IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 38/16

In the *ex parte* application of:

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

and

LAWYERS FOR HUMAN RIGHTS	Intervening Party

In re:

Case Number: CCT 38/16

LAWYERS FOR HUMAN RIGHTS	Applicant

and

THE 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) LTD T/A LEADING PROSPECTS TRADING	Fifth Respondent
PEOPLE AGAINST SUFFERING OPPRESSION AND POVERTY	Sixth Respondent

FIRST AND SECOND APPLICANT'S HEADS OF ARGUMENT

1.

INTRODUCTION:

This is an application for the renewed operation of paragraph 4 of the order made by this Court on 29th June 2017, possibly duly amplified, for a further 24-month period pending the enactment of legislation correcting the defects pertaining to the invalidity of Sections 34(1)(b) and (d) of the Immigration Act No. 13 of 2002.

2.

AD MERITS:

Although the parties appear to be *ad idem* that there is a need for a further opportunity to Parliament to bring about the necessary legislative corrections, the need still remains to persuade this Court that the reasons proffered by the First and Second Applicants as to the failure of Parliament to comply with the 24-month period set out in paragraph 4 of the Order of this Court dated 29th June 2017, justify the bringing of this application.

3.

In essence, the steps taken by the First and Second Applicants subsequent to the order of 29th June 2017, consist of the following:

3.1. The publication of the Draft Immigration Amendment Bill on 11th June 2018[1]

3.2. A further resolution passed by the Parliamentary Portfolio Committee on Home Affairs dated 4th September 2018 to the effect that the Department of Home Affairs engage further with the Departments of Justice, Safety and Security and Correctional Services regarding the proposed amendments to Section 34 of the Immigration Act.[2]

3.3. After October 2018, parliamentary activity was drastically reduced as a consequence of the upcoming National Elections which were set to take place on 22nd May 2019.[3]

3.4. The commencement of the international Covid-19 Pandemic (commencing in March 2020) will have had a further debilitating effect on the further need 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.[4]

3.5. The devastating fire of January 2022 to the Parliamentary premises, will also have had an adverse effect on the workings of the members of Parliament, in particular, the Parliamentary Portfolio Committee.[5]

3.6. The more recent events which also had the effect of increasing the urgency in the need to reintroduce the Bill, occurred as from the end of January

[1] See: Pp 7, par 9
[2] See: Pp 8 par 10.1, read with Annexure "LM3" pp 23
[3] See: Pp 8 par 10.3
[4] See: Pp 9 par 11 read together with pp 30, par 5
[5] See: Pp 9 par 11

2022 when a Senior Johannesburg Court Magistrate directed that Magistrates should no longer entertain Section 34 enquiries into the detention of illegal foreigners.[6] The effect hereof is more fully dealt with herein later.

3.7. On 24th April 2022, the Minister of Home Affairs addressed a letter to the Chairperson of the Parliamentary Portfolio Committee, requesting the reintroduction of the Amendment Bill to Section 34 of the Immigration Act.[7]

3.8. On 16 May 2022, and following upon the Minister's correspondence addressed to the Chairperson of the Parliamentary Portfolio Committee, a meeting was held between the Department of Home Affairs and the Portfolio Committee Chair during which alternatives were discussed, namely, whether or not to develop an Executive Bill, alternatively, whether to request the Portfolio Committee's Chairperson to develop a Committee Bill.

3.9. It was also agreed that the latter process would be more preferable, from a time perspective, given the urgency of the matter.[8]

3.10. The above meeting, in turn, led to the preparation of a submission by the Ministerial Legal Advisor dated 14 June 2022[9] in terms of which the Minister then, on 20th June 2022, approved the process for the

[6] See: Pp 30 par 6
[7] See: Pp 30 par 7 (Annexure "LM6")
[8] See: Pp 11, par 14.3 and 14.4
[9] See: Pp 32, Annexure "LM7"

development of the Committee Bill, for purposes of finalising the amendment.

3.11. The acceptance of the above submission on 20th June 2022[10] led to the First Applicant's letter to the Chair of the Portfolio Committee on the same date, setting out the reasons for the expedited process, such reasons being the following[11]:

3.11.1. The Executive Bill process may have taken longer to have the Bill introduced into Parliament than otherwise would have been the case;

3.11.2. Different interpretations were being given to this Court's judgment, in particular, paragraph 4 of its Order of 29 June 2017;

3.11.3. The above situation was leading to an inability to deport illegal foreigners;

3.11.4. The above was also viewed in the context of the then prevalent anti-migrant sentiment.

4.

POSSIBLE REMEDIES:

[10] See: Pp 37
[11] See: Pp 12 and 13

4.1. LHR propose, without providing specifics, that a form of "*bail*" be introduced *"... since the primary cause of their detention is a lack of valid documentation"*.

4.2. The above proposal is flawed, for the following reasons:

4.2.1. Persons appearing before Magistrates for purposes of confirmation of their Warrants of Detention under Section 34, have already been investigated and have already been found not to have such documentation. Where such findings of being illegal foreigners are based on not being in possession of valid documentation, this will be because such documentation does not exist.

4.2.2. Section 41 of the Immigration Act, makes it clear that an Immigration Official who detains a person under that section for purposes of verifying his or her status, has a 48-hour period within which to do so. This is an opportunity afforded to a potential Illegal Foreigner to in fact provide proof of his or her status entitling him or her to be in the Republic of South Africa. This is equally an opportunity for an Immigration Officer to establish whether or not such documentation exists.

4.2.3. Secondly, regard must also be had to the fact that, in essence, three categories of persons are found to be illegal foreigners namely, being:

4.2.3.1. Persons with expired Permits/Visas;

4.2.3.2. Persons who are completely undocumented; in other words that such persons never had any form of Visa/permit issued to them and will also therefore consist of a category of persons who had illegally entered into the Republic of South Africa in the first instance;

4.2.3.3. Those persons whose exemptions have been withdrawn in terms of the Immigration Act's Sections 10B(4)(Transit Visas), Section 28, (Permanent Residence Permits) as well as Section 31(2)(d) withdrawal of Exemptions issued under Section 31(2)(a).

4.2.4. It respectfully stands to reason that the largest and riskiest component of the aforesaid categories of illegal foreigners, are those persons who are undocumented. Accordingly, whether or not such persons shall have made a s8 review application to the Minister will have no bearing upon the risk attached to such a person absconding, should he/she be released "on bail".

4.3. It also respectfully stands to reason that without detention, deportation cannot normally occur. This is particularly so with regard to the undocumented category of persons who, simply by the very nature of the

illegality of their first step into South Africa, namely their illegal entry, will not avail themselves for purposes of deportation. That is a reality.

4.4. Regard must also be had to the Director-General's unambiguous statement regarding the fiscal constraints associated with introducing such a system.

4.5. Accordingly, the rationale behind the detention of undocumented persons, those persons who only possess expired travel documents, or those persons whose exemptions have been withdrawn, is two-fold, namely:

4.5.1. To obtain emergency travel documents from the relevant Embassy/High Commission/Consular Office of the person concerned, which requires appearances in person at such offices; and

4.5.2. Securing the person of the illegal foreigner, for purposes of deportation.

4.6. Regard must also be had to the dual obligation on both the Minister and on the illegal foreigner, in terms of Section 32 of the Immigration Act, to leave the country/be deported.

4.7. Furthermore, the effect of the proposal by LHR, albeit in vague terms, is to do away, almost entirely, with the notion of detention for purposes of deportation. This, in turn, interferes with the discretion of the Magistrates whose function, during such enquiries, is limited solely to the issue of

whether or not**, for purposes of deportation** the detention is justified (own emphasis).

4.8. It is also clear that LHR are conflating the need to have access to documentation on the one hand, and the objective of the Section 34 enquiry, namely, to establish whether or not, for purposes of deportation, the detention is justified. In other words, the Section 34 enquiry should not be seen as a "*second bite at the cherry*" for purposes of illegal foreigners attempting to justify their stay in the country. They already have had the opportunity to do so during the Section 41 enquiry and furthermore, as is quite clear from that section's limited period of detention, there is an obligation on Immigration Officers to ensure that the potential illegal foreigner is in fact afforded an opportunity to make available such documentation, coupled with the fact that the systems employed by the Department of Home Affairs, will very soon reveal whether or not such a person has in fact, on a prior occasion, been issued with such documentation.

4.9. Where an amendment may well be necessary, is in the wording of paragraph 4 of the Order of 29th June 2017. It is submitted that as it is currently worded, it does not suggest that, for purposes of further extensions to the initial 30-day period, the illegal foreigner should also appear in person in Court. The remedy in this regard is, respectfully stated, a simple one, namely, to attach a similar 48-hour period to be operative no later than 48 hours before the expiry of the initial 30-day period of detention.

By so doing, the individual concerned is once again brought to Court and is afforded the opportunity to make whatever representations he or she wishes to make against the further extension of the initial 30 day detention.

5.

By retaining the Magisterial discretion in determining whether or not a detention, for purposes of deportation, is justified the purpose and intent of the Immigration Act remains intact, namely, that persons who are not entitled to be in the Republic of South Africa, should be deported. It is therefore submitted that an order should be granted in terms of paragraph 2 of the Notice of Motion dated 21st July 2022, duly amplified, to provide for the individual concerned to be brought before a Magistrate in terms of Section 34(1)(d), for purposes of further extending the initial 30-day detention period, not later than 48-hours prior to the expiry of the initial 30-day period.

6.

No order as to costs is sought in terms of the Notice of Motion.

G BOFILATOS SC

Counsel for Applicants

Groenkloof Chambers, Pretoria

15 May 2023