IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 2725/2025

In the matter between:

AFRICAN HAWKERS ASSOCIATION	Applicant
and	
KING SABATA DALINDYEBO LOCAL MUNICIPALITY	1st Respondent
THE MUNICIPAL MANAGER FOR KSD LOCAL MUNICIPALITY: NGAMELA PAKADE	2nd Respondent
RURAL AND ECONOMIC DEVELOPMENT: KING SABATA DALINDYEBO LOCAL MUNICIPALITY	3rd Respondent
DIRECTOR OF SAFETY AND SECURITY: KING SABATA DALINDYEBO LOCAL MUNICIPALITY	4th Respondent

JUDGMENT

ZONO AJ:

<u>Introduction</u>

[1] Applicant approached this court in terms of an application that is said to be in two parts. Part A of the application was intended to be brought on urgent basis in terms of which the interdictory relief is sought. In Part B the applicant appears to be pursuing a challenge on the constitutionality of the Municipality (KSD) By-Law on informal trading, published under local authority notice 1066 of 2024. However, applicant's notice of motion is structurally not a model of clarity in that it does not divide the relief sought in Part A from the one sought in Part B. This unorthodox and unconventional approach in the drafting of notice of motion is only clarified in the founding affidavit.

[2] In distinguishing Part A from Part B the founding affidavit is framed as follows:

> *"**<u>PART A</u>***
>
> *(d) **<u>Cause of Action</u>***
>
> *13. On or about 29th May 2025 and again the 30th May 2025, Municipal Officials acting under the authority and direction of the respondents, forcibly removed us from our lawful trading spaces in York Road and Sutherland Street in Mthatha. These removals were done without any notice, without affording the affected traders an opportunity to be heard and without a court order authorising such actions.*
>
> *14. Furthermore, during the said operation cleaning Mthatha, officials acting on behalf of the respondents confiscated various goods and equipment belonging to the traders. These items include perishable goods, clothing merchandise and other goods critical to our daily operations.*
>
> *15. The conduct of the 1st respondent's officials on both days was aggressive and intimidating, and it has left many of us in a state of fear and financial despair. Our only means of survival has been unlawfully taken from us, without any due process or a notice.*

16. *These actions constitute an ongoing and unlawful pattern of harassment directed at us, who are being systematically driven off from our places of business by Municipal Officials under the purported authority of non-existent or uncommunicated legal instruments, such as the King Sabata Dalindyebo Municipal informal trading By-Laws they keep referring to*". (sic)

[3] The relief in the notice of motion that is consistent with the set of facts outlined under Part A in the founding affidavit appears in paragraph 3.1, 3.2, 3.3, 3.4 and 3.4 which is crafted in the following terms:

"3.1 That the respondents be and are hereby interdicted, restrained and prohibited from interfering with the street trading business of the applicant's members at Sutherland(R61) Street and York Road in future without being ordered by a court to do so.

3.2 That respondents be and hereby interdicted from intimidating the applicant's members and harassing them in an attempt to stop them from trading in the aforesaid streets without obtaining a court order authorising them to drive the applicant's members from selling in these streets forthwith.

3.3 That an order be issued by this honourable court interdicting the respondents' officials and restraining them from interfering with lawful trading of the applicant's members.

3.4 That applicant further seek an interdict and restrain the respondents from interfering with applicant's members trading businesses without any court order authorised them to do so.

*3.5 The applicant further seeks an interdict and restraint court order against the respondents for interfering with their trading business of fruits and vegetables, clothes, sewing services and photocopy services at York Road and Sutherland Streets without any court order given to them to show that they have been authorised by the court."(*sic).

[4] The rest of the paragraphs in the notice of motion deal with the constitutional challenge against the By-Law relating to the informal trading, which challenge relates to Part B as demonstrated in the founding affidavit. Regarding Part B the founding affidavit states as follows:

> *"**PART B***
>
> ***THE ISSUE OF THE BY-LAWS: THEIR CONSTITUTIONALITY***
>
> *43. I wish to pause there and state, under oath, that no copy of those "purported" by-laws has ever been served or communicated to me or our members, nor has there been any consultation with the affected parties regarding their adoption.*
>
> *44. It is therefore clear that the respondents rely on laws that I am not aware of and that have not been promulgated or published in accordance with the requirements of the law and principles of administrative justice. Failure to properly communicate or publish the bylaws renders them unenforceable against me and invalid in their application to the facts at hand*" (sic)

[5] The parties agreed that the matter at this stage is for determination of interdictory relief set out or outlined in paragraph 3 herein above. Applicant's Rule 15A practice note delivered on 24th July 2025 is to the same effect. Having been directed to deal with the interdictory relief outlined in paragraph 3 herein above, I set out to discuss principles and relevant facts herein below.

Discussion and Analysis

[6] An interdict is not a remedy for past invasion of rights, but is concerned with present or future infringements[1]. It is now apposite to examine the kind of conduct the applicant seeks to prohibit. The applicant contends that on 29th May 2025 and again on 30th May 2025 KSD officials forcibly removed its members from their stalls at York Road and Sutherland Street. It is again contended that KSD officials intimidated and harassed applicant's members

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[1] ***National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*** 2008 (5) SA 339 (SCA) at 346 H-I.

on the same dates. It is therefore not apparent from the applicant's papers that applicant's members returned to their trading stalls after their removal by the KSD officials. It therefore means that, as the intimidation, harassment and interference were taking place not only in the context of the removal, but also contemporaneously with the removal of applicant's members from their trading places, all those acts were done and finished on 29th May 2025 and 30th May 2025 respectively. No subsequent conduct or utterances by the KSD officials have been alleged to have occurred.

[7] The founding affidavit is silent about the fact that the same events or acts will happen in the future, or it is reasonably apprehended that such harm is likely to occur in the future. There is no assertion pointing to the fact that presently and or in the future applicants' members will be removed, intimidated or harassed by the KSD officials. Papers, as they serve before me, demonstrate that applicants' members are at their homes or at places other than the ones from which they were allegedly removed, intimidated or harassed. My humble view is that the conducts sought to be interdicted relate to the alleged past invasions and that they cannot justifiably be interdicted. Application for interdictory relief cannot succeed on this ground alone.

[8] There is yet another reason why applicant's application cannot succeed. The applicant seemingly accepts that the interference with their business was done in terms of the KSD informal trading By-Law promulgated in 2024/2025. Paragraph 42 of the applicant's founding affidavit reads as follows:

> *"42. The respondents have claimed that their conduct is authorised by the newly adopted municipal by-laws. It is alleged that these by-laws were drafted in 2024 and passed in January 2025, and that they form the legal basis for our removal from our trading areas and the confiscation of our trading goods"* (sic).

[9] This brings me to another point. Whilst it is accepted that KSD officials were acting in terms of the informal trading By-Law, a prohibitory interdict is a remedy available for the prohibition of illegitimate activities. A court should be

loath to restrain a person from exercising a statutory power[2]. There is no justification for prohibiting the Municipality from enforcing its informal trading By-Law, especially in the light of the fact that the said By-Law is still extant, valid and enforceable. It has not been impugned or declared invalid yet. This put paid to the applicant's complaint about Municipality's interference with their business. The interference for as long as it is in terms of the informal trading By-Law, is lawful. I will return to this point in the course of this judgment. A prohibitory interdict, may be described as an order requiring a person to abstain from committing a threatened wrong or from continuing an existing one[3]. A lawful conduct of the Municipality or a conduct that is performed in terms of the Law cannot be interdicted. On this basis too this application must fail.

[10] Applicant's notice of motion together with the founding affidavit may be interpreted and understood to be seeking a final interdict. I say this because it does appear from the papers that the relief is sought to be granted without any limitation as to time. A final interdict is one which is granted without any limitation as to time.[4] It is granted in order to secure a permanent cessation of an unlawful course of conduct, or state of affairs. Regard should be had to the substance rather than the form of the relief[5]. On the other hand, an interlocutory interdict is one which is granted *pendente lite*[6]*.* It is a provisional order designed to protect the rights of the complainant party pending an action or application to be brought by him to establish the respective rights of the parties. It does not involve a final determination of the rights of the parties and does not affect such determination[7]. Its effect is to freeze the position until the court decides where the right lies[8].

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[2] ***Tiger Trading Co v Garment Workers Union*** 1932 WLD131.
[3] ***Natures Choice Properties (Alrode) Pty Ltd v Ekuirhuleni Municipality*** 2010 (3) SA 581 (SCA) at 588 B-D.
[4] ***Estate Edwards v Sinchair*** 1918 EDL 12 at 18; ***Zuurbekom Ltd v Union Corporation*** Ltd 1947 (1) SA 514 (A).
[5] ***BHT Water Treatment (Pty) Ltd v Leslie*** 1993 (1) SA 47 (W) at 55 A-F; ***Knox D' Archy Ltd v Jamieson*** 1995 (2) SA 579 (W) at 600 G- 602E.
[6] ***Botha v Maree*** 1964 (1) SA 168 (O).
[7] ***Pikoli v President of the republic of South Africa*** 2010 (1) SA 400 (GNP) at 403I-404A.
[8] ***Jordan v Penmill Investments CC*** 1991(2) SA 430E at 438F.

[11] Nothing tells me, from the relief sought in the notice of motion, that once that court order is granted it will survive for and also be limited to a specific time or period. Secondly, it does not appear both in the notice of motion and founding affidavit that the relief, if granted, will endure pending final determination of Part B. Accordingly a relief categorised as Part A is self-standing with no bearing at all to the part categorised as Part B. The distinction between the final interdict and interlocutory interdict is important for purposes of determining the requisites applicable in this application for interdict.

[12] There are three requisites for the grant of a final interdict, all of which must be present[9] namely,

> *"(a) A clear right on the part of the applicant.*
> *(b) Injury actually committed or reasonably apprehended.*
> *(c) The absence of any other satisfactory remedy available to the applicant".*

<u>Clear Right</u>

[13] The applicant relies on the provisions of section 22 of the Constitution which provides for freedom of trade, occupation and profession in the following words:

> *"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."*

Thereanent to this matter, what immediately comes out of this provision is that the right that is available in terms thereof is the right to freely <u>*choose*</u> a trade. Secondly, the practice of a trade may be regulated by law. In my view once a person chooses a trade, the matter becomes more about the practice of a trade than a choice of a trade. After the exercise of the choice, a citizen must

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[9] ***Setlogelo v Setlogelo*** 1914 AD 221.

subject him or herself to the law that regulates the practice of that particular trade. In my view this matter is more about the practice of a trade than a choice of trade. Contrary to what Ms Nyobole submitted that her client has *a right to trade freely,* a proper construction of this provision demonstrates *that the choice to trade must be made freely.* The practice of a trade must be regulated by Law. Accordingly, there is no merit in the submission that the applicant has a right to trade freely. There is authority for proposition that informal trade must be regulated by law[10]. Informal trade must comply with the law. Informal trading is subject as to the strictures of the law.

[14] Antecedent to that is the mandatory requirement of citizenship. I deal with this aspect more fully hereafter. It bears repetition that in terms of section 22 of the Constitution *"Every Citizen has the right to choose their trade."* Once that citizen chooses the trade, he or she is enjoined to subject him or herself to the laws regulating the practice of a trade. Citizenship is contextually dealt with in section 3 of the Constitution thus:

"*3.* ***<u>Citizenship-</u>***

(1) There is a common South African citizenship.

(2) All citizens are-

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) Equally subject to the duties and responsibilities of citizenship

(3) National legislation must provide for the acquisition, loss and restoration of citizenship."

This application is clearly deficient and bereft of an allegation stating the citizenship of applicant's members so as to understand if this provision is available to them. This deficiency raises a question of *locus standi.* In my view one must establish *locus standi* by alleging his citizenship if he wishes to invoke the provisions of this section. This section seeks to distinguish citizens from non-citizens. It is available to citizens. The word

[10] Section 2 of KSD Informal Trading By-Law.

citizen in the section cannot be ignored or treated as tautologous or superfluous[11]. That word must be given a meaning. One cannot treat that word as if it does not exist[12].

[15] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity[13]. The ordinary grammatical meaning of the word *citizen* is obtainable from *"South African Concise Oxford Dictionary*" to mean:

"1. A legally recognised subject or national of or commonwealth.

2. An inhabitant of a town or city."

The first definition or meaning is more apposite. It is now plain that the applicant's members have not alleged or disclosed their citizenship to ensure that the provisions of section 22 of the Constitution are available to them. With *locus standi* not having been established it stands to reason that the application is defective and cannot succeed on this basis only. Assuming that I am wrong, which is not the case, applicant's application would still fail on other grounds which are dealt with hereinafter.

[16] The second leg of section 22 of the Constitution requires that the trade must be regulated by law. Section 156 of the Constitution provide thus:

"1. A Municipality has executive authority in respect of, and has the right to administer -

(a) the local government matters listed in Part B of schedule 4 and Part B of schedule 5; and

(b) Any other matter assigned to it by national or provincial legislation;

2. A municipality may make and administer by-laws for the effective administration of the matter which it has the right to administer.

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[11] ***African Product (Pty) Ltd v AIG South African Ltd*** 2009 (3) SA 473 (SCA) Para 123; ***National Credit Regulator v Opperman & Others*** 2013 (2) SA 1 (CC) Para 99.

[12] ***Ndaba v Ndaba*** 2017 (1) ALL SA 33 (SCA); 2017 (1) SA 342 (SCA) Para 54.

[13] ***SATAWU and another v Garvas and others*** 2013 (1) SA 83 (CC; 2012 (8) BCLR 840 (CC) Para 37.

[17] Section 75 of Local Government Municipal System Act No 32 of 2000 provides:

> *"(1) A municipal council must adopt by-laws to give effect to the implementation and enforcement of its tariff policy.*
>
> *(2) By-laws in terms of subsection (1) may differentiate between different categories of users, debtors, service providers, services, service standards and geographical areas as long as such differentiation does not amount to unfair discrimination.*

[18] On 06th May 2024, under Provincial Gazette no 5095, the Municipality, having adopted the informal trading By-Law published same. I consider this By-law to be the law referred to in Section 22 of the Constitution, which seeks to regulate the practice of informal trading[14]. It seeks to ensure that the informal trading is conducted in an orderly manner. In what follows I deal with relevant provisions of the By-Law so as to determine if a clear right has been established.

[19] Section 8 of the By-Law[15] broadly prohibits informal or street trading at a place or in an area in which informal or street trading is prohibited. The section provides as follows:

> *"8.1 No person shall, within the municipal area of the King Sabata Dalindyebo Municipality:*
>
> *(a) Carry on the business of an informal / street trader:*
>
> *(i) at a place or in any area declared by the Municipality in terms of section 6A(2)(a) of the Act as a place or area in which informal / street trading is prohibited;"*

[14] Section 2 of the By-Law provides thus:

"*The object of this By–Law is to regulate informal trading in a manner which (a) ensures informal trading is conducted in an orderly manner*;"

[15] King Sabata Dalindyebo Municipality Informal Trading By-Law, 2023/2024.

[20] Section 7 of By-Law provides for restricted and prohibited areas. The section provides thus:

"(a) The Municipality may, by resolution and in terms of section A (2) of the Act, declare any place in its area of jurisdiction to be an area in which street trading is restricted or prohibited, and must, to enable compliance therewith, prescribe or make signs, markings or other devices indicating:

i. specified hours, places, goods or services in respect of which street trading is restricted or prohibited;

ii. the locations of boundaries of restricted or prohibited areas;

iii. the boundaries of a stand or area set apart for the purposes of the carrying on of the business of informal / street trading;

iv. the fact that any such stand or area has been let or otherwise allocated; and

v. any restriction or prohibition against street trading in terms of this by-law.

(b) prohibited trading area in any manner it deems appropriate and fit.

(c) Any sign erected in terms of this by-law or any other law, shall serve as sufficient notice to a street trader of the prohibition or restriction of the area concerned; and

(d) Any sign may be amended from time to time and displayed by the Municipality for purpose of this by-law and shall have the same effect as a road sign in terms of the National Road Traffic Act, 1996.

(e) Trading in the following streets is strictly prohibited:

(i) SUTHERLAND (R61) and

(ii) YORK ROAD Streets

(iii) No container allowed as places of business within the Mthatha and Mqanduli Central Business District. All business operation operated on mobile, containers must be granted Consent by local Authority.

(iv) No mobile containers allowed to obstruct pedestrians from designated walkways."

[21] It appears to be known to the applicant that Sutherland Street and York Road were declared to be restricted or prohibited to be the places or areas in which

street trading is to be conducted or carried on. Whilst paragraph 3.8 of the notice of motion deals with the passing of the resolution declaring York Road and Sutherland Street as restricted areas for trading without affording the applicants an opportunity to make representations, paragraph 3.9 and 3.10 thereof contain the following relief:

> "*3.9 That since the respondents have already declared Sutherland street and York Road as restricted areas for street trading, the respondents are hereby ordered to grant the applicant 's members trading permits and inform them the amount they have for such permits as it is only people who are selling in prohibited and restricted areas who are supposed to have permits for trading in terms of the business act. So the applicants' members cannot escape having permits for wish they have to pay for.*
>
> *3.10 That the first and second respondents are ordered and directed to issue permits to the applicants' members with the necessary payment for them to make since they are trading in an area which has been declared prohibited or restricted area for street trading as in terms of the business Act of 1993, as it is only such people operating in area which have been declared as prohibited or restricted who are to carry permits for street trading"* (sic).

[22] It admits of no doubt that the applicant and its members are aware that Sutherland Street and York Road are restricted or prohibited areas or places in or at which to carry on business of street or informal trading. In terms of section 7(e) of the By-Law the trading in the two Streets is *strictly* prohibited. The word *strictly* does not only demonstrate that the provisions are peremptory, it also demands the exactness, sternness and strictness with which the provision must be followed and complied with. Accordingly, this word must be given its ordinary grammatical meaning as failure to do so will result in an absurdity[16]. A statutory requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal

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[16] ***SATAWU and Another v Garvas and others*** 2013 (1) SA 83; 2012 BCLR 840 CC Para 37.

consequences[17]. It is unlawful to contravene peremptory provisions of section 7(a) of the By-Law. The law cannot and does not countenance an ongoing illegality. Courts have a concomitant duty to uphold the doctrine of legality, by refusing to Countenance an ongoing statutory contravention[18].

[23] It is the duty of courts to apply and enforce legislation[19]. If the validity of the legislation is not impugned there can be no justification for not enforcing it. Allowing the applicants and its members to trade in a prohibited area amounts to giving legal effects to a prohibited act[20]. An act that has been performed in violation of a statutory prohibition may, generally have no legal consequences. It is basic principle of our law that a court can never lend its aid to the enforcement of an illegal act[21]. It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect[22]. The applicant prides itself for having carried on business in the prohibited areas for the longest of times. That conduct, unlawful as it is, cannot confer any rights to the applicant and its members.

[24] The conduct of the applicant and its members is an unauthorised and illegal conduct. That conduct militates against the object of the By-Law, *to wit*, "*to ensure that informal trading is conducted in an orderly manner*"[23]. The unauthorised and illegal conduct of the applicant is *contra boni mores* and contrary to public policy and cannot be condoned by the court. It militates against the doctrine of legality, which forms an important part of our legal system, and more especially since the Constitution became the Supreme law of the country [24]. It would be unjustifiable to constrain the local authority from exercising its powers in terms of the law when exigencies of a particular case require it. That would amount to undermining the legality principle which is

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[17] ***Shalala v Klerksdorp Town Council and Another*** 1969 (10 SA 582 (T) at 587 A-C.
[18] ***Lester v Ndlambe Municipality*** 2014 (1) ALL SA 402(SCA); 2015 (6) SA (SCA) Para 23, 24 and 28.
[19] Section 165(2) of the Constitution.
[20] ***Pottie v Kotzie*** 1954 (3) SA 719 (A) at 726H-727A.
[21] ***Cool Ideas 1186 (CC) v Hubbard and another*** 2014 (4) SA 474 (CC) Para 77.
[22] ***Schierhout v Minister of Justice*** 1926 AD 99 at 109.
[23] Section 2 (a) of the King Sabata Dalindyebo Municipality Informal Trading By-Law.
[24] ***Standard bank of South Africa Ltd v Swartland Municipality*** 2010 (5) SA 479 (WCC) Para 22.

inextricably linked to the rule of law. The court is prohibited from giving licence to the performance of an illegal Act.

[25] I therefore come to a conclusion that the applicant has failed to demonstrate a clear right. Even if it can be said that I was wrong in characterising this application as an application for a final relief to come to a conclusion that the applicant must satisfy a requirement of a clear right; I would still hold that there is no right at all even at a *prima facie* level if we were to talk about an interlocutory interdict. In the light of the finding I made above, it is neither here nor there that this is an application for final or interlocutory relief; the matter of the fact is that there is no right of whatever nature that has been established or proved by the applicant.

[26] It is important to note that section 22.1 of the By-Law criminalizes contravention or failure to comply with any provision of the By-Law. Any person who contravenes or fails to comply with any provision of the By-Law shall be guilty of an offence. Trading in a prohibited area is a criminal offence which cannot conceivably give rise to any right. This disposes of any quest for a determination of a right the applicant and its members thought that they have.

[27] To bury the point, section 8(1)(i) of the By-Law prohibits any person within the Municipal area to carry on the business of an informal or street trader in an area or at a place declared as a place or area in which informal or street trading is prohibited. Section 8(g) of the By-Law prohibits carrying on business of an informal or street trader on a stand or in any area demarcated if he or she is not in possession of written proof (permit/token) that he or she has hired such a stand or area from the Municipality or such stand has otherwise been allocated to him or her. Trading from a mobile caravan or container without being granted consent by local authority is prohibited by section 8(k) of the By-Law. I have dealt above with the fact that the applicant is carrying on a business of an informal trader in a prohibited area. Thereanent to section 8(g) of the By-Law, it is a common cause that the applicant and its members have no written permit or token showing or proving

that they hired the stands or areas from the Municipality. They have not shown that the stands were otherwise allocated to them by the Municipality. In the event that they trade using mobile caravans or containers, no consent has been shown to have been given to them by the Municipality.

[28] Applicant's remedy lies with section 12 of the By-Law which deals with the application for and allocation of lease and permit/ token for street trading stands. No applications were made by the applicant or its members to the Municipality for the allocation of stands[25]. No lease agreement was entered into between the Municipality and the applicant and its members[26]. No permit or token were issued to the applicant or its members by the Municipality. In addition to section 22 of the By-Law referred to above, section 12.5 thereof makes it an offence for a street or informal trader to be unable to produce a valid lease agreement or permit or token when carrying on business of a street trade.

[29] With regard to harassment and intimidation, the contention is vehemently denied. Accordingly, Plascon–Evans Rule[27] applies.

[30] In conclusion, I find that there is an adequate and satisfactory remedy available to the applicant and its members who are trading without consent, permit or token to approach the Municipality and apply accordingly. In the circumstances applicant's application cannot succeed. Mr Maswazi, Counsel for the respondents, informed by the fact that the applicant sought to invoke constitutional provisions[28], did not insist on the general principle that costs should follow the event. He submitted that *Biowatch* principle[29] is applicable. No order as to costs shall be made.

Order

[25] Section 12.1 of the KSD Municipality informal trading By-Law.
[26] Section 12.4.1 of KSD Municipality informal trading By-Law.
[27] ***Plascon Evans Paints v Van Riebeek Paints*** (Pty) Ltd 1984 (3) SA 623 (A) at 634-635.
[28] Section 10 and 22 of the Constitution.
[29] ***Biowatch Trust v Registrar Genetic Resources and others*** 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) Para 54-60.

[31] In the result I would make the following order

31.1 The application is dismissed.

31.2 There shall be no order as to costs.

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A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

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Matter heard on **: 14 August 2025**

Delivered on **: 05 September 2025**