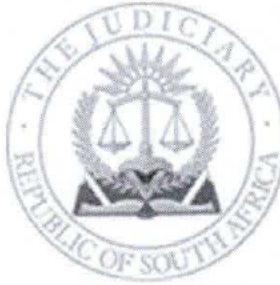


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.:14238/2021

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

Date: 18 September 2024 E van der Schyff

In the matter between:

Lawyers for Human Rights

and

Minister of Home Affairs

Director General of Home Affairs

In re:

Phindile Philile Mazibuko

Lawyers for Human Rights

Legalwise South Africa (Pty) Ltd

and

Applicant

First Respondent

Second Respondent

First Applicant

Second Respondent

Third Respondent

Minister of Home Affairs

First Respondent

Director General of Home Affairs

Second Respondent

and

Children's Institute

Amicus Curiae

JUDGMENT

Van der Schyff J

Introduction and background

- [1] On 16 January 2024, this court handed down a judgment under the abovementioned case number. The litigation concerned the legality of the Department of Home Affairs's (DHA's) practice of blocking identity numbers without following due process when suspicions arose regarding the authenticity of an identity number or identity document or card issued to a person before or while investigating whether a person registered in the national population register is a South African citizen or permanent resident.
- [2] It was ultimately found that the placing of markers against identity numbers resulting in the blocking of the identity numbers (also referred to as ID blocking), in the absence of a fair administrative process preceding the placement of such markers and before a final decision is taken relating to the affected individual's status as a South African citizen or permanent resident, in the absence of empowering legislation, constitutes unjust and irregular administrative action that is inconsistent with the Constitution and invalid.
- [3] The declaration of invalidity was suspended for the sole purpose of allowing the Department of Home Affairs (DHA) to determine whether any identity number against which a marker has been placed prior to November 2022 correctly reflects the particulars of the person to whom the identity number was assigned,

alternatively, to obtain court orders authorising the identity numbers of the affected persons to remain blocked prior to any investigation or inquiry having been finalised.

- [4] Lawyers for Human Rights (LHR) and Legalwise (LW) joined the proceedings not only in the broad public interest but also because they represented specific clients who were adversely affected by the practice of ID blocking. The order, therefore, provided that LHR and LW, respectively, had to provide the DHA with a list of their clients whose identity numbers were blocked before November 2022, within 20 days after the order was granted. The DHA, then, had to investigate whether a security risk would be posed if the blocks on the ID numbers provided were to be uplifted. In regard to those persons where the DHA opined that the unblocking of identity numbers would pose security risks, court orders had to be obtained authorising the identity numbers to remain blocked pending the finalisation of investigations within 90 days of receipt of the lists, failing which the blocks were to be uplifted.

- [5] The order also provided a mechanism for the DHA to approach me, or any judge appointed by the Deputy Judge President, for an extension of the time periods (the 90 days or one year) if the DHA realised that it was unable to timeously finalise the steps necessary to give effect to the orders. Since the word 'timeously' apparently caused uncertainty, it is necessary to put it clearly – where the DHA realised that it would not be able to complete the investigations and obtain the necessary court orders in the periods stipulated in the order. The order outlines the information the DHA must provide to the court when launching an extension application.

- [6] Neither party appealed the judgment and orders.

The extension and contempt of court applications

- [7] The DHA subsequently issued an extension application. The notice of motion is dated 16 July 2024. This extension application was issued after the 90-day period stipulated in paragraph 5 of the order had expired. On 26 July 2024, LHR served a contempt of court application on the DHA. The papers filed of record indicate that

the DHA and LHR were engaged in correspondence prior to the issuing of the two applications.

- [8] From the correspondence, one gleaned that the LHR wrote to the DHA on 27 June 2024 and informed the DHA that, according to its calculation, the 90-day period provided for in the court order expired on 24 June 2024. LHR enquired whether the DHA has identified any persons whose identity numbers appear in the LHR schedule who pose a security risk should the block against their identity numbers be uplifted and whether the DHA has obtained court orders authorising the continued block of those identity numbers or alternatively, uplifted the blocks.
- [9] In a letter dated 4 July 2024, the DHA answered the LHR, and informed it that markers had been uplifted in respect of 10 identified individuals. Twenty-two individuals were identified against whose names no markers were placed. Five instances were identified where duplicate identity numbers were issued, and the LHR was requested to advise their clients to visit their nearest DHA offices to submit their fingerprints and supporting documents for linking purposes to ensure that the identity numbers were allocated to the correct owners. Three identity numbers were marked for deletion because the identity numbers in question were surrendered to the DHA during the 'Dispensation of Zimbabweans Project. Two individuals were found to be deceased. In two instances, the list ostensibly only contained the names of persons without their identity numbers, and LHR was requested to provide the identity numbers. Seventy-eight individuals were identified as individuals whose identity numbers remained blocked, as removing the markers would pose a security risk to the country. The DHA listed the names and identity numbers of the individuals concerned in this letter. Similar correspondence was sent to LW. LHR and LW would have been able to compare the names provided in the letters against the information contained in the lists they provided.
- [10] Subsequent to the extension and contempt applications, respectively, being instituted, the second respondent published a Notice in the Government Gazette of 16 August 2024 (the Notice).¹ The heading of the notice reads as follows:

¹ GG No. 51064 Vol. 709 16 August 2024 No 5135.

‘Notice in terms of section 3 of the Promotion of Administrative Justice Act, 2000: Intention to cancel identity documents or cards of persons whose identity numbers are blocked and call for representation from affected persons’.

- [11] In the Notice, the second respondent states that the reasons for the intended decision in terms of section 19 of the Identification Act 68 of 1997, are that:
- i. The identity documents or cards have been issued to persons whose names are not required in terms of section 5 of the Identification Act to be included in the population register;
 - ii. The identity documents or cards do not correctly reflect the particulars of the persons to whom they were issued;
 - iii. The identity documents or cards were fraudulently obtained in that false statements were made and false information was provided at the time of application for, and issuance of the identity documents or cards; or
 - iv. The identity documents or cards were forged in that the identity documents or cards lawfully issued to other persons were stolen or unlawfully obtained or altered to either reflect the names or the facial image or photograph of the person whose particulars were not to be included in the population register.
- [12] Affected persons are requested to provide written submissions within 30 days from the publication of the Notice, as to why their identity documents or cards should not be cancelled, failing which the second respondent shall proceed to cancel the identity document or card accordingly.
- [13] LW referred to the Notice in its answering affidavit filed in the extension application and submitted that it should not apply to their members. After LHR became aware of the Notice, and on 22 August 2024, LHR filed a notice in terms of Rule 28 of the Uniform Rules of Court, notifying the DHA of its intention to amend its notice of motion in the contempt of court application to include additional relief in that it sought the implementation of the Notice to be interdicted. No objection was filed by DHA,

and on 12 September 2024, the amended notice of motion was effected by delivering the notice of motion in its amended form.

- [14] I pause at this juncture to indicate the LHR faces some difficulty regarding the proposed amendment of the notice of motion. Rule 28(5) provides that if no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment, and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2) effect the amendment as contemplated in subrule (7). Rule 28(8) provides, however, that any party affected by an amendment may, within 15 days after the amendment has been effected or within such period as the court may determine, make any consequential adjustment to the documents filed. Since the amendment was effected, the respondents had no time to make any consequential adjustments to their papers as the hearing of the applications proceeded on the next day, 13 September 2024. This issue will be revisited later.
- [15] A further development that preceded the hearing is that the second respondent's attorney informed LHR that the DHA uplifted blocks on 'about 94' of the identity numbers provided and regarded the contempt application to be moot. In written heads of argument, the second respondent stated that it uplifted the blocks on the identity numbers of 'about' 94 individuals, the said individuals being the clients of LW and the LHR, respectively. As a result, the second respondent informed that it intends to withdraw the extension application and that the contempt of court application became moot. The DHA tendered costs for both applications on a party and party scale.
- [16] Since the extension and contempt applications are closely interlinked, it is necessary to consider the content of the affidavits filed in both applications. This is necessary even though the extension application was withdrawn.
- [17] It is common cause that the extension application was instituted after the 90-day period provided for in paragraph 5 of the order has lapsed. In this application the

Director-General of the Department of Home Affairs (the DG) sought condonation for the late filing of the application. The DG also sought that the determination made by the second respondent after the 90-day period be condoned and that the 90-day period be extended to 31 October 2024.

Non-compliance

- [18] In the founding affidavit, the DG explained that on 13 February 2024, it received lists from LHR and LW with the names of their clients and members whose identities were allegedly blocked before November 2022. The lists respectively contain the names of twenty-three² and one hundred and forty-two individuals.³
- [19] The DG informed both LHR and LW that it intended to apply to court to obtain court orders authorising the continued blocking of the identity numbers of the affected persons.
- [20] In setting out what had been done to date, the DG referred to the letters sent to LHR and LW on 4 July 2024, and attached same to the founding papers. In the affidavit, the DG only states numbers and does not identify individuals against, as in the letters. As far as LHR is concerned, certain inconsistencies are noted. The following is evident:
- i. In the letter, it is stated that markers have been uplifted in respect of 10 individuals, in the affidavit, it is stated that markers were uplifted in respect of 13 individuals;
 - ii. In the letter, it is stated that the Department found that no markers were placed against the identity numbers of 22 individuals, in the affidavit, it is stated that no markers were placed against 23 individuals;
 - iii. The letter states that 78 individuals were identified as posing a security risk, and markers will not be uplifted. However, the affidavit states that 90

² LW members.

³ LHR clients.

individuals were identified, and the removal of the markers would pose a security risk to the country.

- [21] While the letter sent to LHR indicates that 120 individuals were under consideration, the affidavit implies that 137 individuals were considered. This begs the question of which individuals were neither referenced in the DHA's letter nor referred to in the affidavit. On the second respondent's version, the list provided by LHR contained 142 names.

- [22] If the numbers provided in the affidavit are accepted as correct, the inconsistency seems to be addressed if note is taken of the Rule 7(1) notice filed by the second respondent wherein LHR was informed that the second respondent disputes its authority to act on behalf of 5 identified individuals. This aspect will be revisited below.

- [23] I pause to note that, on the strength of the numbers provided in the DG's affidavit, the total of individuals whose identity numbers remained blocked after 24 June 2024 was approximately one hundred and eleven (111), being ninety-five of LHR's clients (90 + 5 referred to in the Rule 7 notice) plus sixteen of LW's clients.

- [24] In this context, it is difficult to interpret DHA's counsel's submission that the DHA complied with the directive in paragraph 5 of the order of 16 January 2024 because the block was uplifted against the names of 94 of LHR and LW's clients. Perspective is further distorted in that the letter sent to the legal representatives dated 10 September 2024 speaks of 'about ninety-four (94) of your client's identity numbers contained in your respective lists received by our offices on 13 February 2024 have been unblocked on 9 September 2024.' This begs the question as to whether the unblocked identity numbers referred to in the letters of 4 July 2024 and the founding affidavit are included in the total of ninety-four or whether an additional ninety-four identity numbers were unblocked. This discrepancy, amongst others, urged me to order the Director General to explain on affidavit, which identity numbers were unblocked.

- [25] In answer to the DG's extension application, LHR submitted that the court is *functus officio* and cannot extend an order if the extension application was only instituted after the lapse of the period provided for in the order. For reasons that will become clear below, it is not necessary to deal with this issue.
- [26] With the extension application being withdrawn, there is no application for consideration. It is, however, evident that the identity numbers of at least 17 individuals whose details were provided in the client lists provided by LHR and LW, whose identity numbers were blocked, remained blocked without any court orders being obtained to extend the blocks. That is, if one accepts that the ninety-four unnamed individuals whose identity numbers were unblocked as of 9 September 2024 do not include the individuals referred to in the letters of 4 July 2024 whose identity numbers were previously unblocked.
- [27] The crux of the matter, however, is that a number of the identified clients of LW and LHR's identity numbers remained blocked after the expiry of the 90-day period and that no court orders were obtained to keep the blocks intact.
- [28] As a matter of law, the department was obliged to lift the blocks in all those matters once the 90-day period expired without it being timeously extended. The extension application has been withdrawn, and the issue of whether the 90-day period could be extended after the period laps became superfluous and moot. The question, now, is whether the Notice published on 16 August 2024 affects the clients of LHR and LW whose identity numbers remained blocked after 24 June 2024.
- [29] This issue needs to be answered to provide clarity to both parties. The question as to whether LW and LHR's identified clients are to be affected in any manner by the Notice published at a time when the blocks on their identity numbers already had to be removed is distinguishable from the question of whether this court can and must interdict the DG from implementing the Notice. The reason for the distinction is simply that the affected individuals' identity documents and cards would have been unblocked by the time the Notice was published had the DG complied fully with the court order.

- [30] I have already found that the practice of placing a marker against an identity number that results in the ID being blocked without following due process in the absence of empowering legislation constitutes unjust and irregular administrative action that is inconsistent with the Constitution and invalid. The DG's invalid actions by placing markers against identity documents cannot be countenanced and, in fact, validated by subjecting these individuals, whose identity numbers had to be unblocked by 25 June 2024, to the Notice. As a result, a mandamus stands to be issued that, insofar it has not been done, and insofar it is necessary to do it with retroactive effect, the identity numbers of the clients in the lists provided by LW and LHR, where full names and identity numbers were provided, must immediately be unblocked with retroactive effect. The Notice does not apply to, and the DG stands to be prohibited from dealing with, any of the individuals listed in the client lists provided by LW or LHR in terms of the Notice published in the Government Gazette dated 16 August 2024.

Contempt

- [31] LHR contended that the DG's non-compliance with the court orders amounts to contempt of court. LHR submitted that the DHA-respondents have disregarded several case management directives and that the lackadaisical approach to the issue for which the DHA-respondents were criticised in the judgment handed down on 16 January 2024, persisted.
- [32] The LHR holds the view that the 90-day period referred to in paragraph 5 of the order had to be calculated as calendar days and that the DHA-respondents afforded themselves an undue extension by calculating it as court days. I pause to state that LHR is wrong in this aspect. It is trite that any number of days referenced in court orders are calculated as court days.⁴
- [33] Non-compliance with a court order does not automatically amount to contempt of court. In addition to showing that there was a court order of which a party was aware, to establish contempt, it must be established that the non-compliance was willful and

⁴ Rule 1 of the Uniform Rules of Court – '...only court days shall be included in the computation of any time expressed in days prescribed by these Rules or fixed by any order of court.'

in bad faith. The onus of demonstrating that non-compliance was not willful and in bad faith rests on the respondent.⁵

- [34] Having regard to the DHA-respondents' conduct and the action taken by them, I cannot find that there was any intention on their side to defeat the course of justice. The DG's explanation that it would have been impossible to finalise investigations and obtain court orders within 90 days after receiving lists totaling 165 individuals cannot be ignored.
- [35] The DG should, however, have approached this court once it became apparent that the Department was faced with a mammoth task and that it was practically impossible to meet the directives in the order, in time. It was precisely because I foresaw the possibility that the task could encompass far more than what was initially envisaged that I provided the opportunity for the order to be extended. The DG's failure to approach the court timeously, is, however, not sufficient to find that the DG's conduct showed disrespect for the court's authority.
- [36] The LHR took issue with the publication of the Notice and described it as an exercise to circumvent the order granted on 16 January 2024. The LHR sought an order interdicting the second respondent from cancelling the identity documents or identity cards of the affected persons mentioned in the Notice. The first issue I have with considering the relief sought in this regard, is that the amendment of the notice of motion was only effected the day before the contempt application was heard. The DHA-respondents' time to file an answer has not yet run out. In upholding the *audi et alteram* principle, the issues raised by the publication of the Notice cannot be adjudicated at this time, and this particular matter is not ripe for hearing.
- [37] In addition, and more important for me, is that the Notice embodies a novel administrative decision that did not form part of the subject matter of the application in which judgment was handed down on 16 January 2024. The Notice cannot, as a matter of course, be regarded as aimed at circumventing the court order granted on 16 January 2024. The litigation instituted under this case number dealt with the

⁵ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

practice of placing a marker against identity numbers, which resulted in those numbers being blocked. This new administrative decision must be subjected to a review, and the review cannot be done within the context of a contempt of court application.

- [38] Whether the Notice, with its very short time frames and its ostensible publication only in the Government Gazette, will withstand judicial scrutiny is a question, however, it is not a question that I am willing to consider at this period in time as part of a contempt of court application.
- [39] The DHA-respondents would be wise to timeously apply for the extension of the time period in paragraph 3 of the order of 16 January 2024, if review proceedings are instituted aimed at setting aside the Notice. They would not, again, be able to rely on the excuse that they interpreted the court order in a manner that afford them an opportunity to apply for an extension after a time period mentioned in the order lapsed.
- [40] Although I am not, at this stage, making a finding that the DHA-respondents are in contempt of court, LHR and LW succeeded in indicating that there was non-compliance with paragraph 5 of the court order. Having regard to the nature of the litigation, it is justified that the DHA be compelled to uplift any block against any identity number, identity document or card that existed on 25 June 2024 in accordance with paragraph 5 of the order of 16 January 2024. The clients of LHR and members of LW who were listed with their names and identity numbers in the lists provided to the DHA on 13 February 2024, whose identity numbers remained blocked, is entitled to immunity against the provision of the Notice published on 16 August 2024.

Miscellaneous

- [41] The DHA-respondents filed a notice in terms of Rule 7(1) indicating that they dispute the LHR's authority to act on behalf of 5 specific individuals and requested to be provided with copies of the individuals' Powers of Attorney.

- [42] The DHA-respondents' reliance on Rule 7(1) is misplaced. This court granted an order affording LHR the opportunity to provide the DHA with a list of the names of their clients whose identity numbers were blocked before November 2022. The DHA could investigate the individuals concerned and either uplift the block or apply for a court order to retain the block. It was not for the DHA to second-guess the list of names provided.
- [43] The *amicus curia* also filed an affidavit dealing with the manner in which particularly paragraph 8 of the order of 16 January 2024 was implemented, or, to be more precise, the lack of action taken in this regard. The DHA-respondents did not file any answer to the *amicus's* affidavit.
- [44] An *amicus curiae* is not a party to proceedings. The issue regarding the DHA's non-compliance with paragraph 8 of the order was not canvassed in the LHR's contempt application, and thus not fully traversed. The issues raised, however, directly impact minor children, and this court is the upper guardian of all minor children. As the upper guardian of all minor children, this court may *mero motu* call for an explanation of whether paragraph 8 of the order was given effect. The DHA-respondents stand to be called on to file a detailed affidavit setting out how paragraph 8 of the order was given effect to.

Costs

- [45] The DHA offered to pay the costs of the extension application on a party and party scale. LHR and LW are not to be left out of pocket for opposing an application that is inexplicably withdrawn at the eleventh hour. In the circumstances, the costs of the extension application stand to be paid by the DHA on an attorney and client scale.
- [46] Although no declaration stands currently to be issued that the respondents are in contempt of court, the respondents' non-compliance with the court order and subsequent developments necessitates the granting of certain orders that are just and equitable. As a result, the LHR and LW applicants are successful, and costs

follow success. The *amicus curiae*, likewise made a sensible contribution by drawing the court's attention to the continued plight of minor children.

- [47] A case is, however, not made out for a punitive costs order in the contempt application, and the DHA stands to be ordered to pay the costs of the *amicus*, LW, and LHR as between party and party on scale C.

ORDER

In the result, the following order is granted:

1. The respondents are granted leave to withdraw the condonation and extension application;
2. It is declared that paragraph 5 of the order granted on 16 January 2024 has not been complied with in full;
3. The Director-General of the Department of Home Affairs must file an affidavit on or before Friday, 27 September 2024, confirming the names and identity numbers of individuals listed by the Lawyers for Human Rights and LegalWise South Africa (RF) (Pty) Ltd, whose identity numbers, identity documents and identity cards were unblocked by 13 September 2024;
4. The identity numbers, identity documents, and identity cards of all individuals listed in the lists provided by the Lawyers for Human Rights and LegalWise South Africa (RF) (Pty) Ltd on 13 February 2024, that had not been unblocked by 25 June 2024, save for:
 - a. identity documents with identity numbers identified as having been issued to deceased persons,
 - b. identity numbers marked for deletion to the three individuals listed in paragraph 7 of the letter sent to Lawyers for Human Rights on behalf of the Department of Home Affairs dated 4 July 2024, and
 - c. Instances where names were provided without accompanying identity numbers,

must be unblocked within twenty (20) days of this order, with retroactive effect;

5. Government Notice 5135 published in Government Gazette 51064 dated 16 August 2024 shall not apply to any individual whose identity number, identity document, or identity card is to be unblocked with retroactive effect in terms of paragraph 4 of this order;
6. The Director General of the Department of Home Affairs must file an affidavit on the Caseline's file and email it to the judge concerned's Registrar within thirty (30) days of this order being granted, explaining in detail what measures were implemented to give effect to paragraphs 7 and 8 of the order granted on 6 January 2024 and how those measures were communicated to its respective offices;
7. Within 60 (sixty) days of the date of this order, a joint report must be filed by the Lawyers for Human Rights, LegalWise South Africa (RF) (Pty) Ltd, and the Department of Home Affairs, using the lists provided by the Lawyers for Human Rights, LegalWise South Africa (RF) (Pty) Ltd on 13 February 2024, wherein the following is indicated:
 - 7.1 The instances where the parties are *ad idem* that the identity number of a particular individual was unblocked as on the date of the compilation of the report;
 - 7.2 The instances where the parties are *ad idem* that a particular identity number is still blocked on the date of the report;
 - 7.3 The instances where the parties hold different views regarding whether an identity number is unblocked or blocked, with each party's submission in support of its view clearly reflected.

8. In anticipation of receiving the two affidavits required from the Director General of Home Affairs, the finalisation of the contempt of court application is postponed *sine die*;
9. The respondents must pay the costs of LegalWise South Africa (RF) (Pty) Ltd and Lawyers for Human Rights incurred in relation to the condonation and extension application on the scale as between attorney and client;
10. The respondents must pay the costs of LegalWise South Africa (RF) (Pty) Ltd, Lawyers for Human Rights, and the *amicus curiae* incurred in relation to the contempt of court application as between party and party on scale C.



E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the second applicant:	Adv. J. Bhima
With:	Adv. C. Makhajane
Instructed by:	Bowmans Gilfillan Attorneys
 For the third applicant:	 Adv. D. Simonz
Instructed by:	Saude-Darbandi Attorneys Inc.
 For the first and second respondents:	 Adv. A.T. Ncongwane SC
With:	Adv. N. Rasalanavho
Instructed by:	State Attorney, Pretoria
 For the <i>Amicus</i> ;	 Adv. L. Muller

Date of the hearing:

13 September 2024

Date of judgment:

18 September 2024