacted corrective legislation. This has resulted in undesirable confusion and uncertainty: courts have taken divergent positions on the legal effects of the expiry of the suspension period; some Magistrates' Courts have incorrectly applied the 2017 Order by requiring detainees to prove the lawfulness of their documentation status; some Magistrates have been unwilling to confirm detentions beyond 30 days resulting in almost automatic releases from detention in cases where deportation should occur; some immigration officers have detained detainees beyond 30 days without bringing them before a court; and some Magistrates have been instructed not to handle section 34 applications.

The Minister and Director-General of Home Affairs (the applicants) approached the Constitutional Court in July 2022 on an ex parte basis by way of an urgent direct access application for a revival of the 2017 Order for a further period of two years. Lawyers for Human Rights (LHR), the applicant in the 2017 proceedings, has been admitted as an intervening party in these ex parte proceedings.

Before the present application in this Court, the Minister also launched an urgent ex parte application in the High Court of South Africa, Gauteng Division, Pretoria (High Court) to revive the 2017 Order. On 21 June 2022, the High Court ordered that the 2017 Order would remain operative pending the finalisation of the application in the Constitutional Court, alternatively, pending the enactment of corrective legislation (2022 High Court Order).

Before the Constitutional Court, the applicants accounted for the delay in enacting corrective legislation by outlining the steps and events since the 2017 Order, including the reduction of parliamentary activity ahead of the May 2019 elections, the impact of the Covid-19 pandemic in 2020 and the fire at the parliamentary precinct in January 2022. The applicants denied the incompetence of the 2022 High Court Order. They also argued that LHR, albeit not cited as a party in the High Court proceedings, was entitled to apply for the rescission of the 2022 High Court Order. The applicants resisted LHR's proposed remedy (discussed below), maintaining that, amongst others, extended section 34 enquires by Magistrates would constitute an overreach of their statutory powers; there are remedies available to LHR to address it if LHR has any difficulties with the way in which the Magistrates are applying section 34; and it is impractical and inappropriate for immigration officers to consider the interests of justice in exercising the power of detention.

LHR submitted that the applicants' case is untenable in law in that the Constitutional Court has, in four previous cases, 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. Nevertheless, LHR submitted that clarity is required from the Court by way of a declaratory order to explain the construction of the 2017 Order, which they proposed ought to be understood as continuing to operate, effectively reading-in the 48-hour

procedure to section 34(1), after the expiry of the suspension pending Parliament's enactment of new legislation. LHR also submitted that 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. Further, LHR submitted that, in order to provide guidance in the absence of objectively determinable conditions, the Court should direct that immigration officers or judicial officers must, in considering whether to exercise the power of detention, consider whether the interests of justice require that detention be discontinued and that appropriate alternative conditions instead be imposed. Lastly, LHR proposed that the Court make a supervisory order to ensure the enactment of new legislation.

In a unanimous judgment penned by Majiedt J (Zondo CJ, Maya DCJ, Kollapen J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ concurring), the Constitutional Court held that, while it cannot revive statutory provisions after the expiry of the suspension period, it can, in terms of section 172(1)(b) of the Constitution, order amplified just and equitable relief to supplement the 2017 Order. The Court held that LHR's proposed construction of the 2017 Order fails to pass the test for necessary implication. The 2017 Order 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. The Court also found it apposite to cure two further constitutional defects in its order: firstly, to provide for an in-person appearance by a detainee when a court is considering whether to extend a detention beyond 30 days and, secondly, to introduce the interests of justice criterion as guidance for the exercise of detention powers by immigration officers and courts. Lastly, the Court held that given its power to supplement and clarify the 2017 Order, as it has done, there is no need for a supervisory order.

The Court ordered that, pending the enactment of remedial legislation within 12 months, and in the event that remedial legislation is not enacted within this period, the provisions listed in the order, which supplement the 2017 Order, apply. These provisions are: (a) an immigration officer must apply the interest of justice criterion when considering the arrest and detention of an illegal foreigner in terms of section 34(1) of the Act; (b) a detained person shall be brought before a court within 48 hours from the time of arrest; (c) the court must apply the interests of justice criterion when this person is brought before it; (d) the court may authorise the further detention of this person if it concludes that the interests of justice do not permit the person's release; (e) if the further detention of this person is ordered, they must again be brought before the court prior to the expiry of the authorised detention period and the court must again apply the interests of justice criterion at this stage; (f) the court may then again authorise the further detention of this person, but by no more than 90 days, if it concludes that the interests of justice do not permit the person's release; and (g) whenever this person is brought before a court, they must be given an opportunity to make representations to the court.

The Constitutional Court's determination on costs was of some importance. The Court held that LHR was entitled to the costs incurred to help resolve the appalling state of affairs brought about by the egregious remissness of the Minister and Parliament. Moreover, the Court found that the applicants' first legal representatives should be denied

raising fees to convey the Court's displeasure at the dreadful manner in which this litigation was conducted and that the applicants should be ordered to pay LHR's costs from their own pockets for the same and additional reasons.

The Court condemned the egregious fashion in which the litigation was conducted and the legal representatives' failure in their duty to represent their clients as required by their professional rules. In sum, the applicants' first legal representatives, amongst other things, inexplicably approached the High Court on an urgent ex parte basis for an incompetent order; failed to join and serve papers on LHR as the original applicant in both the High Court and these proceedings; and either failed or deliberately omitted to mention the relevant case law providing that this Court has no power to extend a suspension period after its expiry. The Court noted that a higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, fulfil procedural requirements and tread respectfully when dealing with rights. It warned that the legitimacy of our legal system will fall into disrepute if the shockingly poor conduct of litigation as in this case is allowed to continue unchecked. The Court accordingly ordered that the fees of the applicant's first legal representatives be disallowed.

The Court recounted that the consideration for confirming a punitive costs order is, amongst others, the higher standard expected from public officials. 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. Where a public official is guilty of bad faith or gross negligence in conducting litigation, they can be held personally liable for costs. Personal costs orders against public officials who flout their constitutional obligations serve to vindicate the Constitution and hold such officials to account. The Minister is ultimately accountable for the fulfilment of his Department's objectives and for the actions or failures of his officials and he is responsible for the executive powers and functions assigned to him. The Director-General admitted to gross negligence in the ligation in that he failed to fully apply his mind to the contents of affidavits, despite confirming their contents under oath, and failed to consult with the Minister prior to attesting to an affidavit on his behalf. The Court accordingly ordered that the applicants must pay LHR's costs and, of these, the Minister must pay 10% and the Director-General 25% in their personal capacities.