

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

7 December 2023

DATE

SIGNATURE

CASE NUMBER: 2023-120529

In the matter between:

JOHANNESBURG FIRE VICTIMS SUPPORT GROUP

Applicant

and

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Respondent

**JOHANNESBURG METROPOLITAN POLICE
DEPARTMENT**

Second Respondent

DEPARTMENT OF HOME AFFAIRS

Third Respondent

SOUTH AFRICAN POLICE SERVICE

Fourth Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Fifth Respondent

GAUTENG DEPARTMENT: HUMAN SETTLEMENTS

Sixth Respondent

OPERATION DUDULA

Seventh Respondent

KHAMPEPE COMMISSION OF INQUIRY INTO THE USINDISO BUILDING	Eighth Respondent
SOCIO-ECONOMIC RIGHTS INSTITUTE	Ninth Respondent
INNER CITY FEDERATION	Tenth Respondent
MEC FOR GAUTENG DEPARTMENT: HUMAN SETTLEMENTS AND INFRASTRUCTURE DEVELOPMENT	Eleventh Respondent
ACTING PROVINCIAL MANAGER FOR GAUTENG DEPARTMENT: HOME AFFAIRS	Twelfth Respondent
MINISTER OF POLICE	Thirteenth Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	Fourteenth Respondent
MINISTER OF HOME AFFAIRS	Fifteenth Respondent
DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Sixteenth Respondent

JUDGMENT

DOSIO J:

Introduction

[1] This is an application for an urgent interim interdict pending the final report of the eighth respondent.

[2] The applicant requests this Court to dispense with the Rules and to hear this matter in terms of Uniform Rule 6(12).

[3] The prayers in the notice of motion request the following relief:

'2 Declaring the illegal eviction, arrest and detention of members of the Applicant by the First, Second, Third, Fourth and Sixth Respondents on 15 November 2023 unlawful;

3 That the First, Second, Third, Fourth and Sixth Respondents are directed to restore the status quo as it prevailed immediately before their conduct in illegally evicting, arresting and

detaining members of the Applicant including, but not limited to, allowing and facilitating the return of residents to the Hof land Park Community Centre;

4 In the alternative to restoring the status quo, directing the First Respondent to find suitable, alternative accommodation for those members discharged from detention, pending the outcome of the Khampepe Commission;

5 That the First, Second, Third, Fourth and Sixth Respondents are interdicted and restrained from illegally evicting, harassing and/or otherwise interfering with the victims of the Usindiso Building fire who are residents at various shelters, including but not limited to the Hofland Park Community Centre; Wembley Stadium Homeless Shelter; MES Impilo Shelter (Fairview) and an informal settlement next to the Denver Men's Hostel (situated at 547 Mainreef Road) (the Denver Shelter);

6 Declaring that the members of the Applicant, as currently arrested and detained (contained in Annexure FA5.1), are entitled to be discharged from detention and directing the Fourth and Fifth Respondents to immediately discharge such members, and release them to the Hofland Park Community Centre or such suitable, alternative accommodation as provided by the First Respondent;

7 A stay of execution of any order relating to the eviction, detention, processing, prosecution and/or deportation of the Applicant's members in respect of the Immigration Act 13 of 2002, until such a time as the Khampepe Commission finalises its recommendations and/or report and/or such a time as those who lost their documentation in the Usindiso Building fire may be re-issued such documentation by the Third Respondent;

8 Costs on an attorney-and-client scale against the:

8.1 First Respondent;

8.2 Second Respondent;

8.3 Third Respondent;

8.4 Fourth Respondent;

8.5 Sixth Respondent; and

8.6 Seventh Respondent.

9 No order as to costs for the remaining Respondents, except where such Respondent opposes this Application.

10 Further and/or alternative relief'

[4] The matter appeared on the urgent Court roll on 17 November 2023 and Windell J gave the respondents leave to file answering affidavits. The matter was accordingly postponed to 23 November 2023. The order of Windell J stated the following:

'1. The First and Second Respondents undertake to maintain the status quo as it relates to the Applicants at Wembley Stadium Homeless Shelter, and MES Impilo in respect of any involuntary relocations to the Denver TRA as at date of this order pending the finalisation of this hearing;

2. The Second, Third, Fifth, Thirteenth, Fourteenth, Fifteenth and Sixteenth Respondents are not in any manner restrained from performing their duties in the ordinary course as prescribed by legislation;
3. The parties have agreed that the First and Second Respondents will file its answering affidavit on or before 21 November 2023 at 18h00;
4. The Applicants will file their replying affidavit on 22 November 2023 at 12h00;
5. The parties shall file their heads of argument on 22 November 2023;
6. The urgent application will be set down for hearing on 23 November 2023; and
7. Costs are reserved.'

[5] Subsequent to the order granted on 17 November 2023, the following respondents filed answering affidavits, namely, the first, second, third, ninth, tenth, twelfth, fifteenth and sixteenth respondents. The third, twelfth, fifteenth and sixteenth respondents will be referred to as ('The Department of Home Affairs'). The remaining respondents did not file an intention to oppose. The ninth and tenth respondents will be referred to as ('SERI') and ('the ICF') respectively. The eighth respondent filed a notice to abide by this Court's order.

[6] On 23 November 2023 the applicant, first and second respondents compiled a settlement agreement which was handed to me to make an order of Court. The contents of this settlement are as follows:

'By agreement between the applicant and first and second respondents;

- 1 The first respondent ("the City") undertakes to provide the occupants at the Denver Shelter at 547 Main Reef Road with the following:
 - 1.1 The City is to finalize the installation of four (4) standpipes encompassing three (3) taps each which comes with grey water drainage, within sixty (60) days from the date of this Order, in replacement of the four (4) taps that are currently on site.
 - 1.2 20 additional lavatory facilities in addition to the 30 that are already on site.
 - 1.3 For the lavatory facilities to be serviced weekly.
 - 1.4 The installation of pre-paid electricity supply within three (3) months from the date of this order.
- 2 The Denver precinct where the Shalazile Denver Camp is located will be patrolled by the security company appointed by the City to prevent land invasions in the entire area.
- 3 The City is to report to this Court within three (3) months concerning its progress in complying with prayer 1 above.
- 4 Any of the parties may re-enrol the matter on notice and on duly supplemented papers in relation to the implementation of this order should it become necessary.'

[7] Subsequent to the order being granted between the applicant, first and second respondents, the applicant argued that it still required the matter to proceed on an urgent basis

to prevent the deportation of the victims of the Usindiso building. It was argued that of the 32 victims of the fire at the Usindiso building ('the residents'), that were arrested and brought before the Johannesburg Magistrate on 16, 17 and 20 November 2023 for a contravention of s34 of the Immigration Act 13 of 2002 ('The Immigration Act'), two of the detainees at Lindela Repatriation Centre ('Lindela') had already been deported, namely, Mr Adam Kamuwelouze and Mr Kingsle Isack. On 20 November 2023, the Johannesburg Magistrate handed down judgment and refused to release them.

[8] This Court regarded this matter as urgent and subsequently heard the parties on the merits.

[9] The ninth and tenth respondents contended that even though an order by agreement between the applicant, first and second respondents was made an order of Court, they stood by their request that the impugned conduct pertaining to the evictions, arrests, detentions and deportations of the residents was unlawful as they were conducted for an ulterior purpose with the effect of impeding the residents from participating in and giving evidence at, the Khampepe Commission.

Background

[10] On 31 August 2023 there was a fire at the Usindiso Building, situated at Albert and Delters streets, Marshalltown, Johannesburg Central. As many as 77 people died, with scores of others (over 500), including women and children, many of whom are foreign nationals, were left homeless and others injured. Many of the surviving residents had to vacate the building leaving their belongings inside the building. When these residents returned to the burnt building their belongings had been looted, which included identity documents, passports and handbags.

[11] At the time of the incident there were 248 affected people at the scene who agreed to be relocated to various shelters. Many foreign nationals refused to be relocated to these shelters due to fear of deportation.

[12] Following the incident, the first respondent temporarily relocated the fire victims to various temporary emergency accommodation shelters ('TEA'), whilst the process of identifying more permanent accommodation was underway. The TEAs which the fire victims were relocated to were, namely:

(a) The Hofland Park Community Centre which accommodated 177 people;

- (b) Wembley Shelter which accommodated 54 people;
- (c) Impilo Shelter in Fairview which accommodated 17 females and
- (d) Denver mens hostel

[13] Representatives from the third respondent took the fingerprints of the residents and the authorities separated the residents into two groups, namely, those who were South African residents, along with documented foreigners and secondly, the undocumented South African and foreign national residents, who were then further separated by country of origin. The South African residents were transported to an informal settlement next to the Men's Hostel in Denver, ('the Denver Shelter').

[14] On 13 September 2023, the Gauteng Premier established the Khampepe Commission to investigate the circumstances surrounding the fire and to produce a report with findings and recommendations as to who was responsible for the deaths and injuries of these residents.

[15] It is alleged by the applicant, SERI and ICF that the residents are important witnesses at the Khampepe Commission and that arresting and deporting those witnesses will have the effect of undermining the Khampepe Commission's ability to perform its function.

[16] The applicant's legal representatives have consulted with approximately 340 of these residents and they intend to assist these residents with their testimonies and to place their evidence before the Khampepe Commission.

Points in limine

1. No locus standi

[17] The Department of Home Affairs took issue with the *locus standi* of the applicant in that it alleged that the entity 'Johannesburg Fire Victims Support Group' does not exist and that the residents affected should have brought this application in their individual names.

[18] It is clear to this Court that there is a Constitution identifying the applicant as 'Johannesburg Fire Victims Support Group' and setting out its main objective which is to provide support and advance the interests of the victims of the fire that occurred on 31 August 2023 at 80 Albert Street, Marshalltown. Furthermore, it's objective is to seek legal representation to advance the interest of these victims and to advocate on their behalf.

[19] The applicant in its founding affidavit has described the applicant as a voluntary association and has attached the list of members who comprise this association at paragraph 30.3 of its founding affidavit.

[20] In the matter of *Ferreira v Levin NO and Others ; Vryenhoek and Others v Powell NO and Others*,¹ the Constitutional Court as per O'Regan J held that:

'There can be little doubt that section 7(4) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing to seek relief are far broader than our common law has ever permitted... The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation. In recognition of this, section 7(4) casts a wider net for standing than has traditionally been cast by the common law.'² [my emphasis]

[21] The matter *in casu* affects the rights of the applicant which is a public character.

[22] Section 38 of the Bill of Rights states that:

'38. Enforcement of rights

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.' [my emphasis]

[23] It is clear from the provisions of s38 of the Bill of Rights, as well as the matter of *Ferreira v Levin*,³ that an association can approach a Court for relief.

¹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13 (6 December 1995).

² Ibid para 229.

³ *Ferreira v Levin* (note 1 above).

[24] This Court is accordingly satisfied that the applicant has *locus standi* and this point *in limine* is dismissed.

2. *Res Judicata*

[25] It was argued by the Department of Home Affairs that due to the appearance of the 32 foreign nationals before the Johannesburg Magistrate and the judgment refusing their release, dated 20 November 2023, that a final finding in respect of the lawfulness of the arrest, the detention and deportation of the non-South African residents had already been made. It was contended that the only way a Court can interfere with this finding is through an appeal or review. As a result, the decision of the Johannesburg Magistrate is *res judicata*.

[26] The applicant contends that the decision of the Magistrate was interlocutory in nature and the doctrine of *res judicata* does not apply.

[27] In essence, the crux of *res judicata* is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed.

[28] In *Molaudzi v S*,⁴ the Constitutional Court defined *res judicata* as ‘a matter adjudged’⁵, meaning that a matter has already been decided by a competent court on the same cause of action and for the same relief between the same parties.⁶

[29] In the matter of *Mkhize NO v Premier of the Province of KwaZulu-Natal*,⁷ the Constitutional Court held that:

‘Importantly, the doctrine of *res judicata* will apply only ‘where a cause of action has been litigated to finality between the same parties on a previous occasion’. Where an order does not have final effect, the doctrine cannot apply. It has been held that the doctrine of *res judicata* does not apply to interim interdicts or matters related to those orders. There is a good reason for this. Often interlocutory orders such as interim interdicts are issued with the intention of being revisited, likely by the same court that issued them. A rule nisi, by its very nature is an interlocutory order. It is intended to govern a situation in the interim, for a period, until it is discharged or confirmed.’⁸ [my emphasis]

⁴ *Molaudzi v S* (CCT42/15) [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) (25 June 2015).

⁵ *Ibid* para 14 read together with footnote 17.

⁶ see *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* (CCT 212/18) [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) (24 October 2019) at para 69.).

⁷ *Mkhize NO v Premier of the Province of KwaZulu-Natal* (CCT285/17) [2018] ZACC 50; 2019 (3) BCLR 360 (CC) (6 December 2018).

⁸ *Ibid* para 38.

[30] Section 34(1) of the Immigration Act states:

‘34. (1) Without 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 the place under the control or administration of the Department 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.’

[31] In the matter of *Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others*,⁹ (*‘Ex parte Minister of Home Affairs’*), the Constitutional Court declared s34(1)(b) and (d) of the Immigration Act unconstitutional and invalid. The Constitutional Court found two main defects, firstly that s34(1)(b) of the Immigration Act does 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 and secondly that section 34(1)(d) of the Immigration Act does not guarantee the detainee the right to appear in person in court to make representations before the court makes a decision about whether to grant the warrant for extended detention.

[32] The Constitutional Court in *Ex parte Minister of Home Affairs*¹⁰ thus supplemented the High Court order made in 2017 by making the following order:

‘(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

⁹ *Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT 38/16) [2023] ZACC 34 (30 October 2023).

¹⁰ *Ibid.*

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 Immigration 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.¹¹[my emphasis]

[33] From the contents of paragraph [32] *supra*, with specific reference to paragraph [e], it is clear that in terms of the decision of *Ex parte Minister of Home Affairs*,¹² the residents held at Lindela must again be brought before the Court before the expiry of the 30 day period of detention, so that the Johannesburg Magistrate Court considers whether the interests of justice permit the release of such residents, subject to reasonable conditions or not. This is a paradigm example of an interlocutory order since it is manifestly capable of being revisited by any Court with jurisdiction.

[34] Since the decision of the Johannesburg Magistrate was purely interlocutory, the doctrine of *res judicata* does not apply as it can be revisited at any time. In fact, the

¹¹ Ibid para 118.

¹² Ibid.

Johannesburg Magistrate made it expressly clear that it was not finally deciding the question of whether the prisoners should be released, but expressly stated that this Court would properly consider those issues, with better evidence. The detained residents have a right to apply for asylum or to appeal the decision of the Johannesburg Magistrate, which would lead to a reevaluation of their continued detention.

[35] It is clear that the Johannesburg Magistrate did not consider or decide whether the detained residents should be released in order to ensure their participation in the Khampepe Commission and neither did that Court decide the question of whether:

- (a) the eviction should be declared unlawful and an interdict be granted against further evictions; or
- (b) the deportation of prisoners should be stayed pending the determination of the Khampepe Commission. The Johannesburg Magistrate merely stated that the decision to refuse the detainees' release be brought to the attention of the Khampepe Commission.¹³

[36] The inquiry by the Johannesburg Magistrate was of an administrative nature, additionally constrained by the knowledge of the pending High Court urgent application. The Johannesburg Magistrate acknowledged, at paragraph 21 of the judgment, that such a ruling may change whole or part of the decision made once 'properly ventilated' with probative evidence.

[37] This Court is not revisiting the decision of the Johannesburg Magistrate or interfering with the decision to release the detained residents, it is merely dealing with the issue of the interdict to prevent their deportation pending the finalisation of the work of the Khampepe Commission.

[38] In light of the above, this Court finds the decision of the Johannesburg Magistrate is not final in effect. Accordingly, this point *in limine* is dismissed.

3. Rule 7(1) Notice

[39] The Department of Home Affairs filed a Rule 7(1) notice challenging the applicant's authority to represent the residents. The applicants have uploaded to CaseLines a resolution which was signed on 15 November 2023 which states the following:

¹³ Para 30 of the judgment of the Johannesburg Magistrate.

'1. The Johannesburg Fire Victims Support Group Committee shall appoint Norton Rose Fullbright to represent the interests of the fire victims in this matter.

2. Candice Christina Pillay, a Director a Norton Rose Fulbright, is hereby authorized and empowered to depose the founding affidavit on behalf of the Johannesburg Fire Victims Support Group Committee and the fire victims.

3. Norton Rose Fulbright shall be instructed to bring an urgent application to address the issues arising from the unlawful evictions and arrests at the Hofland Shelter.

4. This resolution shall be communicated to all relevant parties, including Norton Rose Fulbright, to facilitate immediate action'¹⁴ [my emphasis]

[40] The two detainees, namely Mr Adam Kamuwelouze and Mr Kingsle Isack who allegedly were deported signed a consent form allowing Norton Rose Fulbright to collect evidence for purposes of the Khampepe Commission and to represent the residents who were affected by the fire at the Usindiso Building.¹⁵

[41] The applicant also uploaded a Special Power of Attorney to CaseLines which states that Nigel Keith Branken and Andrew Christy Chinnah nominate Candice Christina Pillay and Nicola Grace Irving of Norton Rose Fulbright South Africa INC to be their lawful attorneys and to institute proceedings in the High Court of South Africa, Gauteng Division, Johannesburg.¹⁶

[42] This Court is accordingly satisfied that the firm Norton Rose Fulbright has the authority to act on behalf of the residents. As a result, this point *in limine* is dismissed.

Applicant's submissions

[43] The applicant's counsel argued that if this Court did not grant the relief to prevent the deportation of the residents, then some of the residents would be deported and this is a harm that cannot be remedied, as the Khampepe Commission would be permanently deprived of their evidence.

[44] Counsel argued that in terms of prayer 7 of the Notice of Motion, the applicant had requested a stay of execution of any order relating to the eviction, detention, processing, prosecution and/or deportation of the applicant's members in respect of the Immigration Act until such time that the Khampepe Commission finalised its recommendations and report. Due

¹⁴ CaseLines 001-222.

¹⁵ CaseLines 001-230.

¹⁶ CaseLines 001-398.

to the agreed order between the applicant, first and second respondents, the applicant now seeks lesser relief, namely an interdict preventing the deportation of the foreign residents. It was argued that in light of the matter of *Hoërskool Ermelo and Another v Head of Department of Education: Mpumalanga and Others*¹⁷ ('*Hoërskool Ermelo*'), the applicant should not be constrained by the prayers in the Notice of Motion.

[45] In light of the decision of *Hoërskool Ermelo*,¹⁸ this Court finds no problem with the lesser relief sought by the applicant.

[46] It is expected that the commission will finalise its work by April or May 2024 and run for approximately six months from October 2023. It was contended that should these residents be deported, the Khampepe Commission will never benefit from their testimony and may, in fact, be crippled by the absence of their testimony. In addition, should these residents earmarked for deportation be found to have been liable for the fire, then the Khampepe Commission will be deprived of making such recommendations. Conversely, if it is found that the State, including but not limited to any of the respondents, is found liable for the fire, it may very well be that the victims, including those earmarked for deportation, are entitled to some form of compensation, or a right to claim such compensation. It was argued that some of the residents detained at Lindela have direct knowledge of the events that led to the fire.

[47] It was contended that owing to the continued threat of reprisal against the victims of the fire by the authorities, this conduct is also likely to have the effect of intimidating the residents who aren't deported, against testifying.

Submissions of the third, twelfth, fifteenth and sixteenth respondents

[48] The Department of Home Affairs maintained its view that the application should be struck from the roll for lack of urgency in that it was brought *male fides*. It maintained its view that the residents were brought before the Johannesburg Magistrate within the expiry of 48 hours and the Magistrate confirmed the lawfulness of arrest and detention rendering this application moot.

[49] The Department of Home Affairs contends that the allegations pertaining to the residents having to testify before the Khampepe Commission has been used as a smokescreen

¹⁷ *Hoërskool Ermelo and Another v Head of Department of Education: Mpumalanga and Others* (219/2008) [2009] ZASCA 22; 2009 (3) SA 422 (SCA); [2009] 3 All SA 386 (SCA) (27 March 2009).

¹⁸ *Ibid.*

in that the applicant fails to state what evidence the residents are going to give to the Khampepe Commission.

[50] Counsel referred this Court to the terms of reference of the Khampepe Commission with specific reference to paragraph 12 which states as follows:

'12. Any person, organisation or legal entity who is in possession of information or documents which may be relevant to the matters to be enquired into by the Commission and who wishes to give evidence before the Commission, is invited to contact the Secretary to arrange the date and time when they may testify before the Commission. The appointment, particulars and contact details of the Secretary will be announced in due course.'¹⁹

[51] It was contended that the above extract from the terms of reference is important because once any person decides to register with the Khampepe Commission it is the Commission itself who will provide a list of the witnesses it desires to hear evidence from. It was argued that at the present stage the applicant had not registered any potential witnesses and as such it could not give names of which residents held in Lindela would testify before the Khampepe Commission. It was argued that in the absence of a list of potential witnesses it is unclear which of the residents held at Lindela the applicant represents. It was argued that a blanket provision to deport any of the residents cannot be carried on endlessly.

[52] It was contended that the establishment of the Khampepe Commission is irrelevant to this application as the Commissioner can proceed without the involvement of the applicants. The work of the Commission has nothing to do with illegal immigrants that are undocumented and are illegally within the country and this application is merely disguised as an appeal of the decision of the Johannesburg Magistrate.

Submissions of SERI and the ICF

[53] Counsel for SERI and the ICF argued that their interest in the matter *in casu* arises from their status as parties before the Khampepe Commission and their intention to preserve the integrity of the commission.

[54] SERI and the ICF contend that the conduct of the first respondent and the Department of Home Affairs is contrary to the law and is currently interfering with the work of the Khampepe Commission to such an extent that it has caused irreparable harm. Forty of the residents that were relocated have already fled and 32 are in Lindela and run the risk of being deported.

¹⁹ Provincial Gazette, Extraordinary 13 September 2023, No. 324.

[55] It was argued that the conduct of the first and second respondents as well as the Department of Home Affairs was unlawful on the basis that it was actuated by an ulterior purpose and/or its effect was unlawful in terms of the regime governing the Khampepe Commission.

Ulterior purpose

[56] It was contended that on the present facts, the ulterior motive of the first and second respondents, SAPS and the Department of Home Affairs is apparent from the following facts:

- (a) If the real purpose had been to achieve a successful and peaceful relocation, the first respondent would have engaged with the residents and their legal representatives and made some attempt to achieve consensual relocation and would not have included Operation Dudula in the action.
- (b) If the purpose of the eviction, arrest, detention and deportation had been to enforce the law, these actions would have been taken independently.
- (d) If the purpose was that one of the shelters was needed, the first respondent would not have targeted all the separate shelters. As a result, the target was the residents, not a specific shelter that was needed to house other people.
- (d) If the purpose of the Department of Home Affairs was to simply verify the status of residents, it would not have acted with extreme haste to begin deporting residents while these proceedings were pending.

[57] It was contended that the residents, be they South African citizens or foreign nationals, are key witnesses before the Khampepe Commission for the following reasons:

- (a) they are the only people who saw how the fire started and who can give evidence of who should be held liable right up to the arrival of the first respondent,
- (b) only six of the residents have filed affidavits detailing their experiences at the Usindiso building, however the remaining residents have still not filed affidavits,
- (c) the testimonies of the residents are indispensable for the recommendations the Khampepe Commission will make. Should the relief not be granted the officials of the first respondent and other organs of State who bear responsibility for the condition of the Usindiso building, prior to the fire, will avoid accountability.

[58] SERI and the ICF referred to various key factors which they contended were dispositive to their argument pertaining to an ulterior motive. They are as follows:

- (a) The first respondent was aware that the residents were legally represented and had received correspondence from them on 6 November 2023. Despite this, it never informed the residents' representatives that a 'relocation' was proposed.
- (b) On 19 October 2023, before the residents secured representation, SERI raised concerns with the first respondent regarding the treatment of the residents and their precarity at the shelters. The first respondent merely stated that its officials were too busy 'trying to secure alternative accommodation for the applicants'. On that same day, the first respondent, the second respondent, the third respondent and the Department of Home Affairs met without informing the residents or their representatives to plan the set of operations involving evictions, arrests, detentions and deportations.
- (c) On 13 November 2023, the first respondent requested the Department of Home Affairs to come to the shelters to verify the status of the residents.
- (d) The first respondent involved the xenophobic vigilante hate group Operation Dudula in the relocation".

[59] Counsel argued that if this Court is not with them on the ulterior motive argument, then the conduct of the first respondent and the Department of Home Affairs is unlawful in terms of the regime governing the Khampepe Commission.

Whether the alleged conduct of the first, second respondents as well as the Department of Home Affairs is unlawful in terms of the regime governing the Khampepe Commission

[60] It was contended that the Khampepe Commission, being a provincial commission of inquiry, is governed by three legal instruments:

- (a) The Provincial Commissions Act 1 of 1997 (Gauteng) ('the Provincial Commissions Act');
- (b) The Khampepe Commission's Terms of Reference, which were issued by the Premier in the Provincial Gazette and have the status of provincial regulations;²⁰
- (c) The Khampepe Commission's Rules, which were made by Justice Khampepe in terms of the Terms of Reference.²¹

²⁰ as set out in the Provincial Gazette, Extraordinary, No 324, 13 September 2023.

²¹ published in the Provincial Gazette and has the status of delegated legislation.

[61] It was contended that the residents have commenced participating and have the right to be present to listen to evidence, to instruct their representatives to cross-examine, to see rulings or directives and to testify themselves.

[62] It was argued that the Khampepe Commission has so far only heard evidence from witnesses from the first respondent, however the residents' opportunity to cross-examine and to testify themselves is approaching. The allegation by the Department of Home Affairs that none of these residents held at Lindela have registered as witnesses to the Khampepe Commission is merely speculative.

[63] It was argued that the conduct of the first and second respondents, as well as the Department of Home Affairs breaches s6 of the Provincial Commissions Act and regulation 18 of the Terms of Reference and is unlawful.

Evaluation

Ulterior purpose

[64] It is a settled principle of our law that the exercise of a power for an ulterior purpose renders such exercise unlawful. In the constitutional era, acting for an ulterior purpose is contrary to the principle of legality which is an element of the rule of law.

[65] In the matter of *South African Broadcasting Corp Ltd v National Director of Public Prosecutions*,²² the Constitutional Court held that:

'A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that Courts in exercising this power must take into account the interests of justice.'²³ [my emphasis]

[66] In the matter of *Lawyers for Human Rights v Minister in the Presidency*,²⁴ the Constitutional Court at paragraph 20 held that:

'In *Beinash*²⁵ Mahomed CJ stated there could not be an all-encompassing definition of "abuse of process" but that it could be said in general terms "that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective". The court held:

²² *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC).

²³ *Ibid* para 36.

²⁴ *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC).

²⁵ *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 734F-G.

"There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes...As was said by De Villiers JA in *Hudson v Hudson and Another* 1927 AD 259 at 268:

When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'

It can be said in general terms . . . that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.²⁶ [my emphasis]

[67] As regards the concerns raised by SERI and ICF, this Court is unpersuaded that the residents were evicted. The function of the Department of Home Affairs is to arrest illegal immigrants and not to evict them. In addition, the premises from which the residents were relocated from belong to the first respondent. These TEA buildings are not privately owned by the residents and neither were the residents renting these premises.

[68] It is this Court's finding that the residents were relocated and I find no ulterior purpose regarding these relocations on either the side of the first respondent or the Department of Home Affairs. Even if this Court is wrong in this regard, the fact remains that the applicant, the first and second respondent's entered into a settlement agreement and accordingly all aspects pertaining to the alleged 'eviction' are now finalised.

[69] On 15 November 2023, the people who were arrested and detained for the purposes of deportation were verified and the Department of Home Affairs could not trace them. As a result, they were declared undocumented and illegal in the country. Within 48 hours after having been arrested and detained they were brought before the Johannesburg Magistrate's Court to confirm their detention and for the Magistrate to consider whether the interests of justice permit the release of the applicants to reasonable accommodation.

[70] The facts of the matter *in casu* are distinguishable from the facts of the matter of *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security*²⁷ ('SWEAT'), because in the matter of SWEAT²⁸ the sex workers were arrested but no prosecution followed. In the matter *in casu*, the residents who were illegal were prosecuted.

[71] The matter *in casu* is also distinguishable from the matter of *Residents of Industry House, 5 Davies Street, New Doornfontein Johannesburg and Others v Minister of Police and*

²⁶ *Ibid* at 734D-G.

²⁷ *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security* 2009 (6) SA 513 (VVCC).

²⁸ *Ibid*.

*Others*²⁹ ('Residents of Industry House'), as that matter involved 15 targeted raids over a period of almost a year, one after the other at various premises. The detained residents in the matter *in casu* were arrested within 48 hours prior to their appearance in the Johannesburg Magistrate Court. There is no evidence of continued targeted raids at the various TEAs and accordingly this Court finds the matter of *Residents of Industry House*³⁰ has no application.

[72] This Court does not find any ulterior motive on the part of the first respondent or the Department of Home Affairs.

The regime governing the Khampepe Commission

[73] As regards the two deportations that took place and the potential for future envisaged deportations, which may arise prior to the conclusion of the work of the Khampepe Commission, requires further scrutiny. This is because any intended deportations will infringe the regime governing the Khampepe Commission.

[74] The regime of the Khampepe Commission is governed by the Provincial Commissions Act, the Commission's Terms of Reference and the Commission's Rules.

The Provincial Commissions Act

[75] Section 6 of the Provincial Commissions Act states that:

'Any person who-

- (a) procures, induces, intimidates, corrupts or bribes any witness to refrain from giving evidence or to give false evidence before a commission;
- (b) by any means or contrivance whatsoever keeps a witness away from any sitting of a commission; or
- (c) destroys or conceals any book, document or object which to his or her knowledge might be of assistance to a commission in any matter relating to the subject of its investigation, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months, or to both such fine and imprisonment.' (my emphasis)

²⁹ *Residents of Industry House, 5 Davies Street, New Doornfontein Johannesburg and Others v Minister of Police and Others* 2021 ZACC 37.

³⁰ *Ibid.*

[76] Section 6 is broad in that it applies to 'any means or contrivance whatsoever' that has the effect of keeping a witness away from any sitting of a commission. Neither negligence nor intention is required.

[77] The conduct of the Department of Home Affairs in deporting the residents at Lindela, breaches s6 of the Provincial Commissions Act in that:

- (a) it will induce or intimidate witnesses not to give evidence, in breach of s6(a) of the Provincial Commissions Act;
- (b) it will keep some witnesses away from the Khampepe Commission in breach of section 6(b), either temporarily or permanently;
- (c) The deportation of some of the residents will also breach section 6(c) if they had potential evidence in their possession which could be placed before the Khampepe Commission, such as photographs or videos of the fire, or notes of meetings with City officials before the fire.

The terms of reference of the Khampepe Commission

[78] Clause 1(a)(i) and (ii) of the Khampepe Commission's Terms of Reference, read with clause 10 and 11 thereof, illustrates that the Commission's Inquiry is divided into two parts. The first part concerns the circumstances surrounding the fire which led to the deaths of at least 77 people and caused serious injury to others leading to their homelessness. The second part looks into the circumstances surrounding the prevalence of buildings or immovable properties in the Johannesburg Central Business District. The second part concerns buildings that have been abandoned by legitimate landlords or owners, or taken over by criminal syndicates or other groups and leased out to and populated with tenants, without providing basic services such as water, electricity refuse removal and sanitation and without paying rates and taxes. Both parts are concerned with making findings as to who must carry liability or responsibility for the abovementioned state of affairs and to draw lessons from those circumstances and make recommendations concerning the appropriate steps that must be taken.

[79] Regulation 18 of the Terms of Reference states that:
'No person may insult, disparage or belittle the Chairperson or any member of the Commission or prejudice the proceedings or findings of the Commission.'

[80] Regulation 19 states:

'Any person who—

wilfully hinders, resists or obstructs the Chairperson, any member or any officer in the exercise of any power contemplated in regulation 15; or (b) contravenes a provision of regulation 5, 10, 16, 17 or 18, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months, or both such fine and imprisonment.’ [my emphasis]

The Khampepe Commission Rules

[81] The Khampepe Commission Rules set out the procedures applicable in the Commission.

- (a) Rule 3.3 to 3.7 stipulates that parties have the right (on application) to cross-examine other witnesses;
- (b) Rule 4 stipulates that proceedings are to take place in person, in public;
- (c) Rule 7 to 9 stipulates that witnesses are to testify by way of oral evidence.

[82] Due to the impending Khampepe Commission hearings, the evidence of the residents held at Lindela is critical. The residents have gone on record at the Commission, confirming their intention to participate fully in its proceedings by challenging and leading evidence. There is no suggestion that the foreigners held at Lindela are a flight risk. Should they be deported, there is no way that there will be any contact with them in Tanzania. Their evidence will be lost, causing detrimental harm to the investigations of the Commission.

[83] Any imminent deportation by the Department of Home Affairs of the residents held at Lindela, whether it be voluntary or not, will threaten and undermine the objects and purpose of the Commission, thereby prejudicing the proceedings and ultimately the findings of the Khampepe Commission. These residents are important role-players and potential witnesses in the entire inquiry.

[84] The Provincial Commissions Act and the Terms of Reference prohibit and criminalise any impugned conduct pending the finalisation of the Khampepe Commissions inquiry. As a result, this Court finds that the deportation of any of the residents held at Lindela is unlawful in terms of the regime governing the Khampepe Commission in that it breaches s6 of the Provincial Commissions Act and regulation 18 of the Terms of Reference. Accordingly, this Court finds it just and equitable to prevent any further harassment or deportation of the residents held at Lindela.

Whether there are grounds to grant an interdict

[85] Since the decision of *Setlogelo v Setlogelo*,³¹ the discretionary remedy of an interdict existed to prevent any continuation of unlawfulness.

[86] In the matter of *Gool v Minister of Justice and another*,³² the Court held that: 'The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegations of mala fides, the Court does not readily grant such an interdict.'³³ [my emphasis]

[87] In the matter of *City of Tshwane Metropolitan Municipality v Afriforum and another*,³⁴ the Constitutional Court held that:

'Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted...'³⁵

and

'Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection ... And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection...'³⁶ [my emphasis]

[88] More recently, in the matter of *United Democratic Movement and Another v Labashe Investment Group (Pty) Ltd and Others*,³⁷ the Constitutional Court held that:

'An interdict is an order by a court prohibiting or compelling the doing of a particular act for the purposes of protecting legally enforcement right, which is threatening by continuing or anticipated harm...'³⁸

and

'In granting an interdict, the court must exercise its discretion judicially upon consideration of all the facts and circumstances. An interdict is "not a remedy for the past invasion of rights: it is concerned with the present and the future". The past invasion should be addressed by an action of damages. An interdict is appropriate only when future injury is feared.'³⁹[my emphasis]

³¹ *Setlogelo v Setlogelo* 1914 AD 221.

³² *Gool v Minister of Justice and another* 1955 (2) SA 682 (CPD).

³³ *Ibid* page 688.

³⁴ *City of Tshwane Metropolitan Municipality v Afriforum and another* 2016 (9) BCLR 1148 (CC).

³⁵ *Ibid* para 55.

³⁶ *Ibid* para 56.

³⁷ *United Democratic Movement and Another v Labashe Investment Group (Pty) Ltd and Others* (CCT 39/21) [2022] ZACC. 34 (22 September 2022).

³⁸ *Ibid* para 47.

³⁹ *Ibid* para 48.

Prima facie right

[89] As regards a *prima facie* right, the applicant argued that the residents are foreign national victims who are asylum seekers and refugees. The Department of Home Affairs on the other hand contended that on 15 November 2023 the people who were arrested and detained for the purposes of deportation were verified and the Department of Home Affairs could not trace them and they were declared illegal in the country as they were undocumented. The Department of Home Affairs had no knowledge whether subsequent to their arrest these residents had sought asylum or refugee status. Neither did the Department of Home Affairs have any knowledge whether any of the arrested and detained residents were appealing the decision of the Johannesburg Magistrate.

[90] Insofar as refugees are concerned, they are entitled to full legal protection in South Africa, including the rights set out in Chapter 2 of the Constitution. As a state party to the 1951 UN Convention Relating to the Status of Refugees amongst other international law instruments, South Africa is bound by international human rights law insofar as asylum seekers and refugees are concerned. The contention of the Department of Home Affairs that the residents held at Lindela cannot suffer harm as they have no rights, is clearly wrong.

[91] The Department of Home Affairs contends that to keep the illegal foreigners in the country perpetuates the illegality and breach of s49 of the Immigration Act. This may be so, however, the Department of Home Affairs fails to address why the residents held at Lindela need to be deported now, rather than at the conclusion of the Khampepe Commission's inquiry and after they have given their evidence.

[92] It is a trite principle of law that an interdict against an organ of the State is granted only in the clearest of cases. This is such a case in that the applicant have established a *prima facie* right, namely that there is a reasonable apprehension of irreparable and imminent harm eventuating should these detained residents be deported. The fact that two of the residents had already been deported at the stage of this urgent application also manifests *male fides* on the part of the Department of Home Affairs.

[93] This Court has inherent powers in terms of s173 of the Constitution to protect the processes of the Khampepe Commission and the deportations constitute an abuse of the process of the Commission, as the deportation of eye witnesses to the fire, before they give their evidence, will subvert the purpose of the Commission.

Apprehension of harm

[94] The Department of Home Affairs contends there is no harm to the residents held at Lindela as they are in the country illegally and have no rights due to the contravention of s 49(1) of the Immigration Act.

[95] This Court disagrees. By being subjected to deportation, prior to the applicant and SERI obtaining the testimonies of these detained residents, impacts on their potential to give evidence at the Khampepe Commission. Furthermore, if it is found that the State, or any of the respondents are found to be liable for the fire, the residents earmarked for deportation would lose out on any form of compensation or a right to claim such compensation.

Balance of convenience

[96] The relief sought by the applicant simply proposes that the conduct of the authorities be suspended pending the final report of the Khampepe Commission and not that the Department of Home Affairs be prevented from implementing the law, when the time is right for them to do so. The balance of convenience favours the applicant in that a stay in respect of the deportation of the detained residents will secure their attendance and testimony before the Commission. Furthermore, in the event that any of the individuals earmarked for deportation are found to have been liable for the fire, by deporting them it will deprive the Commission of the ability to make recommendations.

Absence of any alternative remedy

[97] Without such urgent relief, the harm suffered by the applicant and the detained residents will be irreparable and will impact on the proceedings of the Khampepe Commission. The applicant cannot wait for the detained residents to appear before the Johannesburg Magistrate within 30 days of 20 November 2023, as many more detained residents may by that time already be deported. As a result, the applicants do not have another remedy.

Costs

[98] Costs were reserved on 17 November 2023.

[99] The applicant does not seek a punitive cost order against the Department of Home Affairs. It merely asks for the costs of two counsel.

[100] The Department of Home Affairs has persisted to oppose this matter, notwithstanding that the first respondent reached a settlement with the applicant. Accordingly, there is no reason why the Department of Home Affairs should not pay the costs of today as well as the reserved costs for 17 November 2023.

Order

[101] In the premises the following order is made:

- 1 The forms, notices and time periods provided for in the Rules are dispensed with and this matter is heard as one of urgency in terms of Uniform Rule 6(12);
- 2 The third, twelfth, fifteenth and sixteenth respondents are interdicted from deporting the 32 (thirty-two) detained victims of the Usindiso Building fire from the Lindela Repatriation Centre, pending their appearance before the Johannesburg Magistrate after the lapse of the 30-day period referred to in para 118(1)(e) of the Constitutional Court judgment in *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 and pending the finalisation of the recommendations and report of the Khampepe Commission.
- 3 The third, twelfth, fifteenth and sixteenth respondents are directed to take reasonable steps to facilitate the participation of those members of the applicant who are detained at the Lindela Repatriation Centre in the proceedings of the Khampepe Commission of Inquiry, including:
 - 3.1 Granting the applicants' legal representatives standing access to consult with those members of the applicant within business hours;
 - 3.2 Enabling those members of the applicant to view the online stream of the proceedings of the Khampepe Commission of Inquiry when it is sitting;
 - 3.3 Providing transport to enable those members to attend the proceedings of the Khampepe Commission of Inquiry when they are required to testify at the Commission.
4. The third, twelfth, fifteenth and sixteenth respondents are directed not to take any steps that may impede the future participation of the members of the applicant at the Khampepe Commission of Inquiry.

5 The third, twelfth, fifteenth and sixteenth respondents are to pay the costs of the applicant, including costs of two counsel.

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JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 December 2023

Date Heard: 23 November 2023

Judgment handed down: 7 December 2023

Appearances:

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Adv. M Salukazana

Instructed by: NORTON ROSE FULBRIGHT

On behalf of the First and Second Respondent:

Adv M. Makgato
Adv K. Pama-Sihunu

Instructed by:

PHAMBANE MOKONE
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On behalf of the Third, Twelfth,
Fifteenth and Sixteenth Respondent:

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Instructed by:

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On behalf of the Ninth and Tenth Respondent:

Adv J. Brickhill

Instructed by:

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