



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

Case No.: | **2026-039980**

In the matter between:

BERNARD EGBUNA MBA

Applicant

and

**MAGISTRATE SIMLAH – SOMERSET WEST
MAGISTRATE’S COURT**

First Respondent

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Second Respondent

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERNS CAPE**

Third Respondent

**THE STATION COMMANDER SOMERSET WEST
POLICE STATION**

Fourth Respondent

THE MINISTER OF HOME AFFAIRS

Fifth Respondent

THE MINISTER OF POLICE

Sixth Respondent

Coram: Montzinger AJ

Heard: 12 March 2026

Delivered: 30 April 2026

Summary: Urgent application in two parts — under Part A of notice of motion — applicant, an illegal foreigner, effectively challenging lawfulness of continued detention and seeking to be released pending the review of his conviction sentence in Magistrate's Court under Part B of notice motion - plea of guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 — applicant detained in terms of section 34(1) of the Immigration Act pending deportation — peremptory requirements of section 34(1) read with regulation 28 for detention of the Immigration Act — discretion of immigration officer to be exercised *in favorem libertatis* — interim interdict pending finalisation of Part B of the notice of motion — applicant released subject to conditions.

ORDER

1. The applicant's non-compliance with the Uniform Rules of Court relating to forms, service and time periods, and with the notice provisions of section 35 of the General Law Amendment Act 62 of 1955, is condoned and the application is dealt with as one of urgency.
 2. The order of Mayosi AJ of 25 February 2026 and the order of this Court of 12 March 2026 are discharged and replaced with the order set out below.
 3. The applicant is to be released forthwith from his current place of detention.
 4. Pending the finalisation of the relief sought in Part B of the notice of motion, alternatively the conclusion of any review or appeal proceedings available to the applicant in terms of section 8 of the Immigration Act 13 of 2002 (whichever occurs later), the deportation order issued by the first respondent on 10 February 2026, is suspended subject to paragraph 5 below.
 5. In the event that Part B and any review or appeal proceedings under section 8 of the Immigration Act are finalised and the applicant is unsuccessful, he shall
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depart the Republic voluntarily within 10 calendar days of the date of the conclusion of the last of those proceedings, failing which the fifth respondent, or its duly authorised officials, may proceed with the applicant's arrest, detention and deportation in accordance with the Immigration Act.

6. Notwithstanding the relief in paragraph 5, the fifth respondent may approach this Court on notice to the applicant and on duly supplemented papers, for the reconsideration, variation or discharge of this order. In particular, but not exclusively, where the applicant fails to prosecute the relief sought under Part B of the notice of motion or any review or appeal proceedings under section 8 of the Immigration Act, with reasonable diligence.
7. Costs of the application in respect of Part A stand over for determination at the hearing of the relief sought under Part B of the notice of motion.

JUDGMENT

Montzinger AJ

Introduction

- [1] This matter came before me as one of urgency on 12 March 2026.
- [2] The applicant is detained at the Somerset West Police Station. He is detained pending his deportation from the Republic. Part A of the notice of motion asks the Court, in essence, to interdict his deportation and to release him from detention pending the determination of the relief that is being pursued under Part B of the notice of motion. Part B seeks the review and setting aside of the applicant's plea,
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conviction and sentence in the Somerset West Magistrates' Court that was concluded on 10 February 2026, and further seeks the review and setting aside of the order of deportation made by that court on the same date.

- [3] The application is only opposed by the third respondent, the Director of Public Prosecutions, Western Cape ("the DPP"), and by the fifth respondent, the Minister of Home Affairs ("Home Affairs"). The remaining respondents, although a notice to oppose was filed on their behalf, did not deliver answering papers and did not appear at the hearing.

Background and litigation details

- [4] The applicant is a Nigerian national. He says he came to the Republic in 2005, was issued with an asylum-seeker permit in terms of section 22 of the Refugees Act¹, and has resided here continuously since then. He married a South African citizen, Ms Mandisa Mdokwe, and was issued with a life-partner visa valid from 16 November 2020 to 15 November 2023. He has three minor children with his wife and owns three immovable properties in South Africa.
- [5] On 8 February 2026 the applicant was arrested at his home by members of the South African Police Service. The arrest followed a complaint of assault laid by his wife arising out of a domestic dispute. He was taken to the Somerset West Police Station and detained there.
- [6] On 9 February 2026, in the course of processing the applicant's detention, the police were unable to verify his immigration status. The DPP's office at Somerset West then sought confirmation from the Stellenbosch Inspectorate Unit of Home Affairs.

¹ 130 of 1998

An immigration officer, Ms Sibabalwe Mazwayi, established from departmental records that the applicant's asylum-seeker application had been rejected and since 15 November 2023 the applicant's life-partner visa has expired. Consequently, he has not since regularised his stay and he held no valid visa. Ms Mazwayi deposed to a sworn statement in terms of section 212 of the Criminal Procedure Act 51 of 1977 ("the CPA"). On the strength of that statement, the applicant was also charged, in addition to the assault charge, with a contravention of section 49(1)(a) of the Immigration Act 13 of 2002 ("the Immigration Act").

- [7] The applicant first appeared in the Somerset West Magistrates' Court on 9 February 2026. On the last mentioned date he was legally represented and the matter was postponed to the following day for plea. On 10 February 2026 the applicant pleaded guilty to both charges in terms of section 112(2) of the CPA in the form of a written statement. He was convicted of common assault and to a contravention of section 49(1)(a) of the Immigration Act.
- [8] The applicant's sentencing proceedings were also immediately conducted. On the assault charge the applicant was sentenced to a fine of R2,000.00 or six months' imprisonment, wholly suspended for a period of two years on customary conditions. The fine was accordingly not payable. On the charge of contravening section 49(1)(a) the applicant was sentenced to a fine of R2,000.00 or 12 months' imprisonment. He paid that fine on the same day.
- [9] In addition to the sentences imposed, the Magistrate made an order that the applicant be deported from the Republic, that he be detained at Macassar SAPS pending deportation, and that the Director-General of Home Affairs be authorised
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to execute the order. As it turned out, the applicant was not transferred to Macassar but remained in detention at Somerset West.

[10] The reality of being deported spurred the applicant into action and on 20 February 2026 the applicant launched the present application. The matter first served before Mayosi AJ on 25 February 2026. On that date an order was granted in the form of a *rule nisi*, interdicting Home Affairs from deporting the applicant pending the determination of the relief in Part A of the notice of motion on 12 March 2026. The applicant was also directed to amend his notice of motion and file a supplementary affidavit. The order further provided for the exchange of further affidavits.

[11] The matter then served before me on 12 March 2026 as the urgent duty judge. The applicant had been late in delivering his supplementary affidavit and sought condonation. That condonation was granted. By that time the DPP and Home Affairs had filed an answering affidavit deposed to by Ms S Karjiker, with a confirmatory affidavit by Mr T C Mabena, the Chief Immigration Officer responsible for Stellenbosch and Somerset West.

[12] After hearing argument, I reserved judgment but issued an interim order preserving Mayosi AJ's interdict and authorising the Somerset West Magistrates' Court to entertain any application for the extension of the applicant's detention in terms of section 34(1)(d) of the Immigration Act. That was necessary because the period of 30 calendar days contemplated in section 34(1)(d) was about to expire and continued detention beyond that period requires a warrant².

² The relevant section requires that an illegal foreigner may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days. Practically this means that the applicant must be brought before a magistrate every 30 days to extend his detention pending his deportation, until the

The relief that is being sought

[13] The notice of motion is, regrettably, not a model of clarity. As amended, Part A combines what are plainly final review prayers, for example, that the guilty plea be expunged, that the conviction be set aside, and that the applicant be brought before a new Magistrate *de novo*. The attorney for the applicant accepted, correctly, that final review relief cannot be granted at this stage of the proceedings, at least not as set out in part A of the notice of motion.

[14] Upon consideration the relief that is properly before me in Part A of the notice of motion is therefore confined. First, an interdict restraining the deportation of the applicant pending the determination of the relief in Part B. Secondly, an order securing the applicant's release from detention. The applicant has couched the latter prayer as an application for "*bail in the amount of R500.00*", which is plainly inapt in this context. But the substance of what is being sought is unambiguous: The applicant seeks to be released from administrative detention pending the determination of the relief in Part B of the notice of motion. I treat the application accordingly.

The basis for the relief and the parties' competing contentions

[15] The applicant contends that his guilty plea was neither informed nor voluntary. He says English is not his first language, that his home language is Igbo, and that no Igbo interpreter was provided. He says he did not appreciate the nature and consequences of a guilty plea in terms of section 112(2) of the CPA, nor that a conviction in terms of section 49(1)(a) of the Immigration Act would expose him

expiration of 120 days, when the illegal foreigner must be released.

to deportation. He says his then attorney advised him that pleading guilty was the only practical route to securing his release.

[16] The applicant says further that the Magistrate ordered his deportation without any opportunity for him to make representations in respect of his family circumstances, the presence of his three minor children in the Republic, who are all South African, his asylum history, his alleged fear of persecution if deported to Nigeria, the withdrawal of the assault complaint by his wife, and his explanation for the lapse of his visa. He further contends that his continued detention pending deportation is unlawful.

[17] The DPP and Home Affairs assert that the applicant was at all material times legally represented during the guilty plea proceedings; that his rights were explained to him; that he signed his section 112(2) statement with full understanding of his rights; and that the decision of the Magistrate to order his deportation was correct in law. They rely on *S v Cuna*³ for the proposition that, upon conviction of a person of contravening section 49(1) of the Immigration Act, the Magistrate is bound to make a deportation order. They contend that, once such an order has been made, continued detention follows axiomatically. Otherwise, so it is said, an offender released after conviction would be perpetually in fresh contravention of section 49(1)(a). On these grounds urgency is said to be self-created and the applicant said to have demonstrated no *prima facie* right to relief.

[18] An important feature of the answering papers needs to be highlighted. The affidavit of Ms Karjiker is the only affidavit on behalf of the respondents. She is the attorney

³ *S v Luis Alberto Cuna* 2022 JDR 3738 (GP)

of record for the DPP and Home Affairs. She does not claim to have been present at any of the proceedings before the Magistrate on 9 or 10 February 2026. She did not personally process the applicant on his arrest. There is no confirmatory affidavit from the prosecutor who appeared in the Magistrates' Court, nor from the police officer in charge of the applicant's detention, nor from any immigration officer who arrested or processed the applicant for the purposes of his detention pending deportation.

[19] The confirmatory affidavit of Mr Mabena, the immigration official, is expressly limited to confirm paragraphs 38 to 43 of Ms Karjiker's answering affidavit. Those paragraphs deal exclusively with the applicant's prior asylum history and certain allegations of fraudulent visa applications. They say nothing about the lawfulness of the applicant's current detention. The supporting section 212 statement by Ms Mazwayi, deposed to on 9 February 2026, deals only with the verification of the applicant's status. It does not speak to a detention warrant, that the applicant was notified of his rights, or his arrest in terms of section 34 of the Immigration Act.

[20] In a notice served on 5 March 2026, Form 31 / DHA-1726, supported by an affidavit of an immigration officer Ms Justine Jane Adams, the applicant was advised of an intention to apply to the Magistrates' Court for the extension of his detention under section 34(1)(d) of the Immigration Act beyond 30 days. That notice records that the warrant for the applicant's deportation was "*issued*" on 10 February 2026. No copy of that warrant has been placed before me and no Form 28 detention warrant has been produced. In addition, no Form 29 notification has been produced. These omissions matter for reasons that will become apparent.

The Legal Framework

[21] The applicant's current detention is administrative detention. It is not detention in terms of a sentence of imprisonment. The fine on the section 49(1)(a) charge was paid on the day of conviction, and the sentence on the assault charge was wholly suspended. Regardless of the lawfulness of the conviction, the applicant is not in custody serving a sentence. He is in custody pending his deportation. The legal framework that governs that detention is governed by the Immigration Act and the Regulations made under section 7 of that Act.

[22] Section 32 of the Immigration Act provides that an illegal foreigner shall depart the Republic unless authorised by the Director-General to remain pending an application for status, and that an illegal foreigner "*shall be deported*".

[23] Section 34(1)⁴ provides that, without the need of a warrant, an immigration officer may arrest an illegal foreigner and detain him for the purposes of deportation. Section 34(1)(a)⁵ requires that the foreigner be notified in writing of the decision to deport him and his right to appeal that decision. Section 34(1)(b)⁶ confirms an illegal foreigner's right to request that his detention be confirmed by a warrant of court within 48 hours, failing which he must be released. Section 34(1)(d)⁷ limits

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

⁵ (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

⁶ (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

⁷ (d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and

the period of administrative detention to 30 calendar days, beyond which a court warrant is required, which itself may not exceed 90 calendar days.

[24] Section 41⁸ read with section 34(1)(b) of the Immigration Act permits the temporary detention of a *suspected* illegal foreigner for 48 hours pending verification of status.

[25] The Regulations to the Immigration Act prescribe peremptory forms. Regulation 33(1) requires that an arrested person's detention be effected by means of a warrant issued by an immigration officer in a form corresponding to Form 28. Regulation 33(2), read with section 34(1)(a) of the Act, requires that the deportation notification shall be in the form of Form 29. Regulation 33(9), read with section 34(7) of the Act, requires that removal of the detainee from custody for purposes of deportation be effected through a warrant in a form substantially corresponding to Form 35.

[26] Whatever the powers of a criminal court may be that sentence an accused for a contravention of section 49(1) of the Immigration Act is a question I do not decide with this judgment. Suffice to remark that sections 32 and 34 deals expressly with arrest, detention and deportation. The lawfulness of detention pending deportation must therefore be assessed against the requirements of at least section 34 read with the regulations to the Immigration Act.

⁸ (1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.

[27] The leading authority on the application of section 34 is the judgment of the Supreme Court of Appeal (“SCA”) in *Jeebhai*⁹. Cachalia JA, writing for the Court, set out four peremptory requirements that Home Affairs must establish in order to demonstrate that an arrest, detention and deportation are lawful: (i) that the arresting officer arrested a person who is in fact an illegal foreigner; (ii) that the detention was effected by means of a warrant in the form prescribed by regulation 33(1) (Form 28); (iii) that the detainee was promptly informed in writing, on a Form 29, of the reasons for the intended deportation, of the right of appeal in terms of section 34(1)(a), and of the right to have the detention confirmed by a warrant of court in terms of section 34(1)(b); and (iv) that any removal of the detainee from custody for deportation was effected by means of a Form 35 warrant.

[28] *Jeebhai* further confirms that, once a person has placed the lawfulness of his detention in issue, the onus rests on the State to adduce sufficient facts to prove that every procedural requirement was complied with¹⁰. The Court made clear that the principle that every deprivation of liberty is presumptively unlawful, and the consequent onus on the detaining authority, applies even in motion proceedings¹¹, as an exception to the ordinary requirement that an applicant must make out his entire case in the founding papers. The Court relied in this regard on *Hurley*¹² and *Zealand*¹³.

⁹ *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) para 35 (i) – (iv); the forms and references to the section and regulations in the *Jeebhai* judgment is different from how the Act and the Regulations currently read, as both instruments have since *Jeebhai* was handed down been amended.

¹⁰ *Jeebhai* para 39

¹¹ *Jeebhai* par 22 with reference to *Minister Van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) p 294B-D.

¹² *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A)

¹³ *Zealand v Minister of Justice and Constitutional Development* 2008 (2) SACR 1 (CC)

[29] *Jeebhai* also draws an important distinction between the *decision* that a person is an illegal foreigner, and the *decision* to arrest and detain him for purposes of deportation¹⁴. The decision that a person is an illegal foreigner triggers the right of review or appeal in terms of section 8 of the Immigration Act. The decision to arrest is a separate, discretionary act. As Cachalia JA put it, it is the decision that a person is an illegal foreigner that triggers the rights in section 8 of the Immigration Act¹⁵.

[30] The discretion of an immigration officer in terms of section 34(1) was the focus of the judgment of the SCA in *Ulde*¹⁶, delivered together with *Jeebhai*. In *Ulde* the Court held that, because section 34(1) deals with the deprivation of personal liberty (albeit of an illegal foreigner), the immigration officer must construe his discretion *in favorem libertatis*¹⁷. The discretion must be exercised in the light of the standards generally applicable to discretionary public power. The officer must apply his mind, must direct his thoughts to the relevant data, must avoid irrelevant considerations and must avoid an arbitrary approach¹⁸. The position is reinforced by section 12(1)(a) of the Constitution, which guarantees freedom from arbitrary deprivation of liberty.

[31] *Ulde* also makes clear that an immigration officer may not avoid the obligation to exercise his discretion by acting under what he takes to be a “blanket policy” of detaining all persons found to be illegal foreigners. To do so is to fail to exercise the very discretion the Act demands. Cachalia JA found that section 32 of the Act imposes an obligation on an immigration officer to deport an illegal foreigner; it is

¹⁴ *Jeebhai* paras 26, 28 and 34

¹⁵ *Jeebhai* para 27

¹⁶ *Ulde v Minister of Home Affairs* 2009 (4) SA 522 (SCA)

¹⁷ “*in favour of freedom or liberty*” *Ulde* par 7

¹⁸ *Ulde* par 7 with reference to *Northwest Townships (Pty) Ltd v The Administrator of the Transvaal* 1975 (4) SA 1 (T)

not concerned with the power to detain¹⁹. The detention power is supplied by section 34, and that power is discretionary.

[32] In *Lawyers for Human Rights*²⁰ the Constitutional Court held that the protections of section 12(1) and section 35(2) of the Constitution apply to detained illegal foreigners. They are persons within the protection of the Bill of Rights.

[33] The above framework provides the basis on which the applicant's detention falls to be considered.

Urgency

[34] Mayosi AJ entertained the application as one of urgency and granted relief in the form of a *rule nisi*. To the extent that the respondents persist in their challenge to urgency, the challenge is without merit.

[35] The applicant is in detention. He faces deportation. If deported, the relief he seeks under Part B of the notice of motion would be rendered, for all practical purposes, hollow. The modest delay between his sentencing on 10 February 2026 and the launch of the application on 20 February 2026 do not detract from the objective urgency of his position. As the Constitutional Court reaffirmed in *Ashebo*²¹, urgency in matters of this nature flows from the threatened deprivation of liberty and the imminence of removal.

¹⁹ *Ulde* para 10

²⁰ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 27

²¹ *Ashebo v Minister of Home Affairs* 2023 (5) SA 382 (CC) at paragraphs 12–13

[36] The applicant could not, in any meaningful sense, obtain substantial redress in due course. A successful review of the conviction and deportation order, brought after deportation, would deliver no practical remedy.

[37] Non-compliance with the Uniform Rules of Court relating to forms, service and time periods as well as with the notice provisions of section 35 of the General Law Amendment Act 62 of 1955 is therefore condoned.

The lawfulness of the applicant's detention

[38] Whether the applicant's detention is lawful is the critical issue. I must assess that question in three stages. First, is the applicant an illegal foreigner? Secondly, if so, has Home Affairs discharged the onus to show compliance with the peremptory requirements of section 34 read with regulation 33 of the Immigration Act? Thirdly, was the discretion contemplated in section 34 properly exercised by an immigration officer?

Is the applicant an illegal foreigner?

[39] The starting point is whether the applicant is an illegal foreigner within the meaning of section 1 of the Immigration Act. If he is not, the question of detention pending deportation does not arise, and he must simply be released.

[40] The applicant resists the characterisation of himself as an illegal foreigner principally by attacking the conviction in the Magistrates' Court. However, that issue is reserved for later determination by a court when the relief in part B of the notice of motion is considered. At this stage, and for present purposes, I cannot rely on the conviction. The applicant has placed the integrity of the plea proceedings in

issue. He says he did not understand them, that no Igbo interpreter was provided, and that his then attorney advised him to plead guilty as the only way to his release.

[41] But even disregarding the plea, the applicant's own version puts him outside the law. He admits that his life-partner visa expired on 15 November 2023. He says he has been trying since then to regularise his stay but has not succeeded. He also says he applied for a new spousal visa and that the application was declined and that he was saving up to retain an immigration agent to assist him with a new application. He cannot produce anything authorising his current presence in the Republic.

[42] The applicant submits that he never *intended* to remain in the country illegally. However, that is not what the Immigration Act requires. Section 1 defines an illegal foreigner by reference to the absence of authorising documentation, not by reference to the foreigner's state of mind. On the applicant's own account, he has held no valid visa or permit and has therefore been an illegal foreigner in the Republic since 15 November 2023.

[43] I therefore accept, for purposes of the relief sought, and on the applicant's own version, that he is an illegal foreigner within the meaning of the Immigration Act. However, this finding does not preclude the matter to still be argued in respect of the challenge set out in part B of the notice of motion. It merely opens up the next question whether the applicant's detention is lawful.

The peremptory requirements for detention; the *Jeebhai* standard

[44] An applicant who places his detention in issue is not required to disprove its lawfulness. As *Jeebhai* makes clear, every deprivation of liberty is presumptively

unlawful²². As I have stated under the legal framework section of this judgment, once the lawfulness of a detention is put in issue, the onus of justification rests on the detaining authority. That is even the position in motion proceedings.

[45] Home Affairs has not discharged that onus. Three of the four peremptory requirements identified in *Jeebhai* are not addressed by the answering papers. The fourth requirement, which concerns the warrant for removal from custody for the purposes of deportation, is not yet engaged because deportation has not been activated yet given Mayosi AJ's order.

[46] The first requirement: that an immigration officer in fact arrested the illegal foreigner, is not, on the papers before me, and therefore not met. The applicant was arrested on 8 February 2026 by the South African Police. That arrest was on the charge of assault and not for any immigration offence. There is no evidence that the applicant was at any subsequent time arrested by an immigration officer in terms of section 34(1) of the Immigration Act. The deportation order made by the Magistrate on 10 February 2026 does not serve as compliance with the Act's requirement. Section 34(1) confers the power of arrest for purposes of deportation on an immigration officer not on a Magistrate. The Magistrate's Court becomes involved in the detention process prior to the first 30 days expiring in terms of section 34(1)(d) of the Act.

[47] The second requirement: that the detention be effected by means of a Form 28 warrant, is also not met. In the matter before me Home Affairs did not produce a Form 28 warrant. There is also not even an allegation that a warrant in fact exist.

²² *Jeebhai* para 22

The only document resembling the existence of a warrant is the reference, in the Form 31 notice signed by Ms Adams, to a “*warrant for his deportation*” said to have been “issued on the 10/02/2026”. That warrant was not put before me.

[48] The third requirement: that the detainee be informed promptly, on a Form 29, of the reasons for the intended deportation, of his right of appeal in terms of section 34(1)(a), and of his right to have his detention confirmed by warrant of a court in terms of section 34(1)(b) of the Immigration Act, is also not met. There is no evidence that a Form 29 was given to the applicant. Once again there is no allegation supported by evidence that the applicant was advised of his rights in terms of section 34(1)(b) to require his detention to be confirmed by warrant of court within 48 hours, failing which he had to be released. The first formal notice given to the applicant involving any aspect of his deportation was the Form 31 served on him on 5 March 2026, almost a month after his original detention. It may very well be that these documents exist, but that Home Affairs overlooked the reverse onus that a claim by an illegal foreigner that detention is unlawful, invokes. It may also be that the documents do not exist. That scenario will rather point toward Home Affairs misunderstanding its duties as prescribed by the Immigration Act and imposed on it by law.

[49] The shortcomings in the process of detention, I have highlighted, are not technical or formalistic. The forms exist for the purpose of giving operative content to the constitutional rights of the detainee in terms of sections 12(1) and 35(2) of the Constitution. I referenced earlier that the Constitutional Court reminded us in *Lawyers for Human Rights*, that those rights vest in detained illegal foreigners also.

[50] Counsel for Home Affairs urged the Court to read section 32 of the Immigration Act and the *S v Cuna*²³ judgment and the section 212 affidavit by Ms Mazwayi together as evidence that the detention is lawful. That argument has serious difficulty. The *S v Cuna* judgment, even if it correctly states the law in relation to the *deportation* order, a question I do not decide, it does not address the peremptory requirements of section 34 read with regulation 28 of the Immigration Act. *Jeebhai* and *Ulde* draw a clear distinction between the order to deport and the procedure for arrest and detention pending deportation. The latter is governed by section 34, and that section was not complied with.

[51] The first basis on which the applicant's detention is therefore unlawful is due to the failure of Home Affairs to comply with three of the four peremptory requirements as prescribed by the Immigration Act read with the regulations, as identified and confirmed in *Jeebhai*.

The discretion in terms of section 34

[52] Even if it had been shown that Form 28 and Form 29 had been issued, the applicant's detention would, on the evidence before me, still be unlawful for a second reason. The discretion that vested in the immigration officer by virtue of section 34(1) of the Immigration Act to arrest the applicant, was on the papers, never engaged.

[53] In *Ulde* the Supreme Court of Appeal held clearly that the immigration officer is required to exercise the discretion in section 34(1)²⁴. The officer in *Ulde* purported to detain the applicant in that matter on the basis of his understanding that section

²³ *S v Cuna* 2022 JDR 3738 (GP)

²⁴ *Ulde* para 7

32 of the Immigration Act imposed an obligation on him to do so, and on the basis of generic considerations. The court in *Ulde* found that the officer had not exercised any discretion. He had instead implemented what he took to be a blanket policy²⁵. The court found that the reliance on section 32 of the Immigration Act was misplaced because that section deals with the obligation to deport, not the power to detain.

[54] The position in the present matter is the same in substance, although it is achieved by a different route. The justification advanced by Home Affairs for the applicant's continued detention is, in essence, that the Magistrate ordered it. Ms Karjiker's affidavit asserts that, following the granting of a deportation order, continued detention is "*axiomatically warranted*", because if the offender were to be released pending deportation, he would be perpetually in fresh contravention of section 49(1)(a) of the Immigration Act. She adds that this approach reflects the "*standard practice*" of Home Affairs.

[55] That justification proceeds on a misunderstanding of the structure of the Immigration Act and of the holding in *Ulde*. As *Ulde* confirms, the power to detain pending deportation is provided for in section 34, not section 32. The power is discretionary, not automatic and it must be exercised by an immigration officer in respect of each individual case. A standard practice of seeking detention orders from magistrate courts on the strength of a deportation order is not the exercise of the statutory discretion. It is, in *Ulde*'s language, the implementation of a blanket policy. It is the very thing the SCA held to be unlawful.

²⁵ *Ulde* para 10

[56] The discretion not having been exercised, the applicant's continued detention cannot be sustained.

[57] The reliance placed by Home Affairs on *S v Cuna* does not assist on this issue. That judgment concerned the question whether, upon a conviction under section 49(1)(a) of the Immigration Act, the magistrate's court is bound to make an order for the deportation of the convicted person. It did not, as I understand it, address the separate question whether continued administrative detention may follow as a matter of legal compulsion from such an order. However, to the extent that the dicta in *S v Cuna* could be read to displace the obligation to exercise a discretion in terms of section 34, that would be inconsistent with the binding authority of *Jeebhai* and *Ulde*. At this stage, I express no view on the correctness of *S v Cuna* on the deportation issue itself, as it is not necessary. However, when the opportunity presents itself, I am of the passing view that a court may potentially find that *S v Cuna* was wrongly decided.

[58] The second basis on which the applicant's detention is unlawful, is accordingly, that no immigration officer has, on the papers, exercised the discretion required by section 34 of the Immigration Act and the exercise of that discretion by an immigration officer is peremptory as the Act and as confirmed by the *Ulde* judgment.

The Magistrate's order as a basis for detention

[59] There is another basis on which the continued detention of the applicant is also unlawful. This ties in with what I have discussed that no discretion was exercised by an immigration officer to detain the applicant.

[60] As I have stated, on Home Affairs' own version, the applicant's continued detention is based on the Magistrate's order of 10 February 2026 directing that he be detained at Macassar SAPS pending deportation. This I referenced earlier is the *S v Cuna* basis for deportation and detention. However, as I have already found, the Magistrate's decision to detain pending deportation is, on the structure of the Immigration Act a power afforded to an immigration officer. It is not a power afforded to a Magistrate. A Magistrate's role, with regards to the detention of an illegal foreigner, is confined to section 34(1)(b) in terms whereof a Magistrate may, on application, confirm a detention by warrant of court within 48 hours of arrest; and in terms of section 34(1)(d) the Magistrate may, on good and reasonable grounds, extend a period of detention beyond 30 days. Neither of those provisions authorises the Magistrate to direct administrative detention pending deportation.

[61] The point can be put more directly. Receiving a person into custody under the purview of administrative detention is an exercise of public power. As the SCA and the Constitutional Court has found in the *Zealand* judgments²⁶ such exercise is constrained by the principle of legality. It must be authorised by law. The Magistrate's order, in so far as it purported to direct detention rather than merely deportation, was not authorised by section 34 of the Immigration Act. Whatever else section 32(2) of the Immigration Act may permit a court to do, it does not permit a court to substitute itself for the immigration officer charged by the legislature with the discretionary decision to detain an illegal foreigner.

²⁶ *Minister of Justice and Constitutional Development v Zealand* 2007 (2) SA 401 (SCA) para 24 and *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) para 44

[62] I am further of the view that such a finding does not offend the legal position that a decision by a court to remand an accused person in custody results in lawful detention of that person²⁷. First, the Magistrate's decision in this case was not a remand, but rather perpetual detention until the applicant's deportation, and secondly the Magistrate's decision to order the applicant's detention falls foul of the provisions of the Immigration Act. This means that the detention order is liable to be set aside. However, since the deportation and resultant detention order is to be considered when the review in part B of the notice of motion is heard and having regard to the fact that I have already found that the applicant's detention is unlawful, I do not have to make an order at this stage setting aside the detention order on which Home Affairs rely.

[63] Regarding the section 34(1)(d) extension and the order I granted allowing the Magistrate to extend the detention. As I have noted, when this matter served before me on 12 March 2026 the period of 30 calendar days from 10 February 2026 was about to expire. I authorised the Magistrates' Court to entertain an application in terms of section 34(1)(d) pending judgment. That order was provisional. Nothing in the result that I now reach should be taken as a determination of the lawfulness or otherwise of any extension order made. The order I now make in any event should render the question of any further extension for detention moot.

[64] In conclusion on the lawfulness of the applicant's detention, the applicant has, on the papers, established various independent grounds why his continued detention is unlawful.

²⁷ *Isaacs v Minister van Wet en Orde* [1995] ZASCA 152; [1996] 1 All SA 343 (A) at 351f-j.

[65] The right to be released from unlawful detention is a clear right. It is not a *prima facie* right open to doubt. It follows directly from sections 12(1) and 35 of the Constitution and from the jurisprudence in *Hurley*, the *Zealand* judgments and *Lawyers for Human Rights*. The status of the applicant as an illegal foreigner does not exclude him from the protection of those rights, as the Constitutional Court emphasised in *Lawyers for Human Rights*. The applicant is therefore entitled to be released.

The interim interdict

[66] The relief was framed as an application for an interim interdict pending the resolution of the relief in Part B. Strictly speaking, given the conclusions I have reached on the lawfulness of the applicant's detention, it is not necessary to engage with the conventional requirements of an interim interdict in respect of his release. The unlawfulness of his detention is an independent basis for his release.

[67] In any event the conventional requirements for an interim interdict are nonetheless satisfied. The applicant has demonstrated not only a *prima facie* right but in fact a *clear* right to a fair deportation and detention process, to a properly informed plea in terms of section 112 of the CPA, to have the right to an interpreter if his command of English does not allow him to follow proceedings²⁸. Whether his plea, conviction and the deportation order will ultimately be set aside is for another court to decide. For the relief that is before me it is enough that the applicant has identified

²⁸ *S v Said* 2007 (20 SACR 637 and *S v Mponda* 2007 (2), SACR (C); [2004] All SA 229 (C); also *Katsshingu v Chairperson of the Standing Committee for Refugee Affairs* 19726/2010 ZAWCHC 480 (1 November 2011)

a case which, if it were to succeed, would render his deportation unlawful or at least premature.

[68] The applicant has demonstrated a well-grounded apprehension of irreparable harm, although harm is not a requisite since the right being infringed is clear²⁹. If he is deported to Nigeria pending the relief he seeks in Part B, the review will be rendered, for all practical purposes, hollow. He also cannot pursue his review and appeal remedies in section 8 of the Immigration Act. He has alleged a fear of persecution upon his return, the disruption of his family life with his three minor children, and the loss of his property and income. Whether each of those allegations would, on its own, found relief is a question for another court in due course. However, cumulatively these factors comfortably establish irreparable harm at this interim stage.

[69] The balance of convenience favours the applicant. The State retains the means to enforce any deportation should the applicant fail with Part B or not diligently pursue that litigation. He, by contrast, would have no means of restoring himself to the Republic if removed.

[70] The applicant has no satisfactory effective alternative remedy. An *ex post facto* review, brought from Nigeria, given his unique circumstances, would not be a remedy in any practical or effective sense.

²⁹ *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (T), at 383 A – F; 11 LAWSA, 2nd ed, para 405

Conclusion and order

[71] The applicant has made out a case for his release. That release should not, however, be unconditional. He is, on his own version, an illegal foreigner. He has the responsibility, even now, to attend to the legal regularisation of his stay and to attend to prosecuting the relief under part B of the notice of motion with diligence and or his remedies in section 8 of the Immigration Act.

[72] The interdict against deportation should run pending the finalisation of the relief in Part B of the notice of motion and any review or appeal in terms of section 8 of the Immigration Act, whichever is later. If the applicant is unsuccessful in those proceedings, he must depart voluntarily within 10 days of the last of those decisions. If he fails to do so, Home Affairs will be at liberty to proceed in accordance with the Immigration Act.

[73] This Court has, under section 173 of the Constitution, the inherent power to regulate its own process and to revisit interim orders in the light of changed circumstances. To give effect to that, the order will reserve the opportunity to Home Affairs to approach this Court on notice to the applicant, and on duly supplemented papers, for the reconsideration, variation or discharge of the order. That liberty will be available where the applicant fails to prosecute the relief sought in Part B of the notice of motion or his section 8 remedies as contemplated by the Immigration Act. I therefore include an order to the aforementioned affect.

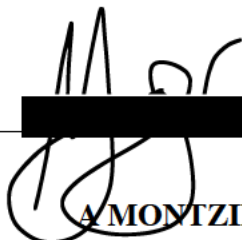
[74] The orders of Mayosi AJ of 25 February 2026 and of this Court of 12 March 2026 were both interim measures intended to hold the position pending judgment in respect of the urgent relief sought in Part A of the notice of motion. They should be

discharged and replaced by the order I now make. The issue of costs of Part A to stand over for determination at the hearing of Part B.

[75] Consequently, the following order is made:

1. The applicant's non-compliance with the Uniform Rules of Court relating to forms, service and time periods, and with the notice provisions of section 35 of the General Law Amendment Act 62 of 1955, is condoned and the application is dealt with as one of urgency.
 2. The order of Mayosi AJ of 25 February 2026 and the order of this Court of 12 March 2026 are discharged and replaced with the order set out below.
 3. The applicant is to be released forthwith from his current place of detention.
 4. Pending the finalisation of the relief sought in Part B of the notice of motion, alternatively the conclusion of any review or appeal proceedings available to the applicant in terms of section 8 of the Immigration Act 13 of 2002 (whichever occurs later), the deportation order issued by the first respondent on 10 February 2026, is suspended subject to paragraph 5 below.
 5. In the event that Part B and any review or appeal proceedings under section 8 of the Immigration Act are finalised and the applicant is unsuccessful, he shall depart the Republic voluntarily within 10 calendar days of the date of the conclusion of the last of those proceedings, failing which the fifth respondent, or its duly authorised officials, may proceed with the applicant's arrest, detention and deportation in accordance with the Immigration Act.
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6. Notwithstanding the relief in paragraph 5, the fifth respondent may approach this Court on notice to the applicant and on duly supplemented papers, for the reconsideration, variation or discharge of this order. In particular, but not exclusively, where the applicant fails to prosecute the relief sought under Part B of the notice of motion or any review or appeal proceedings under section 8 of the Immigration Act, with reasonable diligence.
7. Costs of the application in respect of Part A stand over for determination at the hearing of the relief sought under Part B of the notice of motion


A MONTZINGER
Acting Judge of the High Court

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