



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

Case number: 2025-08578

In the matter between:

KARL LARS MAGNUSSEN

First applicant

EMMA LISA CAROLIN EKSTROM

Second applicant

ELSA VALENTINA STINA MAGNUSSEN EKSTROM

Third applicant

SIGNE LEONTINA STINA EKSTROM

Fourth applicant

and

MINISTER OF HOME AFFAIRS

First respondent

DIRECTOR-GENERAL, HOME AFFAIRS

Second respondent

Coram: Van Zyl, AJ
Heard on: 11 July 2025
Order granted on: 22 July 2025
Reasons delivered on: 28 November 2025

Summary: Application for interdict – requirements for grant of interim interdictory relief – no *prima facie* right – judicial deference in considering whether state functionaries should be restricted in the exercise of their functions – similar relief previously

sought – doctrine of *res iudicata* – *issue estoppel*

ORDER

The application is dismissed, with costs, including counsel's fees taxed on Scale B.

REASONS

VAN ZYL, AJ:

Introduction

1. Should the applicants be allowed to leave the Republic and return without hinderance despite not being in possession of the required documentation?
2. The applicants¹ sought an interdict on an urgent² basis to prohibit the respondents from preventing the applicants' re-entry into South Africa upon their return from an intended journey to Sweden to visit the first applicant's ailing father. The interim interdict was sought pending the final review of an appeal³ and application for judicial review⁴ lodged by the applicants under section 8(6) of the Immigration Act 18 of 2002 and the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Through the appeal and review processes, the applicants were seeking the setting aside of the second respondent's decision to

¹ The first and second applicants are the third and fourth applicants' parents.

² The matter was initially postponed with a timetable for the delivery of papers, and by the time of the hearing it was no longer necessary to address the question of urgency.

³ Section 8(6) of the IA: "(6) *An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.*"

⁴ Instituted under case number 21610/2023.

declare them "prohibited persons" as envisaged in section 29(1)(f)⁵ of the IA, and thus "illegal foreigners" in South Africa, as envisaged in section 8(1)⁶ of the IA.

3. The notice of motion was framed in wide terms, seeking an order (pending the review and appeal) that the applicants be allowed to *"leave and re-enter South Africa freely on their valid passports and permits; the respondents are interdicted from arresting, detaining, declaring them undesirable, refusing them entry or confiscating any passport, visa permit or identity document ..."*.
4. The applicants demanded further that the respondents, within 72 hours of the grant of an order in the application, had to *"purge all existing APP or V-list blocks, remove the Applicants from the Visa Stop list, deactivate every related border alert and circulate confirmation of these steps to every port of entry so that no deportation, exclusion of other punitive measure is taken against the applicants whilst these proceedings remain pending."*
5. In oral argument counsel for the applicants conceded that the relief sought was unwieldy, and he suggested that all that the applicants were seeking was permission to leave and re-enter on a single occasion, namely an intended visit to the first applicant's family in Sweden, as well as for the purpose of a business meeting there.
6. There was some disagreement between counsel as to whether the relief

⁵ Section 29(1)(f) of the IA: "(1) The following foreigners are prohibited persons and do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit: ... (f) anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document."

⁶ Section 8(1) of the IA: "(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and- (a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or (b) in any other case than the one provided for in paragraph (a), that request shall be submitted to the Minister within three days after that decision."

sought was to be classified as interim or final relief. The applicants submitted that it was interim in nature because of the proposed narrow reformulation thereof during argument. The respondents contended that the wide relief sought in the notice of motion was interim in form but final in effect,⁷ and the applicants therefore had to prove the requirements for the grant of a final interdict (questions such as the balance of convenience would thus not arise). I did not think that it ultimately made a difference on the facts and in the context of this particular matter, but accepted in favour of the applicants that they needed to satisfy the requirements for the grant of interim interdictory relief.

7. This notwithstanding, I was of the view that the applicants failed to clear the interim interdictory hurdles. However one looked at it, there was no denying that the applicants sought far-reaching relief, which at its core would clothe them with rights which they did not have and were not entitled to. An added complication for the applicants was that this Court⁸ had since dismissed the applicants' application for judicial review upon which they had relied in their notice of motion, on the basis that they had to exhaust their internal remedies under section 7 of PAJA. All that remained was their appeal to the second respondent and, should that fail, fresh review proceedings would have to be brought. This state of affairs affected the applicants' allegations of harm, as well as the balance of convenience.
8. The grant of the relief would, moreover, prevent the respondents from carrying out their duties under the IA. This called into play the principles of the separation of powers and of judicial deference: A court may grant a temporary restraining order against the exercise of statutory or executive powers only in exceptional cases, and when a strong case for such relief has been made

⁷ See *Metlika Trading Ltd v Commissioner for SA Revenue Services* 2005 (3) SA 1 (SCA) paras 21-23.

⁸ The Honourable Justice Ndita presiding.

out.⁹ The court must recognise and assess the impact of temporary interdicts when dealing with those matters pertaining to the best application, operation, and dissemination of public resources. The question is thus not merely whether an interim interdict against a State functionary is competent, but also whether it is constitutionally appropriate to grant the interdict.¹⁰ The court must be satisfied that the applicant for an interdict in these types of cases has good prospects of success in the main review, based on strong grounds which are likely to succeed.¹¹

9. There was another elephant in the room, which related to the applicants' previous litigation against the respondents.

Res iudicata

10. The applicants had, earlier in 2025, brought a similar application in this Court to enable them to visit an ill relative overseas. An interim order was granted but their application for final relief was dismissed on 11 April 2025.¹² The applicants did not apply for leave to appeal against the decision, and it accordingly stands. There had, in fact, been another, similar application in 2019, at which stage the respondents consented to a court order allowing the applicants to see ill relatives overseas. The respondents remarked that, at the time, they "*did not know that this was a litigation strategy to force the issue and so three similar applications over 6 years*" made them see the matter in a different light.

11. In any event, in paragraph 19 of the April 2025 judgment the court held as follows:

⁹ *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) paras 41-45.

¹⁰ *National Treasury supra* para 66.

¹¹ *Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC) para 42.

¹² The Honourable Acting Justice Siyo presiding.

"I find the applicants' reliance on an apprehension that they would be deported curious given that they have failed to assert and establish a right to enter and leave the country, which if not protected by an interdict, irreparable harm would ensue. I agree with the respondents, the applicants have failed to establish a right to be admitted into the country in terms of the Immigration Act 13 of 2002.

In my judgment the applicants have failed to demonstrate an injury reasonably apprehended."¹³

12. In paragraph 22 of the judgment the court held:

"For these reasons, the applicants have in my judgment failed to demonstrate the absence of any other satisfactory remedy. The respondents have a satisfactory remedy in the appeal mechanism outlined in the Immigration Act."

13. It was common cause, both in the present matter and the previous one, that the real issue between the parties was whether the applicants had a right to demand entry into the country. The respondents contend that that issue had already been determined on 11 April 2025.

14. *Res judicata*¹⁴ is a doctrine that prevents the same parties from re-litigating the same issue that has already finally been decided by a court of competent jurisdiction.¹⁵

"[69] Res judicata strictly means that a matter has already been decided by a competent court on the same cause of action and for the same relief between the same parties. In Evins, Corbett JA stated that:

"Closely allied to the 'once and for all' rule is the principle of res judicata which establishes that, where a final judgment has been given in a matter by a com-

¹³ My emphasis.

¹⁴ A matter already judged.

petent court, then subsequent litigation between same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the exceptio rei judicatae vel litis finitae. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions.”

[70] In essence, the crux of res judicata is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed. The underlying rationale for this principle is to ensure certainty on matters that have already been decided, promote finality and prevent the abuse of court processes.

[71] The requirements of res judicata, although trite, can be summed up as follows: (i) there must be a previous judgment by a competent court (ii) between the same parties (iii) based on the same cause of action, and (iv) concerning the same subject-matter, or thing... the defence of res judicata requires that a party must establish that the present case and the previous case are based on the same set of facts that have been finalised by a competent court or tribunal by the same parties on the merits of the same cause of action.”

15. The doctrine has three key elements. The first is that the previous judgment must have been a final one. The original case must have concluded with a final judgment on the merits, not an interim or procedural ruling. In the applicants’ case, the 11 April 2025 findings of this Court were final, and disposed of the matter.

16. The second element is that the same parties must have been involved. The parties in the second case must be the same as, or in privity with, the parties in the original case. This requirement was satisfied in the present matter.

17. Third, the same cause of action must have been involved, in connection with

the same subject-matter. The second case must thus involve the same issue or legal claim as the first case. In the present matter, the applicants were seeking the same relief as previously sought on the basis of essentially the same facts. The applicants' status as "illegal foreigners" had not changed between the previous application and the present one.

18. The applicants argued that the doctrine was not applicable because the previous decision had been taken at the final relief stage, while the present application was one for interim relief. I did not think that that made a difference in this case. In *Ascendis* the Constitutional Court remarked: ¹⁶

"The Court in Bisonboard held that it is a well-established principle of our law that there is a distinction between causes of action on the one hand and legal proceedings on the other. The result of this distinction is that it is not the legal proceedings that will be terminated by res judicata, but the individual causes of action that have been decided. The High Court appears to have found that the proceedings were res judicata on the basis that the legal proceedings have a similar outcome. This is clearly wrong. The applicant relied on different causes of action and on the strength of that, the matter could not have been res judicata."

19. The applicants' causes of action in the two rounds of litigation were clearly the same, and entailed the same subject-matter. Counsel for the applicant argued that the previous application had been brought on different facts, but the only difference was, essentially, that it was the illness of another relative (not the first applicant's father) that necessitated the applicants' proposed exit from and re-entry into South Africa. The fact that the grant of the relief might be approached differently does not alter the position. In any event, the ambit of the *exceptio res iudicata* has been extended by the relaxation, in appropriate cases, of the common law requirement that the relief claimed or the cause of action be the same. This means that the "same issue" question is whether an

issue of fact or law was an essential element of the previous judgment¹⁷ As stated in *Ascendis*:¹⁸

“[111] ... The doctrine of res judicata has ancient roots as an implement of justice. It seeks to protect litigants and the courts from never ending cycles of litigation. Its strict terms applied when a later dispute involves the same party, seeking the same relief, relying on the same cause of action.

[112] But the doctrine’s roots lay in good sense and fairness. This demanded wider application, that barred repeat cycles of litigation on less stringent exaction of the “same cause of action” requirement. And that happened.

[113] And so it has become well accepted that enforcing the requirements of res judicata should yield to the facts in each case. Thus, the doctrine was enforced when a plaintiff demanded the same thing on the same ground, or (which is the same) on the same cause for relief, or further, where the same issue had been subjected to final previous judicial determination And the breadth of what is required when repeat litigation is barred is still being developed. ...”

20. The defence nevertheless remains that of *res iudicata*.¹⁹ Given the particular facts of this matter, I regarded the applicants’ application for interim relief as having been precluded by the doctrine of *res iudicata*.

The requirements for the grant of an interim interdict

21. If I was wrong in relation to the issue of *res iudicata*, I was nevertheless of the view that the applicant had not made out a proper case for an interdict. The requirements for the grant of an interim interdict are the following:²⁰

21.1 A *prima facie* right – this need not be shown on a balance of probabili-

¹⁶ *Ascendis supra* para 66 (my emphasis).

¹⁷ *Ascendis supra* para 97 (first judgment).

¹⁸ *Ascendis supra* paras 111-113 (second judgment).

¹⁹ *Prinsloo NO and others v Goldex 15 (Pty) Ltd and another* 2014 (5) SA 297 (SCA) para 10.

²⁰ See *Prest Interlocutory Interdicts* (1993) at 54-86.

ties, but is sufficiently proved if *prima facie* established though open to some doubt. The stronger the right is, the less need there is for the balance of convenience to be considered.

21.2 A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted – this is a harm that a reasonable person might entertain on being faced with certain facts, and is an objective test.

21.3 A balance of convenience favouring the grant of the interim relief – the court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is.

21.4 The absence of any other satisfactory remedy in the circumstances.

22. The proper approach in determining whether to grant an interim interdict is to take the facts set out by the applicants, together with any facts set out by the respondents which the applicants cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicants should on those facts obtain final relief at the trial (or application for final relief).²¹

23. All of these requirements must be met by an applicant seeking an interim interdict, and even if they are all met, the court still has the discretion to refuse to grant the interdict sought. By contrast, if an applicant fails to satisfy all four requirements mentioned above, the Court has no discretion to grant an interdict.

Did the applicants have a *prima facie* right?

²¹ *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688D-E.

24. In the present matter, the applicants alleged that they used to have a right to be in South Africa permanently and to enter and exit the country freely based upon the first applicant's permanent residency status, as well as the valid visas held by the second, third and fourth applicants allowing them to do so. The respondents subsequently, in about 2019, revoked this right on the basis that the documentation in question had been fraudulently obtained, and declared them "prohibited persons". It is that *prima facie* right which the applicants seek to protect while the validity of the decision is being considered in the appeal and review process. The revocation of such permit and visas directly infringed such right.

25. The applicant argued that the manner in which such revocation was decided and acted upon was unlawful and invalid. This was, amongst other factors, because in revoking the decision the respondents relied on an affidavit deposed to under section 212(3) of the Criminal Procedure Act 51 of 1977 (the CPA). reads as follows:

"(3) Whenever in criminal proceedings the question arises whether any matter has been registered under any law or whether any fact or transaction has been recorded thereunder or whether anything connected therewith has been done thereunder, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is the person upon whom the law in question confers the power or imposes the duty to register such matter or to record such fact or transaction or to do such thing connected therewith and that he has registered the matter in question or that he has recorded the fact or transaction in question or that he has done the thing connected therewith or that he has satisfied himself that the matter in question was registered or that the fact or transaction in question was recorded or that the thing connected therewith was done, shall, upon its mere production at such proceedings, be prima facie proof that such matter was registered or, as the case may be, that such fact or transaction was recorded or that the thing connected therewith was done."

26. No criminal proceedings had been instituted against the applicants, and they

contend, therefore, that the respondents could not place reliance upon the section 212(3) affidavit. The affidavit indicated that the respondents' decision was reached based upon there not being an internal record of the applicants' VAS numbers in the respondents' systems. It was thus unclear how the applicants had come to be granted permission to remain in the country from the outset, and the respondents were of the view that the applicants had not given a satisfactory explanation as to how their documents had been obtained. The applicants contended that they could not be blamed for the respondents' internal VAS numbers not corresponding with the entries on their internal systems, and the possibility exists that there was fraud within the respondents' department or its affiliated services themselves.

27. The applicants argued that similar reasoning was followed in the matter of *AK and others v Minister of Home Affairs and another*.²² The facts of that case were, however, different. The first applicant, a Russian citizen, had been found in possession of a fraudulent work visa, and declared an illegal foreigner, and was ordered to leave the country. Her children had been born in South Africa, and they, as well as her husband, were South African citizens. The practical effect of the Minister's decision was that the first applicant would either have had to leave her minor children behind in South Africa or depart with them to Russia which was in a state of war with Ukraine. She accordingly instituted an application for the judicial review under PAJA of the Minister's decision. The court granted the review application on the basis that the first applicant's version as to how she came to be in possession of the visa was effectively unopposed. The court emphasised that the "*effect of the order will merely be to uplift the declaration of prohibition to enable the first applicant to apply for a permanent residence visa. Nothing more.*"²³ It was not concerned with the question as to whether the first applicant should be allowed freely to exit and re-enter the country in the absence of the appropriate documentation.

28. It is necessary to start at the basic premise. The Constitution of the Republic of South Africa, 1996, in particular the Bill of Rights, affords South African citizens certain rights which are specifically reserved for them, while other “universal” rights are extended to all persons residing in the country, including non-citizens. In the present matter the applicants, who are currently “illegal foreigners”, sought to rely on the right to enter and leave the Republic.

29. Section 21 of the Constitution sets out the right to freedom of movement and residence:

- “(1) *Everyone has the right to freedom of movement.*
- (2) *Everyone has the right to leave the Republic.*
- (3) *Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.*
- (4) *Every citizen has the right to a passport.”²⁴*

30. The change in wording between sections 21(2) and 21(3) is telling. The Constitution is, on an ordinary reading, clear on the right to leave and enter the Republic. The right to enter is limited to citizens. It was common cause that the applicants were not South African citizens. They accordingly fell outside of the ambit of section 21(3) of the Constitution. The respondents have never attempted to prevent the applicants from leaving the country – it was their re-entry that was the bone of contention.

31. The preamble to the IA, in turn, states the following in relation to the entry of non-citizens into the Republic:

“In providing for the regulation of admission of foreigners to, their residence in, and

²³ *AK v Minister of Home Affairs supra* para 54.

²⁴ My emphasis.

their departure from the Republic and for matters connected therewith, the Immigration Act aims at setting in place a new system of immigration control which ensures that –...(f) the entry and departure of all persons at ports of entry are efficiently facilitated, administered and managed...”²⁵

32. The IA thus proceeds from the basic premise of section 21(3) of the Constitution, namely that only citizens have a right to enter the Republic. Non-citizens are required to seek permission from the respondents to enter the country if they meet the lawful requirements. Section 9 of the IA (“*Admission and departure*”) provides as follows:

- “(1) *Subject to this Act, no person shall enter or depart from the Republic at a place other than a port of entry.*
- (2) *Subject to this Act, a citizen shall be admitted, provided that he or she identifies himself or herself as such and the immigration officer records his or her entrance.*
- (3) *No person shall enter or depart from the Republic-*
 - (a) *unless he or she is in possession of a valid passport, and in the case of a minor, has his or her own valid passport;*
 - (b) *except at a port of entry, unless exempted in the prescribed manner by the Minister, which exemption may be withdrawn by the Minister;*
 - (c) *unless the entry or departure is recorded by an immigration officer in the prescribed manner; and*
 - (d) *unless his or her relevant admission documents have been examined in the prescribed manner and he or she has been interviewed in the prescribed manner by an immigration officer: Provided that, in the case of a child, such examination and interview shall be conducted in the presence of the parent or relative or, if the minor is not accompanied by the parent or relative, any person of the same gender as the minor.*
- (4) *A foreigner who is not the holder of a permanent residence permit contemplated in section 25 may only enter the Republic as contemplated in this sec-*

tion if-

- (a) *his or her passport is valid for a prescribed period; and*
- (b) *issued with a valid visa, as set out in this Act.”*

33. In relation to the issue of possible fraud in the issue of the applicants' documentation, the respondents pointed out that the applicants had never been able to provide a receipt from the relevant agency for the submission of their visa applications. It therefore did not matter whether the applicants were in fact the victims of fraud – there was no proof of the fact that they had duly submitted the required application. The fact that the respondents had been alerted to this fact by way of a section 212(3) affidavit took the matter no further.

34. There was, in addition, a problem with the internal appeal that the applicants said they had lodged with the respondents, and the outcome of which the applicants were awaiting. The respondents were not in receipt thereof – it did not bear an acknowledgement of receipt by the department, but a Western Cape High Court stamp instead. Whether there was thus a valid appeal process pending was questionable.

35. The long and the short of the matter was that the applicants, as non-citizens, no longer had a right to enter South Africa upon revocation of their visas, and they could not show a *prima facie* right in this respect. This aspect was crucial to the relief that they sought. The fact that the issue of their documentation in the first place might have come about as a result of fraud, whether from the respondents' department or elsewhere, did not convert their unfortunate situation into an entitlement.

36. The applicants placed much emphasis in their founding papers on their right to lawful, reasonable, and procedurally fair administrative action under section 33 of the Constitution. An applicant may, however, not rely on a professed right to review the impugned decisions based on section 33 of the Constitution. The

prima facie right that must be established for an interim interdict is not simply an applicant's right to approach the court for a review:²⁶

"... the *prima facie* right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite*."

37. The applicants approached the *prima facie* right enquiry essentially by focusing on the grounds on which they suggested that they had good prospects of success in the review application. This was not the correct approach for determination of the first requirement underpinning the grant of an interim interdict. The question was not whether the applicants had established the existence of a *prima facie* right on the basis of their alleged prospects of success in the appeal or a notional review application instituted if their appeal failed (although such prospects fell to be considered given the impact of the interdict sought),²⁷ but rather whether the applicants had demonstrated that they had a *prima facie* right which was threatened by imminent irreparable harm. This the applicants did not show.

38. I have alluded to the fact that the applicants sought an interim interdict against the exercise of the respondents' statutory powers under the IA and the regula-

²⁶ *National Treasury supra* para 50.

²⁷ See, for example, *Economic Freedom Fighters v Gordhan supra* para 54: "...The interim interdict test, which has been developed through case law – culminating in the OUTA test – is sound and has sufficient safeguards to ensure that the Public Protector is not denuded of her powers when an interim order is granted against her. In light of OUTA, it is evident that the interim interdict test must be informed by the normative scheme and democratic principles buttressed by the Constitution. This test is broad and supple enough to take into account the

tions thereto. In this respect, an “*interim interdict restraining the exercise of statutory powers is not an ordinary interdict, and courts will grant it only in exceptional cases and when a strong case for that relief has been made out.*”²⁸

Of course, an organ of State is only entitled to act to the extent it is empowered by the Constitution, the law and government policy. The constitutional principle of legality requires organs of state to act lawfully and within the boundaries of the Constitution.²⁹ Where an organ of state acts beyond its constitutional and statutory authority, it is the function of the court to prevent such action. Under such circumstances, judicial intervention is consistent with the doctrine of separation of powers. This was, however, not the case in the present matter.

39. The applicants were required to set out, at least, facts which established that they were *prima facie* entitled as foreigners to enter the Republic. There is no such right established on the papers. In these circumstances, this Court had no discretion to grant the interdict sought.³⁰

40. I deal briefly with the other requirements for the grant of interim interdictory relief.

A reasonable apprehension of irreparable harm

41. An applicant seeking an interim interdict must show that, without the interdict being granted, it can reasonably expect to be prejudiced irreparably.

42. In *V&A Waterfront Properties (Pty) Ltd and another v Helicopter and Marine*

constitutional role and functions of the Public Protector and to ensure that she is not inadvertently stripped of her powers.”

²⁸ *Marcé Projects (Pty) Ltd and another v City of Johannesburg Metropolitan Municipality and another* [2020] 2 All SA 157 (GJ) para 68.

²⁹ *Member of the Executive Council, Department of Education, Eastern Cape Province and another v Eduplanet (Pty) Ltd* [2017] ZAECHC 9 para 18.

*Services (Pty) Ltd and others*³¹ the court held that the term “injury” should be understood to mean “infringement of the right which has been established and resultant prejudice”.

43. The applicants, having failed to establish the right which they alleged was being infringed, could not meet this second criterium for the grant of interim relief, because they could not allege that they would suffer any harm should they be refused entry into the country. It was therefore no wonder that their founding affidavit was glaringly bare in this respect, whether in relation to the first and second applicants or their children. On the contrary, the applicants stated that reuniting with family in Sweden was essential for their children’s well-being. As indicated, the respondents had no objection to the applicants leaving the country, and thus reuniting with family in Sweden.

The balance of convenience

44. If I was wrong in the determination of the first two requirements (in particular, the view that the applicant failed to demonstrate the existence of a *prima facie* right), then I considered that an interim interdict should not be granted because the balance of convenience did not favour the applicants.

45. This requirement is to some extent linked with the *prima facie* right, and highlights the discretion a court has in the grant of interim relief:³²

"In every case of an application for an interdict pendente lite the court has a discretion whether or not to grant the application. It exercises this discretion upon consideration of all the circumstances and particularly upon a consideration of the probabilities

³⁰ *Plettenberg Bay Entertainment (Pty) Ltd v Minister van Wet en Orde* 1993 (2) SA 396 (C) at 401C-D.

³¹ [2004] 2 All SA 664 (C) para 18. A subsequent appeal to the Supreme Court of Appeal was successful, but this definition was not disturbed. Leave to appeal to the Constitutional Court was refused.

³² *Prest The Law and Practice of Interdicts* (1996) at 79. My emphasis.

of success of the applicant in the action. It considers the nature of the injury which the respondent, on the one hand, will suffer if the application is granted and he should ultimately turn out to be right,' and that which the applicant, on the other hand, might sustain if the application is refused and he should ultimately turn out to be right. For though there may be no balance of probability that the applicant will succeed in the action, it may be proper to grant an interdict where the balance of convenience is strongly in favour of doing so, just as it may be proper to refuse the application where the probabilities favour the applicant if the balance of convenience is against the grant of interim relief. The exercise of the court's discretion usually resolves itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less the need for such balance to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him."

46. I have already found that the applicants did not prove a *prima facie* right. There were, however, further difficulties in the applicants' argument that the harm that they would suffer should the relief not be granted would outweigh the harm the respondents would suffer in the event of it being granted. The exercise of the court's discretion usually requires a consideration of the prospects of success in the application for final relief, and the balance of convenience: The stronger the prospects of success, the less the need for such balance to favour the applicant; the weaker the prospects of success the greater the need for it to favour him. There was, however, no longer a pending review application before the High Court, and the applicants were still awaiting an outcome from the second respondent on their alleged internal appeal.

47. The respondents were not preventing the applicants from leaving the country. This dispute originated from 2019, and as such the applicants had years to regularise their presence in the South Africa. Their failure to do so should not prejudice the integrity and sovereignty of the Republic's borders and ports of entry. As indicated earlier, a final order sought in similar terms had been dismissed earlier in 2025, and the applicants did not indicate in their papers in the present matter that they had suffered harm as a result.

No other satisfactory remedy

48. It was, given my conclusions on the first three requirements for the grant of interim relief, not necessary to consider whether another satisfactory remedy existed.

Costs

49. There was no reason why costs should not follow the event. In the exercise of my discretion under Rule 67A of the Uniform Rules of Court, I was of the view that counsel's fees should be taxed on Scale B.

Conclusion

50. In the circumstances, I did not consider that the applicants had satisfied the requirements for the grant of the interim interdictory relief sought in circumstances where the "clearest of cases"³³ was required. I was also of the view that the applicants were in any event precluded, on the basis of the doctrine of *res iudicata*, from seeking the relief set out in the notice of motion. I accordingly granted the order set out at the beginning of these reasons.

P. S. VAN ZYL
Acting Judge of the High Court

Appearances:

For the applicants:

Mr D. Rabie

Instructed by:

A. S. Madikizela Attorneys

For the respondents:

Mr T. Mayosi

Instructed by:

The State Attorney