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

Case No: 8486/2024

In the matter between:

SCALABRINI CENTRE OF CAPE TOWN	First Applicant
TRUSTEES OF THE SCALABRINI CENTRE OF CAPE TOWN	Second Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
CHIEF DIRECTOR OF ASYLUM SEEKER MANAGEMENT: DEPARTMENT OF HOME AFFAIRS	Third Respondent
REFUGEE APPEALS AUTHORITY	Fourth Respondent
STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fifth Respondent

Coram: Acting Justice B Manca

Heard: 27 August 2024

Delivered: 13 September 2024

JUDGMENT

MANCA AJ:

[1] This is an application by the Scalabrini Centre of Cape Town and its Trustees ("the Scalabrini")[1] for an order interdicting and restraining the Minister of Home Affairs; the Director-General: Department of Home Affairs; the Chief Director of Asylum Seeker Management: Department of Home Affairs; the Refugee Appeals Authority; and the Standing Committee for Refugee Affairs ("the respondents") from:

1.1. deporting or causing any foreign national who has indicated an intention to seek asylum under the Refugees Act 130 of 1998 ("the Act") to be deported or otherwise compelled to return to their countries of origin, unless and until their asylum application has been finally rejected on its merits;

1.2. from implementing ss 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of the Act and Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Refugee Regulations ("the Regulations") including not arresting and/or detaining foreign nationals pursuant to the application of these provisions; or refusing to allow any person to apply for asylum on the basis of the provisions listed in paragraph 2.2 above (*'the challenged provisions'*); or

---

[1] The first applicant, the Scalabrini Centre is registered with the Department of Social Development as a non-profit organisation and with the South African Revenue Services as a public benefit organisation. Its core mandate concerns assisting migrant communities and displaced people, including asylum seekers and refugees. Across all of its programs it assists approximately 6 000 individuals annually. The Second applicant is the trustees of the Scalabrini Centre.

1.3. refusing to allow any person to apply for asylum on the basis of the challenged provisions.

[2] The Scalabrini bring the application in their own interest and in the interest of those asylum seekers who are unable to do so.

[3] The relief is sought pending the determination of a constitutional challenge, contained in Part B of the Notice of Motion, in which the challenged provisions are sought to be declared inconsistent with the Constitution and invalid ("the main application").

[4] Only the application for interim relief is before me.

[5] The usual requirements for interim relief are that an applicant must establish a *prima facie* right to the interim relief, that it will suffer irreparable harm if the relief is not granted, that the balance of convenience favours it and that it has no alternative remedy.[2]

[6] But, as highlighted in *OUTA,*[3] in cases where an applicant seeks to restrain the implementation and operation of legislation, there is a twist to the ordinary test for the granting of interim interdicts:

---

2 *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 372E-G.

3 *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para [47].

'A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.'

[7] In *EFF*,[4] the Constitutional Court restated the principle as follows:

'We were cautioned by this Court in OUTA that, where Legislative or Executive power will be transgressed and thwarted by an interim interdict, an interim interdict should only be granted in the clearest of cases and after careful consideration of the possible harm to the separation of powers principle. Essentially, a court must carefully scrutinise whether granting an interdict will disrupt Executive or Legislative functions, thus implicating the separation and distribution of power as envisaged by law. In that instance, an interim interdict would only be granted in exceptional cases in which a strong case for that relief has been made out.'

The Statutory Regime

[8] Section 2 of the Act, reads as follows:

'Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where —

he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

---

4 *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) at para [48].

his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in any part or the whole of that country.'

[9] The relevant portion of s 4 of the Act provides:

'(1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she -

(f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or

(h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or

(i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum.'

[10] Section 21(B) of the Act reads as follows:

'(21B) An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa.'

[11] The relevant portions of Regulation 8 provide:

> *"(1) An application for asylum in terms of section 21 of the Act must—*
>
> *(a) be made in person by the applicant upon reporting to a Refugee Reception Office or on a date allocated to such a person upon reporting to the Refugee Reception Office;*
>
> *(b) be made in a form substantially corresponding with Form 2 (DHA-1590) contained in the Annexure;*
>
> *(c) be submitted together with—*
>
> *(i) a valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act, or under permitted circumstances, a valid visa issued in terms of the Immigration Act;*
>
> *(ii) proof of any form of a valid identification document: Provided that if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer; and*
>
> *(iii) the biometrics of the applicant, including any dependant.*
>
> *(2) Any person who submits a visa other than an asylum transit visa issued in terms of section 23 of the Immigration Act must provide proof of change of circumstances in the period between the date of issue of the visa and the date of application for asylum.*
>
> *(3) Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees.*
>
> *(4) A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in subregulation (3).'*

[12] Sections 23(1) and (2) of the Immigration Act[5] provide:

> *'1) The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum.*
> *(2) Despite anything contained in any other law, when the visa contemplated in subsection (1) expires before the holder reports in person at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act 130 of 1998), the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act.'*

The Scalabrini's case

[13] In *Ruta*[6], the Constitutional Court held that section 2 of the Act was a remarkable provision which not only placed the prohibition it enacted over any other provision in the Act but also over any other statute or legal provision. Practically it enacted a prohibition but also expressed the principle of *non-refoulement* which is the concept that persons fleeing persecution or threats to their life, safety or freedom should not be made to return to the country from whence those threats came.

[14] The Scalabrini contend that the challenged provisions offend the principle of *non-refoulement* and falls to be struck down in the main application on account thereof.

---

5 Act 13 of 2002 (as amended).
6 *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) ("*Ruta*") at para [24].

[15] The Scalabrini also contend that the challenged provisions introduced an overlapping set of mechanisms whereby asylum seekers must first demonstrate adequate compliance with immigration procedures before they are entitled even to seek asylum.[7]

[16] In the founding affidavit deposed to by the Scalabrini's director of Advocacy, Mr James Chapman, he explained that asylum seekers who wish to approach a Refugee Reception Office ("RRO") to apply for asylum must first obtain a so-called appointment slip to do so. This process is not regulated by law and, according to Mr Chapman, requires the asylum seeker to return in six to eight months. When, eventually, the asylum seeker returns and is granted access to the RRO, the first interview they receive is held by immigration officers in terms of s 21(1B) of the Act read with Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4). The purpose of the interview is to ascertain whether, if the asylum seeker does not hold an asylum transit visa in terms of section 23 of the Immigration Act or other visa, such person has "*valid reasons*" or "*good cause*" for such an adverse status. No matter how generous and lawfully it is held, the immigration interview does not consider the merits of the asylum seeker's claim.

[17] According to Mr Chapman, the interview is limited to questions of condonation and procedure and the immigration officers do not apply their minds to the fundamental question of what persecution the asylum seeker will face if returned to their country of origin. After the immigration officers find that an

---

7 The challenged provisions all came int effect on 1 January 2020 pursuant to amendments to the Act and Regulations.

asylum seeker has failed his or her interview, the asylum seeker is arrested, detained, and brought before a court to initiate the deportation process.

[18] Mr Chapman testified that although the courts may carry out their own assessment of whether the asylum seeker has shown "*good cause*" in the vast majority of cases the courts confirm the adverse decisions of the immigration officers (typically without providing written judgments). In the event that an asylum seeker did pass their interview and was allowed to appear before a Refugee Status Determination officer ("RSDO") to seek asylum, the RSDO would also have to assess whether such asylum was excluded from seeking asylum in terms of ss 4(1)(f), 4(1)(h), 4(1)(i) of the Act. Only if compelling reasons are found by the RSDO to excuse non-compliance with sections 4 (1) (h) and 4(1) (i) will the asylum seeker be allowed to apply for asylum.

[19] In sum, the Scalabrini submit that the effect of the challenged provisions is that almost all new asylum seekers attending on RROs are refused the right to apply for asylum and are either arrested for deportation or are ordered to depart South Africa. Almost no new asylum applicants are, in fact, attending on RROs, since they have become aware that such attendance amounts, in practice, to being expelled from South Africa.

[20] The Scalabrini submit that it has at the very least, *prima facie* prospects of success in the main application; in fact, it submits that it has very strong and clear prospects of success.

[21] In support of its *prima facie* case for interim relief the Scalabrini submit that the challenged provisions fall to be declared to be unconstitutional as: first, the very concept underpinning the challenged provisions – that is, that asylum seekers can be disbarred from the refugee system solely due to their adverse immigration status, without any consideration of the merits of the asylum seeker's claim – is an unacceptable and unjustifiable violation of the right to *non-refoulement,* the Constitution, and international law and second: that the concept of disbarment is irrational, inasmuch as it serves no legitimate government purpose.

[22] In advancing the first proposition the Scalabrini rely heavily on one of their own cases before the Constitutional Court to which they refer to as *Scalabrini 3*.[8]

[23] In *Scalabrini 3*, the court was requested to declare ss 22 (12) and (13) of the Act and its associated regulations invalid for their inconsistency with the Constitution as well as their irrationality.

[24] Those impugned sections provided that an asylum seeker who failed to renew his or her asylum seeker visa within one month of its expiry was deemed to have abandoned his or her application, may not reapply for asylum and was to be dealt with as an illegal foreigner. The effect thereof was that a process would ensue to determine whether the asylum seeker had abandoned his or her application for asylum. During that enquiry, the merits of the asylum seeker's

---

8 *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* 2024 (3) SA 330 (CC).

application would not be considered and, absent any other authorisation from the Department of Home Affairs, such asylum seeker was liable to be deported.

[25] In *Scalabrini 3* the Constitutional Court held that these provisions *"fly in the face of the prohibition contained in section 2 of the Act"* and declared the provisions and the related regulations to be invalid.[9]

[26] The Scalabrini's case is that *Scalabrini 3* is effectively on all fours with this case as the challenged provisions have exactly the same effect as ss 22 (12) and (13) of the Act in that they permit the deportation of asylum seekers who are in South Africa illegally without considering the merits of their asylum applications.

The Respondents' Case

[27] In their answering affidavit, which addressed only the issue of interim relief, the respondents did not challenge any of the facts put up by the Scalabrini in their founding affidavit. They did complain that the facts were allegedly "*hypothetical*". Whilst it is correct that the Scalabrini did put up a hypothetical scenario they did support this by referring to 5 actual cases and provided confirmatory affidavits in respect thereof from the affected persons.

[28] Indeed, the answering affidavit almost entirely consisted of legal argument save for one set of facts: the respondents had proposed a settlement of the interim

---

9 *Scalabrini 3* also held that the impugned provisions were arbitrary and served no rational government purpose. This is also the basis of the judicial review of the regulations in this matter.

relief on the basis that they would *'issue an instruction to all relevant officials that they must not initiate any process to arrest and/or deport any foreign national present in the Republic in the event that such foreign national has indicated an intention to make an application for asylum – in terms of section 21(1)(b) of the Act'* and that this proposal had been rejected by the Scalabrini.

[29] The respondents contended that the proposal effectively conceded the relief which sought to interdict the respondents from deporting or causing any foreign national who has indicated an intention to seek asylum under the Act to be deported or otherwise compelled to return to their countries of origin, unless and until their asylum application has been finally rejected on its merits. They also contended that it addressed the Applicant's concerns regarding detention and arrest which was also sought in the Notice of Motion and ensured that the Scalabrini's arguments in relation to the principle of *non-refoulement* would be addressed pending the hearing of the main application.

[30] As regards the remaining relief, viz interdicting the respondents from implementing the challenged provisions pending the constitutional challenge in the main application, the respondents argued that in *Ashebo*[10] the Constitutional Court had already found that the challenged provisions did not offend the principle of *non-refoulement*.

---

[10] *Ashebo v Minister of Home Affairs and Others* 2023 (5) SA 382 (CC).

[31] In *Ashebo*, the applicant was an Ethiopian who was in South Africa illegally. He had been arrested and detained by immigration officials and had expressed a wish to apply for asylum. He was kept in detention and was not taken to an RRO in order to make an asylum application. He made urgent application to the High Court to interdict his deportation until his status was determined and for orders that he was that his detention was unlawful, that he had a right to remain in South Africa for 14 days in order to approach an RRO and that he should be immediately released. The High Court struck the matter from the roll for want of urgency and he sought leave to appeal directly to the Constitutional Court which granted him such leave.

[32] There were two issues before the Constitutional Court.

[33] The first was whether his delay in making an application for asylum barred the making of such an application. The Constitutional Court held that it did not.

[34] The second issue was whether a foreign national who was in the country illegally, such as Mr Ashebo, was entitled to be released from detention after expressing an intention to seek asylum while awaiting deportation, and until such time as his or her application had been finalised. This mirrors the interim relief the Scalabrini seek in relation to arrest and detention of such foreign nationals who evince an intention to apply for asylum.

[35] In answering the second question the Constitutional Court considered it necessary to review the relevant legislation which included an examination of

section 2 of the Act, section 23 (1) of the Immigration Act as well as the challenged provisions.

[36] In answering that question the Constitutional Court held that:

> *'…it was clear that the combined effect of the amended provisions in ss 4(1)(h) and 4(1)(i) and 21(1B) of the Act, and the regulations, was to provide an illegal foreigner, who intends to apply for asylum, but who did not arrive at a port of entry and express his or her intention there, with a means to evidence the intention, even after the five-day period contemplated in s 23 of the Immigration Act. This was done during an interview with an immigration officer at which the illegal foreigner must show good cause for their illegal entry or stay in the country and furnish good reasons why they do not possess an asylum transit visa, before they are allowed to apply for asylum.'*[11]

[37] The Constitutional Court held that :

> *'These provisions do not offend the principle of non-refoulement embodied in s 2 of the Refugees Act. Their effect is by no means out of kilter with art 31 of the Convention, the fount of s 2. Rather, they accord with its import because it too does not provide an asylum seeker with unrestricted indemnity from penalties. The article provides that a contracting state may not impose penalties on refugees on account of their illegal entry or presence in the country, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'* [12]

[38] The Constitutional Court accordingly held that the door was still open for Mr Ashebo to make an asylum application.

---

[11] *Ashebo* at para [43].

[12] *Ashebo* at para [44]. The reference to the Convention is a reference to the 1951 United Nations Convention relating to the Status of Refugees. South Africa acceded to the Convention on 12 January 1996.

[39] In regard to his further detention the Constitutional Court pointed out that although a foreign national who is in the country illegally is still entitled to apply for asylum this does not negate the fact that he or she has contravened the Immigration Act by entering and remaining in the country illegally. It held that if such a detained foreigner expressed a wish to apply for asylum, the State was not obliged to release him or her, but was required to facilitate an opportunity for the showing of good cause, which could, practically, entail taking the individual to an RRO, or bringing the requisite officials to the place of detention. The Constitutional Court held that such a person's further detention would depend on whether the foreign national was facing charges for contravention of the Immigration Act and could be lawfully detained under the provisions of the Criminal Procedure Act. [13]

[40] The respondents submitted that the blanket suspension of the challenged provisions on an interim basis would ignore the dicta in *Ashebo* to which I have referred and by which I am bound.

[41] The respondents also submitted, on the back of the decision in *OUTA,* that as the Constitutional Court had already found that the challenged provisions did not fall foul of the principles of *non-refoulement* this was certainly not the clearest of cases which would entitle me to restrain the respondents from exercising a statutory power.

---

[13] *Ashebo* at paras [59] and [61].

[42] In answer to these submissions, the Scalabrini submitted that first: the findings of the Constitutional Court in relation to the challenged provisions were not made in the context of a constitutional challenge to those provisions; second: the findings in relation to the challenged provisions not offending the principle of *non-refoulement* were *obiter dicta* and that I was not bound thereby; and third: the Constitutional Court was wrong in finding that article 31 of the convention was the fount of section 2 of the Act.

[43] The Scalabrini also referred me to the judgment of this court which preceded *Scalabrini 3* in which Justice Baartman granted a temporary interdict restraining the respondents from implementing ss 22(12) and (13) of the Act pending a constitutional challenge to those sections ("the Baartman J judgment").[14]

[44] In particular I was referred to two passages in the Baartman J judgment.

[45] In the first passage, the court held that the implementation of any law in contravention of the right of *non-refoulement* is not in compliance with the respondents' constitutional obligations. It held that the real possibility of one person being returned in these circumstances would tip the balance of convenience in favour of granting interim relief.[15]

---

[14] *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* (WCD 5541/2020).

[15] The Baartman J judgment at paras [52] to [53].

[46] The second passage to which I was referred dealt with the decision in *OUTA*. In regard thereto Baartman J held that *OUTA* was not authority for the proposition that in the face of the evidence of the likely contravention of the right of *non-refoulement* the court should yield to the doctrine of the separation of powers.[16]

[47] I am not persuaded by the Scalabrini's submissions.

[48] Whilst it is so that the findings of the Constitutional Court in *Ashebo* in relation to whether the challenged provisions offended the principle of *non-refoulement* were not made in the context of a constitutional challenge and constitute *obiter dicta*, they remain of significant persuasive force to a single judge who is asked to suspend the very provisions considered by the Constitutional Court not to offend the principle of *non-refoulement* on the basis that, *prima facie*, they do. In any event, the constitutional challenge is not before me. An application for interim relief pending that challenge is.

[49] In the Baartman J judgment the court found, *prima facie*, that the challenged provisions in that matter contravened the principle of *non-refoulement*. The obvious distinguishing factor between the Baartman J judgment and this application is that in *Ashebo*, the Constitutional Court held that the challenged provisions do not offend the principle of *non-refoulement*. There were no previous judgments of the Constitutional Court dealing with whether Sections

---

[16] The Baartman J judgment at para [51].

22(12) and (13) of the Act offended the principle of *non-refoulement* and thereby limited the extent to which that court was able to conclude that, *prima facie*, the provisions of ss 22(12) and (13) of the Act offended the principle of *non-refoulement*.

[50] In the circumstances the Scalabrini have failed to convince me *'in the clearest terms'* that I can disregard the separation of powers between the judiciary and the executive and restrain the respondents from implementing the challenged provisions, albeit on an interim basis.

[51] Furthermore, I have not had the benefit of full argument in relation to the Constitutional challenge itself, and I am in no position to comment on whether or not the Constitutional Court may have incorrectly read certain provisions of the Convention and thereby incorrectly concluded that the challenged provisions do not offend the principle of *non-refoulement*.

[52] In any event, and as I have already indicated, the respondents agree to an order interdicting them from deporting any foreign national who has evinced an intention to seek asylum until such as his or her application is determined on the merits, pending the determination of the relief in the main case.

[53] Accordingly, I shall not make an order interdicting the respondents from implementing the challenged provisions pending the hearing of the main application.

[54] That, however, is not the end of the matter.

[55] Although the Department originally proposed a settlement of the application for interim relief on the basis that they would instruct their officials not to arrest such illegal foreigners, this position changed during oral argument and was clarified in a written note delivered after the oral hearing and to which the Scalabrini replied in writing.

[56] The arrest and detention of asylum seekers who are in South Africa illegally is dealt with in *Ashebo* and the Constitutional Court's findings in relation thereto formed part of its *ratio*. As pointed out above, Mr Ashebo wanted the Constitutional Court to do precisely what the Scalabrini want me to do in this case viz. not arrest or detain foreign nationals who are in the country illegally once they evince an intention to apply for asylum. The Constitutional Court made it plain that in regard thereto the criminal law must take its course.

[57] I accordingly intend only to make an interim order interdicting the deportation of foreign nationals who evince an intention to make application for asylum until such time as their asylum application has been decided on its merits.

The Conduct of the Litigation

[58] Before doing so, I must address the manner in which this litigation has been conducted and is to be conducted going forward.

[59] These proceedings are motion proceedings and are governed by the provisions of Rule 6 of the Uniform Rules of Court ("the rules").

[60] Rule 6(1) provides that "*Every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.*"

[61] These facts must be set out simply, clearly and in chronological sequence, and without argumentative matter.[17] The statement of facts must at least contain information relating to the applicant's *locus standi*, the jurisdiction of the court, the cause of action and the evidence on which the applicant relies.[18] The affidavits should not unnecessarily burden the record and it is not open to a party to simply annex documentation to an affidavit without identifying the portions thereof on which reliance is placed and without an indication of the case which is sought to be made out on the strength thereof.[19] Affidavits containing unnecessary evidence may constitute grounds to disallow a successful litigant its costs.[20]

[62] The founding affidavit contained references to some thirteen reported and unreported judgments. In many instances large tracts were quoted from the judgments in support of argumentative submissions made by Mr Chapman. In one instance, a reported case, an unreported case (and an unsuccessful

---

17 *Reynolds v Mecklenberg (Pty) Ltd* 1996(1) SA 75 (W) at 781.
18 Erasmus at 6-10 to 6-13 A.
19 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 729 (T) at 324F-G.
20 *Hlazi v Buffalo Metro Municipality* 2023 (6) SA (ECEL).

petition) were referred to as support for the Scalabrini's contention that the first and second respondents have a principal place of business in Cape Town as opposed to stating the facts upon which that contention was based. In another instance, an unreported judgment of the Eastern Cape Division of the High Court was annexed to support a factual allegation that RRO's are understaffed. Quite apart from the admissibility of the judgment to prove the factual finding made therein in these proceedings, the factual finding made in that judgment related to the staffing of an RRO in the Eastern Cape in 2019.

[63] In addition, the Scalabrini contended that corruption is rife at RROs and annexed two written reports from Lawyers for Human Rights (who are the Scalabrini's attorneys) which reports were alleged to confirm the widespread nature of the problem. Quite apart from the fact that the allegations of corruption appear to have no bearing on the constitutionality of the challenged provisions, the reports run to some 64 pages and no effort was made by the Scalabrini to direct the reader of the reports to the sections therein which are relevant to the relief sought. This could, of course, be attributed to the fact that the reports are entirely irrelevant to the relief sought. I should also mention that the second report appears not to have been annexed in its entirety as the last annexed page thereof ends with an unfinished sentence.

[64] The application was originally set down for hearing on 24 May 2024. It was launched on 26 April 2024 as a matter of urgency.

[65] The Scalabrini had resolved on 15 February 2024 to launch these proceedings

but did not immediately do so. It first attempted to persuade the respondents during March and April to agree to suspend the challenged provisions. This came to naught.

[66] In its abridged Notice of Motion, the Scalabrini required the respondents to deliver a notice of intention to oppose and deliver their answering affidavits by 10 May 2024. The respondents ignored the timetable set out in the Notice of Motion and on 23 May 2024 the State Attorney delivered a notice of opposition on behalf of the respondents. On the next day, 24 May 2024, the respondents launched a formal application for a postponement of the application to be heard on 24 May 2024 and, in doing so, were represented by Denga Incorporated ("Denga Inc").

[67] Mr Alpheus Denga, an attorney at Denga Inc deposed to the affidavit in support of the postponement. He alleged that he was authorised to do so. In that affidavit Mr Denga explained the difficulties the respondents encountered in relation to briefing counsel and relying on the State Attorney to properly represent them. It transpired that that the State Attorney had *'filed'* a notice of opposition on 10 May 2024 but had done so in the incorrect court. It also did not appear to have been served on the Scalabrini's attorneys. Mr Denga annexed a copy of the notice of intention to oppose so drafted by the State Attorney which in fact referred to the case being heard in the Gauteng division of the High Court of South Africa. The respondents were dissatisfied with the manner in which the State Attorney performed its mandate in representing them and they terminated that mandate and instructed Denga Inc.

[68] Be that as it may, the Scalabrini were aware as at 24 May 2024 that Denga Inc purported to represent the respondents.

[69] An order postponing the matter to the semi-urgent roll was taken on that day by agreement between the parties. Denga Inc represented the respondents in that process. The order provided that the respondents were to deliver their answering affidavits by Tuesday, 23 July 2024. They did not do so.

[70] On 26 July 2024 the Scalabrini served a notice in terms of rule 7 (1) on Denga Inc in which notice they disputed the authority of Denga Inc to act on behalf of the respondents and required Denga Inc to file copies of powers of attorney (if any) and copies of any letters, correspondence or other documents authorising their authority to act on behalf of the respondents in these proceedings.

[71] Rule 7 (1) provides that the authority of anyone acting on behalf of a party may dispute that person's authority within 10 days after it has come to the notice of a party that such person is so acting. After the expiry of the 10-day period the authority of the person acting may only be disputed with the leave of the court on good cause shown at any time before judgment.

[72] The Scalabrini's notice in terms of rule 7(1) was hopelessly out of time and any challenge by them to Denga Inc's authority could only have been made with the leave of the court on good cause shown. No such leave was sought by the Scalabrini.

[73] Despite this, Denga Inc replied to the notice in terms of rule 7 (1) on 29 July 2024 and annexed a letter from the second respondent to Denga Inc appointing it to represent the first and second respondents. The Scalabrini appeared to be dissatisfied with this response.

[74] The respondents delivered an answering affidavit on 15 August 2024. It was deposed to by the second respondent.

[75] Although it was not accompanied by a formal condonation application, it did deal with the late delivery of the affidavit and set out why the respondents had not complied with the order that they deliver their answering affidavit by Tuesday, 23 July 2024. One of the reasons given by them for failing to do so is that they alleged that the rule 7 issue needed to be addressed before the answering affidavit could be filed. This is manifestly incorrect. The answering affidavit had to be delivered by Tuesday, 23 July 2024. The belated challenge to Denga Inc's authority to act was only made on 26 July 2024. This is self-evidently after the answering affidavits were to be delivered.

[76] Be that as it may, the second respondent's answering affidavit also disregarded the rules relating to the contents of affidavits in motion proceedings. It too referred to reported cases and quoted extensively therefrom. An ironic feature of his affidavit (which escaped the deponent and the draftspersons) is that he complained about Mr Chapman's ability to make legal submissions and refer to case law when, in the same breath, as it were, he did exactly the same thing in his affidavit. What all the parties failed to appreciate is that the references to

case law and the legal opinions expressed therein are in respect of matters which the court is called upon to decide. Expert legal evidence on domestic law is neither necessary nor admissible.[21]

[77] In addition to the answering affidavit suffering from these shortcomings, much of it was directed at why the matter was not urgent and how unreasonable the Scalabrini were in respect of both the authority challenge and the rejection of its settlement proposal. The respondents accordingly submitted that the Scalabrini had conducted the litigation recklessly and vexatiously. The affidavit concluded with the respondent's contending that the application for interim relief should be struck from the roll with costs, *alternatively* that it should be dismissed and that, in either event, the Scalabrini should pay the respondents costs on a punitive scale.

[78] Undeterred by the threat of a punitive costs order, the Scalabrini soldiered on and delivered a replying affidavit in the short time available to them to do so. Not only was the reply again largely argumentative,[22] but the Scalabrini continued to complain about Denga Inc's authority to act or lack thereof. Both they and the respondents appeared to be blissfully unaware of the fact that the rule 7(1) notice was wholly ineffective due to its being way out of time and that if the Scalabrini wished to dispute Denga Inc's authority, they needed the court's leave to do so. I should add that the first respondent deposed to a confirmatory

---

21 *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 88 I-J.
22 It too included references to reported judgments.

affidavit shortly before the hearing which put the authority challenge to rest, and it was not pursued during oral argument.

[79] When the matter came before me on 27 August, *Mr Simonz*, who appeared together with *Ms Slingers* for the Scalabrini, proposed that he address me, first on the respondents' failure to apply for condonation for the late filing of their answering affidavit, second, on urgency, and finally on the merits of the Scalabrini's case. He indicated that would do so without asking me to first make orders in relation to the admissibility of the answering affidavit and deciding the preliminary question in relation to urgency.

[80] After some debate in relation to both the respondent's failure to properly apply for condonation for the late filing of their answering affidavit and the question of urgency (and with some prompting from me), the Scalabrini's challenge to the admissibility of the answering affidavit was not pursued and the respondents' position that the application was not urgent and should be struck from the roll was also not pursued. As a consequence, I proceeded to hear argument in relation to the relief sought on an interim basis by the Scalabrini.

[81] The question which now arises is what costs order, if any, I should make at this stage of the proceedings bearing in mind that the Scalabrini have to some extent been successful albeit as a consequence of a concession made by the respondents.

[82] In determining an appropriate costs order, I am also mindful of the disregard for the rules displayed by all parties and, in the case of the respondents, for their disregard of the court order requiring them to deliver their answering affidavits by 23 July 2024.

[83] The Scalabrini and the respondents are seasoned litigators. Indeed, they have crossed swords on many occasions. They should know better.

[84] These proceedings were launched as a matter of urgency on 26 April 2024 and set down for hearing on 24 May 2024. In regard to the main application, the respondents were required to furnish the record of proceedings which led to the promulgation of the challenged regulations within 15 days of receipt of the Notice of Motion. The record has not been furnished to the Scalabrini nor have the Scalabrini taken any steps under the rules to compel the respondents to furnish that record.

[85] The consequence thereof is that the main application has not progressed at all for some four months. The Scalabrini have appeared to focus all their attention on the interim relief and appeared to be quite content with the main application proceeding at a snail's pace.

[86] This is unfortunate. Interim relief is just that. Interim. It is to endure until such time as the main application is determined. If the relief in the main application is not granted, the interim relief falls away. If granted it must await certification

by the Constitutional Court until it becomes effective.[23] The parties agreed that such a process would be lengthy. In this case, if the Scalabrini are successful in having the High Court declare that the challenged provisions are invalid, the Scalabrini may seek a temporary interdict on the basis sought in this application pending the Constitutional Court's decision thereon.[24]

[87] In summary, the manner in which the litigation has thus far been conducted leaves much to be desired. The disregard for the rules relating to the contents of affidavits in motion proceedings displays a lack of discipline in the preparation thereof and the skirmish in regard to Denga Inc's authority was unwarranted let alone not made in accordance with the rules.

[88] The respondents' failure to adhere to a court order regulating the further conduct of the matter is to be deprecated. There was simply no excuse therefor. Their opposition to the application on the basis that the application for interim relief was not urgent even though they had agreed to an order to refer the matter to the semi urgent roll in which they were afforded generous time periods to deliver answering affidavits smacks of pettiness.

[89] The issues raised by the Scalabrini are of considerable importance and one would have expected the respondents to welcome an early determination of the matter rather than request, in the answering affidavit, that the matter should be struck from the roll for want of urgency. To his credit, *Mr Arendse*, who appeared

---

23 Section 172(2)(a) of the Constitution.
24 Section 172 (2)(b) of the Constitution.

with *Mr Börgstrum* and *Mr Nacerodien* for the respondents, readily abandoned this position at the oral hearing.

[90] In the circumstances, and even though the Scalabrini have enjoyed some degree of success, I am of the view that I should not award costs to any party at this stage and that the costs incurred in the seeking of interim relief should be costs in the cause of the main application.

[91] The parties have, at the invitation of the court, made arrangements in respect of the further conduct of the matter. Those arrangements, which include a date for hearing of the main application and a timetable for the delivery of the record, further affidavits and the heads of argument will, by agreement between the parties, be included in my order.

[92] **In the circumstances, I make the following order:**

1. The Respondents are interdicted from initiating any process to deport any foreign national present in the Republic in the event that such foreign national has indicated an intention to make an application for asylum – in terms of section 21(1)(b) of the Refugees Act 130 of 1998.

2. This interdict is to endure pending the determination by the High Court of the part B relief sought in this application.

3. The costs incurred in seeking the interim relief are to be costs in the cause of the main application.

4. The application for the relief sought in Part B of this application is to be heard on the semi-urgent roll on **THURSDAY 27 FEBRUARY 2025.**

5. The Respondents are to deliver the record in terms of Uniform Rule 53 by no later than **THURSDAY 10 OCTOBER 2024**.

6. The Applicants are to deliver their supplementary founding affidavits by no later than **THURSDAY 31 OCTOBER 2024**.

7. The Respondents are to deliver their answering affidavits by no later than **FRIDAY 13 DECEMBER 2024**.

8. The Applicants are to deliver their replying affidavits by no later than **THURSDAY 23 JANUARY 2025**.

9. The Applicants' heads of argument are to be delivered by **THURSDAY 6 FEBRUARY 2025** and the Respondents' heads of argument are to be delivered by **THURSDAY 13 FEBRUARY 2025**.

ACTING JUDGE B J MANCA

For the applicants: Adv D Simonsz, Adv G Slingers (The heads of argument were prepared by them and Adv A Katz SC)

Instructed by: Lawyers for Human Rights, Ms N Mia

For the respondents: Adv N Arendse SC, Adv D Borgström SC, Adv A Nacerodien

Instructed by: Denga Inc., Mr A Denga