



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: 15525/2024

In the matter between:

MOWLID MUHUMED MAOW

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR-GENERAL HOME AFFAIRS

Second Respondent

MINISTER OF POLICE

Third Respondent

STATION COMMANDER, CALEDON POLICE STATION

Fourth Respondent

ADDITIONAL MAGISTRATE CALEDON

Fifth Respondent

Coram: Acting Justice P Farlam

Heard: 31 July, 2 & 7 August 2024

Order delivered electronically: 7 August 2024

Judgment delivered electronically: 13 January 2025

JUDGMENT

INTRODUCTION

- [1] After this application was heard in the urgent court at the end of July and in early August 2024, I granted an order on 7 August 2024 in the following terms:

"IT IS ORDERED THAT:

1. *The applicant be released from detention and permitted to remain in the Republic of South Africa pending the final outcome of Part B of this application, subject to reasonable terms and conditions to be furnished by the first and second respondents to the applicant within 10 (ten) days of this Order.*
2. *In the event of the respondents failing to furnish the applicant with such terms and conditions within the requisite 10 (ten) day period, the applicant will be permitted to remain in the Republic of South Africa, pending the final outcome of Part B of this application, subject to the following conditions:*
 - 2.1 *The applicant must report to the nearest Refugee Reception Office within 5 (five) days from the date of expiry of the ten-day period referred to above.*
 - 2.2 *The applicant must inform the first and second respondents of the Refugee Reception Office he has attended within 3 (three) days of so reporting.*
 - 2.3 *Pending the final outcome of Part B of this application, the applicant must report to the Inspectorate: Department of Home Affairs, Caledon once a week on a day designated by the Inspectorate.*
3. *The first and second respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved, with the costs of counsel to be taxed on Scale A."*

- [2] The reasons for that order are set out below, beginning with a summary of relevant facts.

BACKGROUND TO THE APPLICANT'S ARREST AND DETENTION

- [3] The applicant (Mr Maow) is a 26-year-old Somali national, who states that he entered South Africa on 14 June 2023, via Zimbabwe, after having left Somalia to escape tribal conflict.
- [4] According to Mr Maow, he applied for asylum at the Gqerberha Refugee Reception Office on 8 November 2023 and returned to the same Refugee Reception Office in May 2024 for his fingerprints to be taken. A photograph of the prescribed form affidavit which he alleges he signed on 8 November 2023 before a commissioner of oaths was appended to his founding affidavit. In between his visits to the Refugee Reception Centre in Gqerberha, Mr Maow apparently also applied for a new Somali passport at the Somali embassy in Pretoria, which issued him with an Application Form Verification on 23 February 2024.
- [5] Mr Maow states that he resided in Gqerberha at this time (hence applying for asylum there), but visited a friend in Kleinmond, a small coastal town near Cape Town, in June 2024. On Wednesday, 19 June 2024, when helping the friend at a shop in Kleinmond, the police and Department of Home Affairs (**DHA**) officials entered the shop and arrested him. Mr Maow avers that he advised the police that he had applied for asylum and had a return date at the Refugee Reception Centre in Gqerberha, but that they insisted on placing him in custody and detaining him. He also says that the police took his Somali passport.

- [6] In the first and second respondents' answering affidavit, deposed to by Mr Tyronne Bout, a Control Immigration Officer, working at the Department of Home Affairs, it is acknowledged that Mr Maow was arrested and detained on the 19th of June 2024, during what Mr Bout says was a "*special operation*" in and around Kleinmond. This was the result, so Mr Bout states, of Mr Maow not having documents justifying his stay in the Republic, his also not being able to explain his presence in South Africa, and Mr Maow's immigration status (and more particularly whether he had applied for asylum) not being confirmed in the DHA system. Inconsistently, that affidavit also alleges both that Mr Maow "*had no documents to identify himself*", as well as that Mr Maow's Somalian passport "*was not stamped by any immigration structure at any level or port of entry*". The correct position appears to be that, as Mr Bout had informed the magistrate, Mr Maow was in possession of a Somali passport and ID card at the time of his arrest (which were viewed by Mr Bout), but that there was no stamp or visa in the passport allowing Mr Maow to live or work in South Africa, and there was also no proof of any asylum application.
- [7] On Thursday, 20 June 2024, Mr Maow appeared before a magistrate in the Caledon Magistrates' Court (the fifth respondent). As Mr Maow does not speak good English (his first language is Somalian, and his second Arabic) and there was also no interpreter present, the case was postponed to Tuesday, 25 June 2024. On that occasion, Mr Maow was represented by a lawyer and there was also a Somali / English interpreter present. Mr Maow's lawyer told the magistrate (Mr Nolan Lendor) that Mr Maow had applied for asylum at the Refugee Reception Centre in Gqerberha, and had his fingerprints taken there.

Mr Bout responded that the DHA system had no record of such an approach or of Mr Maow's biometrics having been taken. As there were no documents supporting Mr Maow's allegations that he had applied for asylum, the magistrate then found that Mr Maow was "*an undocumented person as described in the Immigration Act*", and "*further authorise[d] a warrant for [his] detention for purposes of deportation*". To that end, the magistrate signed a Form 30,¹ which advised the station commissioner of the Caledon SAPS, and the relevant Immigration Officer from the Department of Home Affairs (Mr TW Bout), in terms of section 7(1)(g), read with section 34(1), of the Immigration Act, 13 of 2002 (the **Immigration Act**) and regulation 33(3) of the Immigration Regulations, that Mr Maow had made himself liable to deportation and that he should not be released pending such deportation.

- [8] The Form 30 requires a court confirming the further detention of an "*illegal foreigner*" to insert a date until which the further detention is extended. The magistrate did not fill in a date in this instance; but it seems to have been understood that the matter would come before the Caledon Magistrates' Court on Thursday, 11 July 2024 (i.e., just over two weeks later), as Mr Maow appeared in the court again on that day, at which point it was mentioned that the matter was due to be heard in the High Court the next day and that the file should anyway be taken to Mr Lendor.

¹ A form prescribed under the Immigration Regulations (promulgated under the Immigration Act), which is headed "*Confirmation by court of further detention for purposes of detention*".

- [9] At this time, Mr Maow was still being detained in a holding cell in Caledon, though he had been advised that he would be transferred to a repatriation facility in Pretoria, Gauteng, whereafter he would be deported to Somalia.

THE APPLICANT'S HIGH COURT APPLICATION

- [10] As indicated, Mr Maow had, after his appearance in the Caledon Magistrates' Court on 25 June 2024, brought an application to the High Court (the present case), which had been set down as a matter of urgency for 12 July 2024. According to Mr Maow, this application was made possible by his friend in Kleinmond procuring legal representation from his current attorneys (ZS Inc.) on 8 July 2024 and instructing them on Mr Maow's behalf to launch urgent proceedings.

- [11] The application was issued on Wednesday, 10 July 2024 and served by email on 11 July, after an unsuccessful attempt at personal service on the 10th. It appears that physical service then took place on the morning of the 12th.

- [12] The application sought relief under two parts: Parts A and B.

12.1. Under Part A, the applicant sought an order that this Part be heard as one of urgency, as well as that, pending the final outcome of Part B of the application:

12.1.1. The Form 30 (confirmation by the court of his detention for purposes of deportation), dated 25 June 2024, in respect of his detention, *"be suspended and of no force and effect insofar as it is relevant to the applicant"*;

12.1.2. The applicant be released from detention and permitted to remain in the Republic of South Africa, subject to reasonable terms and conditions to be furnished by the respondents to the applicant within five days of the relief under prayer 2.1 being granted;

12.1.3. In the event of the respondents failing to furnish the applicant with any such reasonable terms and conditions within the requisite 5-day period, no terms and conditions be imposed on the applicant for purposes of the relief in prayer 2.2.

12.2. In addition, the applicant sought an order that the costs of Part A be paid by any respondents who opposed that part, alternatively that the costs stand over for determination at the hearing of Part B.

12.3. Under Part B, the applicant sought to review the decision (of one or more of the respondents) to detain him for purposes of deportation in terms of section 34(1) of the Immigration Act, and for the matter to be remitted back to the relevant respondent in terms of section 8(1) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

[13] The application was duly entertained on the urgent roll on 12 July 2024, on which day the Court (which indicated that it had heard counsel for the applicant and read the papers filed of record, which then consisted only of the founding papers) issued an order (without reasons) which read in part as follows, in addition to setting a timetable for the filing of further affidavits:

- "1. The forms and service provided for in terms of the Uniform Rules of this Court is dispensed with and **Part A** of the application is heard as one of urgency in terms of Uniform Rule 6(12);*
- 2. Pending the outcome of **Part B** of the application:*
 - 2.1 The Form 30 (confirmation by the court of his detention for purposes of deportation), in terms of the Immigration Regulations to the Immigration Act 13 of 2002, dated 25 June 2024 in respect of the applicant be suspended and of no force and effect insofar as it is relevant to the applicant;*
- 3. The relief sought in prayers 2.2 and 2.3 as per the Notice of Motion is remanded to 31 July 2024 for hearing on the urgent roll. The prayers are repeated here for the sake of convenience.*
 - 2.2 The applicant be released from detention and permitted to remain in the Republic of South Africa, subject to reasonable terms and conditions to be furnished by the respondents to the applicant within 5 (five) days of the relief being granted in terms hereof;*
 - 2.3 In the event of the respondents failing to furnish the applicant with any such reasonable terms and conditions within the requisite 5 (five) day period, no terms and conditions will be imposed on the applicant in terms of the relief sought in prayer 2.2 above.*
- ...*
- 6. The costs of **Part A** shall stand over for later determination at the hearing of **Part B**.*
- 7. The relief sought by the applicant in **part B** is postponed to a date to be determined by the Registrar of this Court.*
- 8. The applicant is detained at the Caledon Police Station."*

[14] What was thus intended to be considered by the Court on 31 July 2024 was the relief set out in prayers 2.2 and 2.3 of Part A of the notice of motion – the

questions of urgency (prayer 1 of the notice of motion) and the suspension of the Form 30 (as sought in prayer 2.1) having been addressed in the order of 12 July. But as explained below, the position was not that straight-forward.

THE APPLICANT'S CASE FOR INTERDICTORY RELIEF

[15] In his founding affidavit, Mr Maow alleged, in support of the relief set out in prayer 2 of his Part A notice of motion, that his detention and proposed deportation were irregular in various respects. Some of the allegations which the applicant made in this regard were clearly unsustainable, while others were not pressed in argument. The applicant's contentions with regard to the first requirement for the interim relief sought under Part A (the existence of a *prima facie* right) essentially boiled down to whether, as he submitted, his proposed deportation would be irregular and *ultra vires* because he had already applied for asylum and so, in terms of section 21(4) of the Refugees Act, 130 of 1998 (the **Refugees Act**), no proceedings could be instituted or continued against him until a decision had been made in respect of the asylum application.

[16] As regards the other three requirements for an interim interdict, Mr Maow contended that (i) he would suffer irreparable harm if he continued to be detained and was then deported without his asylum application being considered; (ii) he had no alternative remedy; and (iii) the balance of convenience also favoured the granting of the interdictory relief sought.

[17] The applicant's case in respect of those last three requirements for interim interdictory relief was, understandably, not seriously disputed. Nor was the

urgency of the Part A relief, which was anyway disposed of when the matter was first called on 12 July 2024. The key issue for purposes of the Part A interdictory relief was therefore whether the applicant had shown *prima facie* that he had applied for asylum in Gqerberha prior to going to Kleinmond in June 2024 and that this asylum application was still pending.

- [18] Mr Maow's case in this regard was, in summary, that he had, as mentioned, applied for asylum at the Gqerberha Refugee Reception Office on 8 November 2023 (as confirmed by a photograph of the two pages of the completed and commissioned form appended to his founding affidavit, as well as the further 'request for appointment to apply for asylum' form attached to the replying affidavit) and had his fingerprints taken at the same Refugee Reception Office for purposes of that application in May 2024. He explained in his replying affidavit that the asylum application form could only be located in a bag at his residence once his cousin had returned from pilgrimage on 28 June 2024 and could therefore not be produced in the magistrates' court on the 25th. He averred, too, that his date of birth had been incorrectly recorded on his passport (which reflected a different date from the one indicated in the asylum application form) and would thus also have been wrongly recorded for purposes of the search done on the DHA's system, which also in a couple of instances used the incorrect name and surname. The replying affidavit pointed out as well that the DHA had been invited by ZS Inc. on 24 July 2024 to search for the pending asylum application using the applicant's correct names and surnames, but that the State Attorney's summary response was that they had filed their answering affidavit and would not be engaging further.

- [19] The stance of the first and second respondents (the Minister of Home Affairs and the Director-General of Home Affairs, respectively) in their answering affidavit (of Mr Bout) was, as noted above, that Mr Maow had produced no documentary proof of the alleged asylum application on the 19th of June (when arrested) or the 25th of June (when his detention was considered in the Caledon Magistrates' Court) and that the search on the DHA system (using the first name and surname combinations and date of birth reflected on the annexures to the answering affidavit) had produced no results for Mr Maow.
- [20] On the affidavits before the Court on 31 July 2024, the applicant had, in my view, comfortably discharged the onus of showing that its version was "*prima facie established though open to some doubt*", and thus satisfied the well-established test enunciated in *Webster v Mitchell*, where Clayden J added:²

"The proper manner of approach ... is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."

- [21] The fact that Mr Maow could not produce the copy of his asylum application on 19 or 25 June 2024 has been adequately explained and was also confirmed

² *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

by copies of the relevant pages of his cousin's passport; while the fact that Mr Bout's DHA search had come up empty was easily explicable on the basis of the names and dates used in the search.

[22] Doubtless aware of their difficulties in this regard, the first and second respondents sought leave to file a supplementary affidavit of Mr Bout on 2 August 2024, in order to adduce evidence regarding the further searches undertaken on the DHA system on 30 July and 1 August 2024, using the correct names and birth date of Mr Maow, which had apparently also not reflected the alleged asylum application. Although the DHA had expressly rejected the applicant's attorneys' invitation on 24 July 2024 to conduct such a search, I considered it in the interests of justice to allow that further affidavit in and to permit the applicant to respond thereto. The matter was accordingly postponed to 8 August 2024 to allow this further evidence to be introduced, as well as to permit the first and second respondents' counsel to present argument with reference to the new affidavits, in accordance with those respondents' specific request.

[23] The further evidence adduced by the DHA casts some doubt on the applicant's version. But I do not consider it to throw "*serious doubt ... upon the case of the applicant*". The completed and signed and commissioned pro forma affidavit, which was corroborated by the affidavit from the commissioner of oaths who commissioned that affidavit and affixed his stamp thereto (which accompanied the applicant's further supplementary affidavit), is *prima facie* evidence that Mr Maow applied for asylum. As it appears that the DHA does not have a discretion to refuse to allow an application to be made, despite

section 21(1)(a) of the Refugees Act requiring such an application to be made within five days of entry into the Republic, the apparent existence of such a document also does not invite immediate scepticism. It is moreover difficult to evaluate the reliability of a search on the DHA system in the abstract. Even if the search function was foolproof, there could moreover be various reasons why an electronic search for an asylum application turns up no results, including a failure on the part of a DHA official to capture the application on the system, or at least do so accurately. What might therefore have been more useful would have been evidence from an appropriate official at the Gqerberha Refugee Reception Office, as to whether it had any record of Mr Maow's alleged application and subsequent biometric testing.

- [24] In the circumstances, I was satisfied that the applicant had *prima facie* established that he had applied for asylum before he was arrested, and that being so, he was insulated from deportation by section 21(4) of the Refugees Act until his application had been finally considered.³ Any potential harm to the DHA, and thus any balance of convenience concerns, were also addressed by the default terms and conditions prescribed in paragraph 2 of my order of 7 August 2024.

³ Section 21(4) of the Refugees Act provides that:

"Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-

- (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such application has been reviewed in terms of section 24A or where the applicant exercised his or her right to appeal in terms of section 24B; or*
- (b) such person has been granted asylum."*

[25] Those reasons alone justified the order I made on 7 August 2024. But there were also further considerations which supported that order. I set these out below.

ISSUES WITH THE ORDER OF 12 JULY 2024

[26] As noted in paragraph [13] above, the Order granted by this court on 12 July 2024 stated in paragraph 2 thereof that:

*“2. Pending the outcome of **Part B** of the application:*

2.1 The Form 30 (confirmation by the court of his detention for purposes of deportation), in terms of the Immigration Regulations to the Immigration Act 13 of 2002, dated 25 June 2024 in respect of the applicant be suspended and of no force and effect insofar as it is relevant to the applicant”

[27] At the same time, the Order provided, in paragraph 3, that the prayer for the release of the applicant from detention pending the final outcome of Part B was postponed to 31 July 2024.

[28] As I see it, those prayers are mutually inconsistent.

[29] Form 30, which is headed “CONFIRMATION BY COURT OF FURTHER DETENTION FOR PURPOSES OF DEPORTATION”, is, as it indicates, to be completed by a court pursuant to regulation 33(3) of the Immigration Regulations which states that: “The confirmation of detention for purposes of deportation contemplated in section 34(1)(b) of the [Immigration] Act shall be on Form 30 illustrated in Annexure A”.

[30] Section 34(1)(b) of the Immigration Act provided that:⁴

“(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned-

...

(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”

[31] In terms of regulation 33(3), the means by which a court confirms the (further) detention of an allegedly illegal foreigner for purposes of deportation is by signing and issuing a Form 30 (which is the “*warrant of a Court*” contemplated in section 34(1)(b)).⁵ That was also in any event what the magistrate in this case, Mr Lendor, did on 25 June 2024, as evidenced by the completed, signed and stamped Form 30 attached to the applicant’s founding affidavit, as well as his *ex tempore* judgment at the end of the proceedings of 25 June, which according to the transcript (appended to the answering affidavit) contains *inter alia* the following statement of the magistrate:

⁴ As noted below, that section has been declared unconstitutional by the Constitutional Court, though the regime put in place by the Court pending the enactment of remedial legislation still requires that the detention of a foreigner be confirmed by a court within 48 hours.

⁵ Regulation 33(3) has not been declared unconstitutional or invalid; nor would such a consequence be implied by the order declaring section 34(1)(b) invalid, as the mention of that section in the regulation could be read as referring to the equivalent provision in the Constitutional Court’s order of 30 October 2023 (quoted in paragraph [40] below).

"The court then ... further authorises a warrant for your detention for purposes of deportation and will [sic] the Form 30 be attached to today's proceedings."

[32] By suspending and declaring of no force and effect the Form 30 issued in respect of the applicant (as sought in prayer 2.1 of Part A of the notice of motion), the court was therefore suspending and declaring of no force or effect the magistrates' court's confirmation of the applicant's (further) detention for purposes of deportation. That being so, the applicant should also have been released from detention, as sought in prayer 2.2 of Part A of the notice of motion. Prayers 2.1 and 2.2 thus had to stand or fall together; and so prayer 2.1 could not be granted while prayer 2.2 was postponed for subsequent consideration.

[33] When I put this to counsel at the hearing, the applicant's counsel acknowledged the force of the proposition, but stated that this was not what was apparently intended. After some deliberation, he eventually proposed in replying argument during the 7 August hearing that paragraph 2.1 of the Order of 12 July 2024 should be deleted and replaced *ex tunc* with a clause suspending the applicant's deportation, resulting in paragraph 2 thereof reading as follows:

"2. Pending the final outcome of Part B of the application:

2.1 The deportation of the applicant is suspended"

[34] I shall assume that this was at least the applicant's understanding of the prayer embodied in paragraph 2 of the 12 July Order (in the absence of reasons, there is no indication of what the court itself considered the effect to be), although any such order would have been inconsistent with the court's

remanding of the relief sought in prayer 2.2 of the Part A notice of motion to 31 July 2024, and thus the court's deferral until then of the enquiry as to whether the applicant should be "*permitted to remain in the Republic of South Africa*" pending the outcome of Part B.

- [35] But in order for paragraph 2 of the 12 July 2024 Order to be amended in that way, at least one of the parties would have had to provide a legal justification for the amendment, and the applicant did not do so, while the first and second respondents did not even seek the amendment of prayer 2, notwithstanding being the parties detrimentally affected by that order. Nor is it immediately apparent what the basis for such an amendment would be. Uniform Rule 42(1)(a) would not be applicable, as it is apparent from the State Attorney's affidavit that the first and second respondents were present in Court on 12 July 2024, even though they had not yet had an opportunity to consider the founding papers properly; while in any event the error was not of the kind contemplated by this sub-rule, as the applicant was procedurally entitled to the order he sought and obtained.⁶ There was also not an "*ambiguity, or a patent error or omission*" as contemplated by Rule 42(1)(b). The problem was not that the court had expressed itself ambiguously or itself made an error; it was instead that the applicant had sought specific relief without apparently appreciating the consequences thereof and the court granted the applicant that relief, in the precise terms sought, thereby bringing about that unforeseen result. Rule 42(1)(c) is inapplicable as well, as the parties were not mistaken

⁶ See e.g., *Lodhi 2 Properties Investments CC v Bondev Developments* 2007 (6) SA 87 (SCA) at paras 26-27.

as to the correctness of certain facts, merely apparently oblivious of the legal consequences of the prayer in question.

- [36] It may therefore be that the only way in which paragraph 2 of the 12 July Order could be changed would be pursuant to an appeal, were one to have been brought. And if that were the case, the relief sought in prayer 2.2 of Part A of the notice of motion may, as a necessary consequence of paragraph 2 of the 12 July Order, have had to be granted in the absence of an appeal (or an application for leave to appeal), irrespective of what I considered the merits of that prayer to be. In the light of the conclusion I have independently reached above (and below) in relation to prayer 2.2 of Part A of the notice of motion, it is however unnecessary for me to consider that dilemma further. Nor is it incumbent on me to resolve the contradiction between paragraphs 2 and 3 of the Order of 12 July 2024. For there is synchronicity between the earlier order granted in respect of prayer 2.1 of the Part A notice of motion and what has now been ordered in relation to prayers 2.2 and 2.3 thereof; and that means that the divergence between paragraphs 2 and 3 of the Order of 12 July 2024 has, at least for present purposes, become moot.

THE CONSTITUTIONAL COURT'S ORDER OF 30 OCTOBER 2023

- [37] The matter was argued before me by both sides on the basis that section 34(1) of the Immigration Act was of full force and effect. The answering affidavit and heads of argument of the first and second respondents even quoted that section in full.

[38] As I discovered with rudimentary research prior to the resumed hearing on 8 August 2024, the Constitutional Court had however found subsections of section 34(1) to be unconstitutional as far back as June 2017 in *Lawyers for Human Rights v Minister of Home Affairs*,⁷ and also twice prescribed what should apply during a period afforded to Parliament to correct the defect(s), most recently doing so in a judgment delivered on 30 October 2023.⁸

[39] In the former case, the Constitutional Court's order (of 29 June 2017) read in relevant part as follows:

- "2. Section 34(1)(b) and (d) of the Immigration Act 13 of 2002 is declared to be inconsistent with ss 12(1) and 35(2)(d) of the Constitution and therefore invalid.
3. The declaration of invalidity is suspended for 24 months from the date of this order to enable Parliament to correct the defect.
4. Pending legislation to be enacted within 24 months or upon the expiry of this period, any illegal foreigner detained under s 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.
5. Illegal foreigners who are in detention at the time this order is issued shall be brought before a court within 48 hours from the date of this order or on such later date as may be determined by a court.
6. In the event of Parliament failing to pass corrective legislation within 24 months, the declaration of invalidity shall operate prospectively.
7. The Minister of Home Affairs and the Director-General: Department of Home Affairs shall, within 60 days from the date of this order, file on affidavit

⁷ *Lawyers for Human Rights v Minister of Home Affairs and Others* 2017 (5) SA 480 (CC).

⁸ *Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* 2024 (2) SA 58 (CC).

a report confirming compliance with para 5, at the High Court of South Africa, Gauteng Division, Pretoria."

[40] The order made by the Constitutional Court at the end of its judgment of 30 October 2023 read thus (omitting the costs paragraphs):

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

- (a) An immigration officer considering the arrest and detention of an illegal foreigner in terms of s 34(1) of the Immigration Act 13 of 2002 (Act) must consider whether the interests of justice permit the release of such person subject to reasonable conditions, and must not cause the person to be detained if the officer concludes that the interests of justice permit the release of such person subject to reasonable conditions.*
- (b) A person detained in terms of s 34(1) of the Act shall be brought before a court within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.*
- (c) The court before whom a person is brought in terms of para (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 para (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 para (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 para (b) or (e) must be given an opportunity to make representations to the court.

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

[41] As the record shows, there was not even an attempt to comply with the provisional regime which has been applicable, at the instance of the Constitutional Court, since 30 October 2023.

[42] Neither the DHA nor the magistrate considered whether the interests of justice permitted the release of Mr Maow subject to reasonable conditions; they instead considered it dispositive that he had no documentary proof of an asylum application or a right to live or work in South Africa and that the DHA system apparently had no record of any such application. When the present application first came before this court on 12 July 2024, there was also no analysis of that kind.

[43] In my view, the interests of justice permitted, and indeed warranted, the release of Mr Maow subject to the default conditions that I imposed, or reasonable terms and conditions furnished by the respondents within five days of the order. This was all the more if, as I was advised by applicant's counsel,

the order granted by the court on 12 July 2024 was intended to preclude Mr Maow from being deported until his asylum application had been considered; for, if that was the case, his continued detention in the interim was not justifiable when relatively strict reporting conditions could instead be imposed.

[44] Independent of the interdict enquiry engaged in above, an application of the test laid down in paragraph 1(c) of the Constitutional Court's 30 October 2023 order thus required the order that I made on 7 August 2024.

[45] When making that order shortly after the resumed hearing on 7 August 2024, I was also concerned that there had been non-compliance with paragraphs 1(d) and (e) of the Constitutional Court's 30 October 2023 order when this court had, on 12 July 2024, postponed until 31 July 2024 a consideration of prayer 2.2 of the Part A notice of motion (and thus postponed a consideration of whether the applicant should be released from detention and permitted to remain in South Africa pending the final outcome of Part B).

45.1. In terms of paragraph 1(d) of the Constitutional Court order, the court before whom a detained person first appears may, if it concludes that the interests of justice do not permit the release of such person, authorise the *"further detention of the person for a period not exceeding 30 calendar days"*. In terms of paragraph 1(e), *"If the court has ordered the further detention of a person in terms of para (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, ...”.

45.2. In the present case, Mr Maow first appeared before a magistrate for confirmation of his detention on Thursday, 20 June 2024, though the matter could not proceed then due to the absence of an interpreter, and his detention was only considered by the court on 25 June 2024. While the practical exigencies might potentially be sufficient in this instance to justify the absence of strict compliance with the Constitutional Court's requirement that the detention of a foreigner be confirmed by a court within 48 hours,⁹ the period of further detention permitted by paragraph 1(d) of the Constitutional Court (a maximum of 30 calendar days) should, in fairness to the applicant, be calculated with reference to the first court appearance (20 June 2024). Accordingly, the magistrate before whom Mr Maow appeared on 25 June 2024 could only authorise his continued detention for a period up until 20 July 2024 at the latest (even if satisfied that the interests of justice did not permit his release, something which Mr Lendor did not consider).

⁹ In terms of paragraphs 1(b), 1(c) and 1(d) of the Constitutional Court's 30 October 2023 order, the magistrates' court should have considered within 48 hours of Mr Maow's arrest on 19 June 2024, and thus by 21 June 2024, whether the interests of justice permitted his release; alternatively, have authorised his further detention. As Mr Maow is a Somali national who speaks limited English, that appears not to have been reasonably possible in this instance, as there was no interpreter present when he appeared in court on 20 June 2024, and the matter therefore had to be remanded until one could be secured. As an interpreter was available on 25 June 2024, Mr Maow's further detention was considered then. While it is not explained what steps, if any, were taken to try to secure an interpreter for an earlier date (more particularly, on 21 or 24 June 2024), it may well be that this constituted sufficient compliance with the Constitutional Court's order given the likely difficulties of securing the presence of a Somali / English interpreter in the Caledon Magistrates' Court.

45.3. Although the Form 30 was not properly completed, it would, as mentioned earlier, seem that the applicant was intended to come before the court again on 11 July 2024 in order for his detention to again be considered by the magistrates' court. The court did not however consider the matter on that day, in part because the present application was due to be heard in the High Court on the 12th of July. Nor did it deal with it again.

45.4. When the present application was heard in this court on 12 July, the Court should therefore have considered on that day whether the interests of justice permitted the release of the applicant, subject to reasonable conditions; or, at the very least, ensured that this question was considered by the court by 20 July 2024 (which would have meant a court hearing on or before Friday, 19 July 2024). The Court could not, consistent with the Constitutional Court order, have postponed the matter until 31 July 2024, and thus brought about a situation in which Mr Maow's further detention was not considered until a period of 41 calendar days had passed since Mr Maow first appeared before a court in order for his detention at the instance of the DHA to be judicially considered.

[46] For this reason, too, I considered it to be in the interests of justice that an order be made as soon as soon as possible after the hearing on 7 August 2024, releasing Mr Maow from detention.

CONCLUSION AND COSTS

[47] There were accordingly various bases for the substantive order that I handed down on 7 August 2024, after considering the parties' further affidavits (which were admitted) and hearing the parties' further argument.

[48] As to costs:

48.1. As noted, the Court on 12 July 2024 ordered that the costs of Part A should stand over for determination at the hearing of Part B.

48.2. That was a procedural order, regulating when the this court would determine the question of the costs of Part A. The court made no finding at all regarding the costs order which was appropriate in respect of Part A – and it would also clearly have been premature to have done so given that the respondents had not yet been afforded an adequate opportunity to deliver an answering affidavit, and the court had also not yet considered a key component of Part A. That order was consequently a purely interlocutory one, capable of being revisited by the court before final judgment,¹⁰ more especially in the context of a determination of the remaining relief sought in Part A.

48.3. For the reasons given above, I am satisfied that the applicant made out a case for interim interdictory relief and that it was also anyway in the

¹⁰ See *Hassim v Commissioner, South African Revenue Service* 2003 (2) SA 253 (SCA) at para [15]; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549F - 551A.

interests of justice for him to be released from detention. The applicant was moreover compelled to come to court to seek such relief urgently given the intransigent and uncommunicative approach of the DHA as outlined in allegations in the founding and replying affidavits which effectively stood uncontroverted (the relevant paragraphs in the founding affidavit only being disputed in general, sweeping and unsubstantiated terms, which did not create a genuine dispute of fact). Importantly, too, the DHA and the magistrate disregarded the Constitutional Court order of 30 October 2023, and the Minister of Home Affairs and the Director-General compounded that failure by not even mentioning the Constitutional Court's order in their papers filed of record, instead approaching the matter on the patently incorrect basis that the parties' respective rights and obligations were set out in a statutory provision which had been declared unconstitutional some seven years earlier. That flouting of a Constitutional Court order in a case in which the Minister and Director-General were applicants is deserving of censure.

48.4. In the circumstances, I considered it appropriate that the first and second respondents pay the applicant's costs in respect of Part A,¹¹ and that the applicant not have to wait until the determination of Part B

¹¹ The first and second respondents themselves sought costs in respect of the Part A relief being dismissed, and thus effectively approached the matter on the basis that the costs of Part A should follow the result.

(which may in any event not have to be persisted with in the light of this judgment, or the DHA accepting the applicant's version).

48.5. I therefore made an order to that effect on 7 August. Insofar as it may not have been clear from the wording of that order that the costs award merely related to Part A, any such ambiguity may legitimately be cleared up in terms of Rule 42(1)(b), as that lack of clarity would have been attributable to infelicitous language in the Court's order, attributable to the court, which did not reflect its true intention.¹² To the extent that it may be necessary to do so, and make any practical difference (which I doubt, as the papers before me effectively only dealt with Part A and the costs order could hardly have been interpreted as covering future developments), I hereby clarify that the costs award in paragraph 3 of the Order of 7 August 2024 was intended merely to relate to Part A and that the first line of that paragraph was intended to convey the following (the words between square brackets having been inserted for the sake of clarification): "*The first and second respondents are to pay the costs of [Part A] of this application jointly ...*".


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¹² Cf. e.g., *Seattle v Protea Assurance Co. Ltd* 1984 (2) SA 537 (C) at 541; *Mostert NO v Old Mutual Life Assurance Co. (SA) Ltd* 2002 (1) SA 82 (SCA) at para [5].

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