

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 14238/21

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

Date: 20 March 2025

E van der Schyff

In the matter between:

MINISTER OF HOME AFFAIRS

DIRECTOR GENERAL OF HOME AFFAIRS

and

LAWYERS FOR HUMAN RIGHTS

LEGALWISE SOUTH AFRICA (PTY) LTD

CHILDREN'S INSTITUTE

In re:

PHINDILE PHILILE MAZIBUKO

LAWYERS FOR HUMAN RIGHTS

First Applicant

Second Applicant

First Respondent

Second Respondent

Amicus Curiae

First Applicant

Second Applicant

LEGALWISE SOUTH AFRICA (PTY) LTD

Third Applicant

CHILDREN'S INSTITUTE

Amicus Curiae

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR GENERAL OF HOME AFFAIRS

Second Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] This is an application by the first and second applicants, the DHA, for the extension of the suspension of a declaration of invalidity. The initial order was granted on 16 January 2024. The parties agreed to the extension of the declaration of invalidity to 28 March 2025 for this application to be heard on 12 March 2025. A 'by-agreement' draft order was emailed for my attention on 14 January 2025. I considered the draft order on 14 January 2025. I proposed minor amendments by electronically circulating the proposed draft order between the parties for their input on 15 January 2025 since the order was proposed by agreement. I signed the draft order on 16 January 2025. This will be revisited in the background discussion below.
- [2] The issues to be considered in this application are (i) the court's authority to extend the declaration of invalidity to 28 March 2025 and the validity of the by-agreement order dated 16 January 2025, and (ii) the merits of the current application.
- [3] In determining the first issue, the court's authority to have granted the extension to 28 March 2025, it is necessary to consider the background preceding the 'impugned' extension of the suspension of the declaration of invalidity.

Background

[4] Due to the challenge raised against this court's authority to have extended the suspension of the declaration of invalidity to 28 March 2025 for the sole purpose of this application to be heard, I have to set out the events preceding the granting of the order.

[5] On 16 January 2024, an order was granted in, among others, the following terms:

'2. It is declared that the placing of markers by the Department of Home Affairs, against identity numbers or identity documents (hereafter collectively referred to as identity numbers) resulting in the blocking of identity numbers (the affected identity numbers);

2.1 In the absence of fair administrative process preceding the placing of such markers against the affected identity numbers, and/or

2.2 before any final decision is taken relating to the affected individual's status as a South African citizen or permanent resident, in the absence of any empowering legislation having been promulgated

constitutes unjust and irregular administrative action that is inconsistent with the Constitution and therefore invalid.

3. Subject to paragraphs 5 and 12 below, the declaration of invalidity in paragraph 2 above is suspended for a period of 12 months from the date of this order, for the sole purpose of allowing the Department of Home Affairs;

3.1 to determine whether any identity number against which a marker have been placed before November 2022 and which to date remain blocked, correctly reflect the particulars of the person to whom the identity number was assigned,

alternatively

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

failing which the blocks shall be uplifted.'

[6] Paragraph 6 of the order granted on 16 January 2024 reads as follows:

'In the event of the second respondent being unable to timeously finalise the steps necessary to give effect to the orders in paragraphs 3 and 5 above, the second respondent is granted leave to approach Van der Schyff J, or any other judge appointed by the Deputy Judge President of this Division, on the same papers and after due notice to the applicants and the *amicus*, for an extension of the periods mentioned in the said paragraphs. An application for extension must be supported by an affidavit wherein the following is set out in detail:

- 6.1 the number of identity numbers that were blocked at the time of the granting of this order;
- 6.2 the steps taken to procure the unblocking of identity numbers;
- 6.3 the reason(s) why the remaining identity numbers remain [un]blocked;
- 6.4 the remaining number of blocked identity numbers;
- 6.5 the proposed steps to be implemented to ensure the blocks are uplifted; and
- 6.6 the proposed timeframe for the finalisation of the process.'

[7] The applicants in the application, collectively referred to as the DHA, decided to apply for an extension of the suspension of the declaration of invalidity. They approached the Deputy Judge President in January 2025 for a directive as to when and how the matter could be heard since the court was still in recess by then.

- [8] The minutes of the meeting reflect that an urgent case meeting was scheduled with the Deputy Judge President for the purpose of complying with the order granted on 16 January 2024. The DHA indicated that their biggest concern was that the twelve-month suspension period would lapse at the end of January 2025 or February 2025 (depending on which interpretation wins the day). I pause to note that the parties are now in agreement that if regard is had to the date on which the order was granted on 16 January 2024, the suspension period would have run out by midnight on 15 January 2025. The minutes further reflect that the sole reason for bringing the extension application on an urgent basis was for the application to 'be heard technically' before 16 January 2025, which is the day the judgment was delivered the previous year. The application was not yet issued when the case management meeting occurred, but the DHA indicated it would be issued soon thereafter.
- [9] At the meeting with the Deputy Judge President, Advocate Simonz, counsel for LegalWise South Africa, raised the issue that he was of the view that it would be pragmatically impossible to file all the relevant papers within a short period before 16 January 2025 and proposed that the DHA file their papers promptly so that the parties can agree to a short extension (not longer than six weeks) to allow for the filing of papers.
- [10] The minutes similarly reflect that Advocate Bhima, appearing on behalf of Lawyers for Human Rights, indicated that he had no objection to the period of suspension being extended pending the finalisation of the extension application. He, however, raised two concerns, namely whether the parties can extend the declaration of constitutional invalidity by agreement, and whether it is possible for a court order to be granted absent an application before the court.
- [11] The DJP agreed with Adv. Bhima that the DHA needed to issue their application before the draft order could be considered and directed the DHA to file their application before 14 January 2025. He confirmed that the matter would be case-managed and heard by myself and directed the parties to prepare a draft order to be delivered to his office. He would ensure that I received the order to consider the draft order and exercise my discretion on making the draft order an order of court.

- [12] On 13 January 2025 at 16h28, the DHA emailed a copy of the minutes of the case management meeting and the proposed draft order to the office of the Deputy Judge President. The DHA confirmed that they have served and uploaded the application for extension as directed by the Deputy Judge President. The said documentation was emailed to me on 14 January 2025.
- [13] As stated, I considered the draft order on 14 January 2025. On 15 January 2025, I proposed minor amendments by electronically circulating the proposed draft order between the parties for their input since the order was a by-agreement order. In the email sent to the parties through my registrar, the following was, among others, communicated,
- ‘Please find attached the proposed draft order, with minor amendments by Van der Schyff J. If any party has any reservation regarding the terms of the order, such reservations must be communicated by return email and by the latest by 14h00 today, failing which an order will be granted in the terms in the draft order.’
- [14] Neither party had any reservations regarding the proposed amendments. I signed the hardcopy order (referred to hereafter as the interim extension order) on 16 January 2025. I pause to note that I also identified three possible dates for a case management meeting since the Deputy Judge President stated that I must confirm whether any party objects to my continued involvement in the matter. The case management meeting took place on 31 January 2025. During this case management meeting, the parties confirmed that they do not foresee any obstacle in the matter proceeding on 12 March 2025 and that they do not have any reservations about the meeting continuing before me. During this meeting, Advocate Bhima confirmed: ‘the order we had agreed to extend the suspension until the 28th.’
- [15] When the matter was heard on 12 March 2025, the respondents took issue with the validity of the interim extension order dated 16 January 2025. They submitted that it is a nullity because, according to them, it was factually extended only on 16 January 2025 when I signed and dated the order. By that time, the respondents submitted, the suspension of invalidity had lapsed, and it could not be revived.

- [16] This challenge to the court's authority is raised in a particular and unique context. Due to the parties' agreement that the proposed draft order could be made an order of court once the extension application was issued and served, they agreed to forego a physical or virtual hearing. The court was thus seized with considering the by-agreement draft order providing for an interim extension of the suspension period on 14 January 2025, when I received the proposed draft order. The parties were fully apprised of the terms of the order and, in fact, again agreed thereto, on 15 January 2025. In these circumstances, I am of the view that the dating of the order is inconsequential.
- [17] Since the issue is raised, however, the first, crisp issue to be considered is whether, in the context of this application, the suspension period could lapse while the court was seized with the application.

The challenge to the court's authority to have granted the order signed and dated 16 January 2025

The parties' respective submissions

- [18] Neither the Lawyers for Human Rights ("LHR") nor LegalWise South Africa ("LW"), the respondents in this matter, raised the issue of the court's authority to have granted the interim extension application in their answering affidavits, which were filed subsequently and in terms of the order dated 16 January 2025. The issue is first raised in the respondents' respective heads of argument.
- [19] Both LHR and LW drew attention to the fact that the initial extension period would have expired on 15 January 2025. Both rely on the by-now entrenched principle that while a court is empowered to extend the period of suspension of a declaration of constitutional invalidity before it expires, it cannot do so after the suspension period has expired. In the result, and with reliance placed on the Supreme Court of Appeal's judgment in *The Master of the High Court (North Gauteng High Court, Pretoria) v*

*Motlala NO and Others*¹ the respondents submit that the interim extension order is a nullity and amounts to 'no order at all'. Because the interim extension order amounts to no order at all, the respondents contend, the granting of the interim order was inconsistent with the Constitution and, therefore, invalid.

- [20] The DHA emphasised that the interim extension was agreed to between the parties and consented to prior to 16 January 2025. The DHA submits that the court accepted the order to be made by agreement and indicated that the order will be granted in the terms set out therein already on 15 January 2025. The DHA took issue with the respondents' *modus operandi* by raising this point of law only in its heads of argument and submitted, relying on *Njongi v MEC, Department of Welfare, Eastern Cape*,² that it was 'simply irregular and incompetent' for the respondents to raise the point in their heads of argument and at the hearing only.
- [21] In its supplementary heads of argument, DHA eludes thereto that the draft order was generated by the LHR and circulated amongst DHA and LW after the parties held discussions subsequent to the case management meeting with the Deputy Judge President. The DHA submits that in the circumstances, it is opportunistic and disingenuous of the respondents to raise the issue of the court's authority. The DHA contends that the signing of the order on 16 January 2025 occurred as an error that can be rectified in terms of rule 42(1) of the Uniform Rules of Court.
- [22] The DHA submitted that the respondents' view that the interim extension order is a nullity and should be declared null and void, is incorrect in law. With reliance on *Department of Transport v Tasima (Pty) Ltd*³ and *State v Zuma*,⁴ the DHA contended that court orders are binding until set aside by a competent court and that wrongly issued judicial orders are not nullities.

¹ 2012 (3) SA 325 (SCA) at para [14].

² 2008 (4) SA 237 (CC).

³ 2017 (2) SA 622 (CC).

⁴ [2021] ZACC 18. Reliance was also placed on *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* 2023 (4) SA 421 (CC) at par [23].

Discussion

- [23] The factual context within which the court's authority to have granted the interim extension order is challenged, comprises the following:
- i. The parties agreed to forego a hearing on whether the interim extension order should be granted;
 - ii. A date was set for the hearing of the extension application;
 - iii. The parties reached an agreement that the suspension of the declaration of invalidity be extended in the interim already on 10 January 2025;
 - iv. The by-agreement draft order and extension application were before the court for consideration on 14 January 2025, and it was indeed considered;
 - v. It was communicated to the parties on 15 January 2025 that an order in the terms circulated would be granted;
 - vi. None of the parties deemed it necessary to emphasise, or remind the court of the 'importance' of finalising the matter on 15 January 2025;
 - vii. The order was signed on 16 January 2025.
- [24] Despite my view that the dating of the order in the circumstances of this specific matter is inconsequential, the dating of the order cannot be described as an administrative error. The factual position is that the hard copy order was signed on 16 January 2025 and stamped by the Registrar on 20 January 2025. If the matter were heard in court on 15 January 2025, the order would, in all probability, have been granted in court as the parties would have been able to iron out the minor amendments there and then. Counsel for LHR is, however, correct that notwithstanding whether the court intended to grant the order in the proposed terms, and communicated it as such to the parties, it was not communicated to the parties that the order was indeed granted on 15 January 2025, and the order is dated 16 January 2025.
- [25] This renders it necessary to consider the question of what the effect is if it is accepted that the order was only formally granted on 16 January 2025. The challenge raised to the court's authority to have granted the interim extension order, and the submission that the order is null and void as it was granted after the suspension

period lapsed, raises a fundamental question of principle. This question is whether a period of suspension can lapse while a court is seized with an extension application that was issued by the applicant, enrolled by agreement, and considered by the court before the period of suspension lapsed, but the judgment or order is handed down after the date on which the suspension would have lapsed or expired. This situation is to be distinguished from the situation where the application was not timeously issued, or timeously issued but not heard by a court before the suspension period lapsed.

- [26] In *Ex Parte: Minister of Social Development and Others*⁵ Van der Westhuizen J explained that the period of suspension lapsed before the application **was heard**, as a result of which the applicants could no longer seek an extension of an existing suspension order. In *Ex Parte: Minister of Social Development*, the extension application was lodged with the court on the eve of the expiry date. It was not possible to convene the court to consider the application.⁶
- [27] I am aware that the Constitutional Court in *Zondi v MEC for Traditional and Local Government Affairs and Others*⁷ and *Speaker of the National Assembly and Others v New Nation Movement NPC*⁸ issued its respective interim extension orders before the suspension periods lapsed. Although the Constitutional Court was at pains to ensure that the interim extension orders were granted before the dates on which the respective suspension periods would in the ordinary course have lapsed, this cautionary approach in itself does not provide an answer to the question as to whether a time period can lapse or expire while a court is considering an extension application.
- [28] The DHA's extension application and the by-agreement draft order came before me on 14 January 2025. By agreement between the parties, it was sufficient for the extension application only to have been issued and placed before the court for an

⁵ 2006 (4) SA 309 (CC) at para [27].

⁶ *Ex Parte: Minister of Social Development*, *supra*, at para [51].

⁷ 2006 (3) SA 1 (CC).

⁸ 2023 (7) BCLR 897 (CC).

interim extension by-agreement order to be considered. Any denial of the existence of an agreement to provide the court with a draft order extending the suspension period to 28 March 2025, is refuted by the objective facts and utterances made, among others, during the virtual case management before me.

- [29] The court took jurisdiction over the matter and became actively involved in assessing it and exercising its discretion on 14 January 2025. In short, the court was seized with the matter. As used here, the term 'seized' signifies that the court has officially accepted the case and is now obligated to pronounce on it. The matter became sub-judice in the true sense of the word.
- [30] When an application is being considered by a court, it can be said to enter a judicial vacuum or time capsule where it is not affected by the passing of time. The running of time periods, as far as it is affected solely by the matter being considered by the court, is paused or suspended while the court controls the case and considers the appropriate outcome. I must add a qualification, the fact that a matter is considered by a court does not necessarily automatically suspend any time periods that a party must otherwise adhere to as dictated by the facts of the particular matter. The court must, however, consider the application of the facts and in the context as it existed at the time the matter came before it for consideration. When this matter came before the court, the suspension order had not yet lapsed.
- [31] An analogy may perhaps be drawn with reference to a *rule nisi*. A *rule nisi* has a fixed period of validity. Once that period of validity has expired, the rule lapses.⁹ The practice often followed when a matter is argued on the return date, and the order is reserved to be granted in the near future, is not to formally extend the return date but merely to hand the order down when the matter has fully been considered and the judgment is ready.
- [32] To hold otherwise would refute the interests of justice, and may result in absurdity. It would also deprive an affected applicant of access to justice. If the suspension

⁹ Rule 27(4) of the Uniform Rules of Court provides for the revival of a *rule nisi* that have been discharged by default of appearance by the applicant, but that does not find application in the current scenario.

lapsed while the court considered the matter, through no fault, action, or inaction of DHA, after the parties agreed to an interim extension, in circumstances where the agreement between the parties negated the need for any hearing or for the court to consider whether the interim extension application meets the requirements to be heard as an urgent application, DHA would be deprived of an opportunity to have its application pronounced upon. If the respondents are correct, DHA would also not be able to appeal the lapsing of the suspension period whilst the matter was in the court's hands, since no order exists. The injustice that is exuded by such a situation is tangible.

- [33] In a democratic society based on constitutional values, courts, among others, constitute a dispute-resolving mechanism. In this context, the primary function of courts is to settle disputes and dispense justice. In discharging these functions, judges analyse and determine the facts on which their decisions are based, interpret the law, and apply the applicable legal principles and law to the facts of the matter under consideration.

- [34] It is imperative to the rule of law that judicial independence is jealously guarded, that judges remain impartial towards the parties of a dispute, and enact 'neutral' justice. If a time-period or the suspension of a declaration of invalidity can lapse while an extension application is being considered by a court, it places the court in the midst of the dispute and changes the role of the judge to that of a functionary or administrator on whose actions or inactions the success of a party's case pivots. It traverses the constitutional boundaries set by the principle of separation of powers. Judges adjudicate; they do not add to the factual matrix of a matter that dictates a particular outcome.

- [35] This brings me to the submission that the order dated 16 January 2025 is a nullity. Even if the respondents are correct in contending that the suspension period lapsed, and as indicated above, I am convinced that they are not, it is not for this court to second guess the validity of an order granted by it. For a court to pronounce on the validity of its own orders is untenable. It is trite that court orders are binding until set

aside by a competent court.¹⁰ The Constitutional Court definitively decided this issue in *Department of Transport and Others v Tasima (Pty) Ltd*,¹¹ when it held:

‘Surely the authors of the Constitution viewed Judges as equally human. The creation of a judicial hierarchy that provides for appeals attest to this understanding. Like administrators, Judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact, and may have legal consequences.’¹²

- [36] In the absence of this court’s order dated 16 January 2025 being challenged and set aside by a competent court, and in light of the order being acquiesced to by the respondents who subsequently filed their answering papers guided by the timelines set out in the order, the challenge to the court’s authority to have granted the by-agreement order dated 16 January 2025, and the concomitant extension of the suspension of the declaration of invalidity stands to be dismissed.

The merits of the extension application

- [37] A court may grant an extension pursuant to its powers to grant a just and equitable remedy.¹³ An application for an extension must be granted if the court considers it to be in the interests of justice.¹⁴
- [38] In considering an application for the extension of the period suspending a declaration of constitutional invalidity, a court should have regard to, among others,
- i. The sufficiency of the explanation for failing to correct the impugned defect in the prescribed time;
 - ii. The potential prejudice if the extension is not granted;

¹⁰ *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* 2023 (4) SA 421 (CC).

¹¹ 2017 (2) SA 622 (CC).

¹² *Tasima*, *supra*, at para [182].

¹³ See, among others, *Minister of Justice and Correctional Services v Ramuhovhi and Others* 2020 (3) BCLR 300 (CC) (26 November 2019).

¹⁴ *Ramuhovhi*, *supra*, at para [9].

- iii. Prospects of remedying the defect during the period of suspension and
- iv. The need to ensure functional and orderly state administration for the benefit of the general public.¹⁵

[39] In the order handed down by this court on 16 January 2024, it was expressly stated that an application for extension must be supported by an affidavit wherein the following is set out in detail:

- i. the number of identity numbers that were blocked at the time of the granting of this order,
- ii. the steps taken to procure the unblocking of identity numbers;
- iii. the reason(s) why the remaining identity numbers remain [un]blocked;
- iv. the remaining number of blocked identity numbers;
- v. the proposed steps to be implemented to ensure the blocks are uplifted; and
- vi. the proposed timeframe for the finalisation of the process

[40] DHA stated that it is crucial for the court to understand the complexity of the process around the unblocking of an identity number and the critical importance of information gathering for the DHA to either responsibly unblock an identity number or to bring an application to retain the block. DHA explained that the bulk of the remaining blocked identity numbers mainly fall into one of two categories, the first being duplicate identity numbers, where two or more persons hold the same identity number or one person has multiple identity numbers, or secondly, illegal immigrants, where the person holds a South African identity number but has been flagged in the DHA system as an illegal immigrant.

[41] The extent of the situation became apparent with the introduction of fingerprint biometrics. The purpose of the markers, DHA now explains, was to require affected individuals to come forward to have the situation regularised by producing documentation confirming the individual's identity. Where the necessary confirmation was obtained, a marker would be uplifted or a new identity number issued. The DHA conceded that in some cases where individuals came forward, it took an inordinate time to consider the case, but states that in most cases, affected

¹⁵ *Ramuhovhi, supra*, at para [9].

individuals did not come forward. Since the DHA does not have current information about the whereabouts of each individual for contact purposes, the co-operation of the affected persons is required to deal with the issues expediently.

- [42] After the order was granted on 16 January 2024, the DHA's review, analysis, and risk assessment were aligned with the court order. DHA did not budget for this project, and funds in the amount of R1.12 million earmarked for other projects had to be redirected. Letters, which the DHA refers to as PAJA letters, were prepared, printed, and distributed. This process was laborious and not without its challenges. The exercise eventually proved to be unsuccessful due to the large number of unserviceable addresses of proposed recipients.
- [43] Due to the failure of this process notices were published in the Government Gazette of 16 August 2024 inviting affected persons to submit representations to the DHA. This also did not bear any meaningful success as DHA only received 3054 emails from affected individuals by the closing date of 30 September 2024.
- [44] The DHA then implemented further steps, which were described as 'mobilization, confrontation, and negotiation with all the relevant stakeholders, both in the private and public sectors, to obtain any relevant information.' DHA executed 'internal organizing information sessions and webinars with the view to engage the members of the public.' A total of 2 714 individuals visited the DHA offices to make representations. Approximately 124 markers were resolved and uplifted, 27 cases were rejected, 116 cases were traced as illegal immigrants, and 2184 cases are in progress as DHA awaits documents from the affected individuals.
- [45] The DHA explains that substantial time and resources were invested in giving effect to the court's order that the DHA had to remove, with immediate effect, any blocks imposed on the identity numbers of all minor children whose parents' status as South African citizens or permanent residents has not finally been revoked or withdrawn.
- [46] The DHA sets out the administrative processes it implemented and describes its challenges in broad strokes. After considering the information in its possession regarding the remaining blocked identity numbers, the DHA decided that removing

it would pose a security risk as they form part of identity number holders who hold duplicate identity numbers (approximately 490 667) or illegal foreigners (approximately 126 519). The DHA intends to file court applications regarding substituted service for PAJA notices, launch a media campaign in this regard, adjudicate documentation received, and obtain court orders to authorise the identity numbers of affected persons to remain blocked, where required.

- [47] The DHA has recently been joined by the South African Social Security Agency (SASSA), which undertook to verify if any of the 687 323 individuals whose identity numbers remained blocked are beneficiaries of the social grants offered by SASSA. In January 2025, the State Security Agency also expressed interest in assisting DHA in verifying and assessing whether the remaining blocked identity numbers pose a security risk to the state's system.
- [48] The DHA considered the steps that need to be taken in this regard and indicates that a 24-month extension of the suspension of the declaration of invalidity is required.
- [49] DHA accentuated throughout the founding affidavit that the only effective way through which it can make responsible decisions in regard to the unblocking of identity numbers is for affected persons to come forward to the DHA with documentation and biometrics. Despite being invited through different avenues, the vast majority of affected persons fail to cooperate.
- [50] The DHA stressed that it would suffer immense prejudice if the suspension period is not extended and it is required to uplift the remaining markers on the identity documents of the 687 323 affected individuals. The prejudice that stands to be suffered will extend beyond the borders of the country and will affect every state department that relies on the National Population Register. The security risks posed by the affected markers indiscriminately being uplifted were again stressed. The DHA contended that any prejudice that affected persons may suffer is outweighed by the prejudice the DHA and the country stands to suffer presently and in the long term

[51] Lawyers for Human Rights (LHR) stated in its answering affidavit that it does not, in principle, oppose an extension of suspension of the period preceding a declaration of invalidity. They took issue with DHA's approach of seeking an extension at the eleventh hour. LHR opposes this application because, in his affidavit, the Director-General:

- i. Speaks in broad and sweeping terms and fails to provide the court with detailed information regarding steps taken;
- ii. Fails to present 'any semblance of a proposed plan' to resolve the blocked ID issue;
- iii. Contradicts himself and changes his version across the numerous versions filed since the inception of the main application.

[52] LHR highlights that the 'uplifting of a block' does not automatically result in restoring a functional identity and that it is ineffective and worthless without the correction of fingerprint biometrics.

[53] LegalWise South Africa (LW) does not oppose granting a limited extension to DHA but contends that the 24-month extension sought is extraordinary and excessive. LW contends that the explanations proffered by the DHA are, for the most, vague and sweeping. LW points out that the DHA website dealing with identity documents does not advise visitors of the problem of ID blocking or what to do if they fear or suspect that their identity documents are blocked. The link, which purports to allow visitors to verify, among others, duplicate identity numbers, is dysfunctional. LW criticised DHA's approach of publishing the notice referred to above in paragraph [44] only in the Government Gazette and for affording people only 30 days to make representations. LW doubts whether 24 months will be sufficient to accommodate the court processes foresaw by DHA. LW proposes that the DHA should spend their time, effort, and taxpayer's money on a fair administrative process and take final decisions rather than desperately seeking court authorisation to keep blocks intact for the interim. Administrative processes are generally quicker, more cost-effective, and less formal than court proceedings.

- [54] The Children's Institute was admitted to the proceedings as *amicus curiae* to draw the court's attention to the plight of children affected by the practice followed by the DHA of placing markers against identity numbers that caused the identity numbers to be blocked. The Children's Institute is, however, not a party to the proceedings and cannot evolve into a party before the court because it is actively pursuing to realise the interests of its clients. The court is also in this application seized with an application to extend the suspension period of the declaration of invalidity. No counter-applications were issued. The court is thus bound to consider the relief sought in the notice of motion and cannot stray to consider issues that might be ancillary to the main dispute with the DHA but that are not sought in the notice of motion. The Children's Institute's contribution is valuable insofar as it sheds light on the plight of children and what it perceives as the shortcomings of the DHA's approach.

Discussions

- [55] During the litigation that led to the judgment and order of 16 January 2024, the DHA conceded that blocking IDs without a fair and just administrative system is inconsistent with the Constitution. The DHA claimed already in January 2024 that it is developing a procedurally fair system that will introduce and implement a transparent process that will still entail placing markers or blocking IDs.
- [56] This court has already expressed the view that:

'[t]he existing legal framework does not provide for placing a marker against an ID that will inevitably result in the concerned individual's ID being blocked during the investigation stage of an inquiry. A mere suspicion that the ID does not correctly reflect the particulars of the person to whom it was issued because the ID might have been fraudulently obtained does not justify the blocking of the ID in the current legislative framework.'

The blocking of an ID during the investigative phase of an inquiry relating to the legitimate issue of an ID inherently limits an individual's constitutional rights. It should be authorised by a law of general application. Unless the blocking of an ID during the investigative stage is authorised in terms of a court order, the respondents [DHA] act *ultra vires* the current empowering legislative framework'.¹⁶

[57] The suspension of the declaration of invalidity was subject to, among others, a restriction on instilling new markers that may result in an ID being blocked. For this reason, it was made subject to paragraph 12 of the order of 16 January 2024.

[58] I accept that this application does not concern the renewed placing of blocks against identity numbers. However, the DHA's silence on the development of any empowering legislation that will allow for the placing of markers against identity numbers resulting in identity numbers being blocked during the investigation phase, and unless and until a final decision is taken on the correctness of information reflected in the national population register regarding any suspicious identity number, is glaring.¹⁷ This is particularly so if one considers the impression created that the Standard Operating Procedure provides for markers resulting in blocks placed on IDs.

[59] Paragraph 7 of the order of 16 January 2024 reads as follows-

'The respondent shall remove, with immediate effect, any blocks imposed on the identity numbers of all minor children whose parents' status as South African citizens or permanent residents has not finally been revoked or withdrawn.'

[60] Since no appeal was lodged against the judgment and order handed down on 16 January 2024, this order stands. It is not for the DHA now to state that it first needs to verify the particulars of minor children's parents' statuses before the blocks

¹⁶ Judgment of 16 January 2024 at paras [94] and [95].

¹⁷ Paragraphs 2 and 12 of the order granted on 16 January 2024.

against the identity numbers of the minor children are uplifted. Unless and until the affected children's parents' status as South African citizens or permanent residents has not finally been revoked or withdrawn, blocks imposed on the identity numbers of all minor children need to be removed.

- [61] The court order of 16 January 2024 also directs that birth certificates be issued to minor children born to parents who are registered in the national population register as South African citizens or permanent residents. This order does not allow for parents not to attend to the prescribed procedures for having a birth certificate issued, and if it is generally required that the parent with South African citizenship or permanent residence must attend to the registration of the birth, that requirement cannot be circumvented.
- [62] Where parents currently apply to register their children's births, they must be assisted in a process that is not dependent on their identity numbers being unblocked. There is, however, no obstacle preventing the DHA from investigating the parents' status, as reflected in the impugned identity document when parents approach the DHA to register their children's birth. Until a final decision is taken regarding such parents' status, their children must, however, obtain the benefit of the doubt.
- [63] The DHA must devise a process to give effect to this order whilst keeping a record of the affected children if it becomes apparent later that they do not meet the requirements to hold South African identity numbers. The DHA faces a conundrum caused by its own actions. The South African Human Rights Commission forewarned the DHA that blocking IDs infringes on affected parties' constitutional rights, and the DHA persisted with the impugned blocking of IDs.
- [64] Despite the criticism raised above, DHA's explanation for failing to address the remaining impugned defects within the prescribed time is sufficient. DHA did not rest on its laurels. The steps taken to date might not have been as effective as initially foreseen by DHA, but again, unless the legality of actions is challenged, it is not for the judiciary to prescribe to the other branches of government how to go about their day-to-day business.

- [65] This court has already considered the risks associated with a blanket upliftment of existing blocks on identity numbers. The risks associated with an indiscriminate upliftment of the remaining blocked IDs contextualise the prejudice that stands to be suffered not only by DHA, but also on a national level, should the extension not be granted. This court also foresaw and accepted that investigating the remaining cases might be complicated and extend beyond 12 months. The papers filed both by the DHA and the LHR indicate that the full practical implications of the order were not previously apparent. The dilemma faced by the DHA because of faceless affected parties who fail to contact the DHA and who cannot be contacted because they are not traceable is echoed by the LHR's frustration of not being able to trace 52 of its clients due to a lack of contact details.
- [66] The order of 16 January 2024 provided specifically for affected individuals to exercise their rights and to approach the court for an order uplifting a block on their identity numbers. The frequency with which applicants seek the upliftment of blocks on their identity numbers in the urgent-, opposed, and unopposed motion court attests to the fact that there are affected individuals who enforce their rights. Affected individuals can thus mitigate the prejudice they face by attending DHA's offices and, in the event that they are not assisted, approach the court for relief.
- [67] The DHA is confident that it will be able to remedy the defect and address the issue of the remaining blocked identity numbers in a period of 24 months. The DHA has been facing a mammoth task since the inception of this litigation. No reason exists for this court to hold that the DHA will not be able to meet its obligation if it prioritises investigating the remaining blocked IDs and focuses its manpower and resources on resolving the issue. A shorter period will not suffice.

Costs

- [68] If it is considered that the practical problems faced by DHA cause immense frustration to affected individuals, the respondents' opposition to the application cannot be frowned upon. However, LHR's own difficulties in tracing its clients should have tempered its approach in that it should have been evident that the DHA faced

obstacles that prevented it from finalising the investigations in the twelfth-month period provided for in the order of 16 January 2024. In the process of addressing the issues of LHR's and LW's identified clients' blocked identity numbers, the obstacles faced by DHA became apparent. This process was evidently also laborious and took time. An objective un-emotive approach would have tempered the opposition to this application.

- [69] It is, however, also true that the DHA placed all the parties under immense stress by issuing this application at the eleventh hour. Cost orders should also reflect a court's disapproval with a party's conduct. For this reason, the DHA stands to pay the respondents' costs. Although the *amicus curiae* is not a party to the proceedings, its continued involvement in the matter provides important context and emphasises the plight of minor children, and the DHA should carry the costs incurred by the *amicus curiae*. No case was, however, made out for costs to be granted on a punitive scale.

ORDER

In the result, the following order is granted:

1. The challenge raised to the court's authority to have granted the order dated 16 January 2025 is dismissed.
2. The declaration of invalidity in paragraph 2 of the order of this court granted in the application under case number 14238/21 on 16 January 2024, is further suspended until 28 March 2027, subject to paragraph 12 of the same order.
3. The applicants are to pay the party-and-party costs of the respondents and the costs of the *amicus curiae*, on scale B.


 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.

For the applicants:	Adv. A.T. Ncongwane SC
With:	Adv. N. Rasalanavho
And:	Adv. B. Ledwaba
Instructed by:	State Attorney
For the first respondent:	Adv. J. Bhima
Instructed by:	Bowman Gilfillan Inc.
For the second respondent:	Adv. D. Simonz
Instructed by:	De Saude-Darbani Attorneys
For the <i>amicus curiae</i> :	Adv. L. Muller
Instructed by:	Centre for Child Law

Date of the hearing:	12 March 2025
Date of judgment:	20 March 2025