




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 14238/21

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
Date: 16 January 2024	E van der Schyff

In the matter between:

PHINDILE PHILILE MAZIBUKO

First Applicant

LAWYERS FOR HUMAN RIGHTS

Second Applicant

LEGALWISE SOUTH AFRICA (RF) (PTY) LTD

Third Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

**DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS**

Second Respondent

and

THE CHILDREN'S INSTITUTE

Amicus Curiae

JUDGMENT

Van der Schyff J

Introduction

- [1] South Africa is one of the preferred destinations for various categories of migrants. The country faces many migration-related challenges, including the increased prevalence of irregular migration and identity theft.¹ Non-South African citizens who enter the country unlawfully often employ various means to obtain identity numbers under the pretense that they were either born as South African citizens or awarded permanent resident status. This abuse of process allows for illegal foreigners to access benefits reserved for South African citizens and permanent residents. The use of fraudulently obtained identity documents creates a dilemma for the Government and the country on different levels.
- [2] To address this dilemma, the Department of Home Affairs (DHA) resorted to a practice, referred to herein as ID blocking, to block any suspiciously processed identity number before or while investigating whether a person registered in the national population register is a South African citizen or permanent resident. Because the ID blocking underpinning this litigation occurred before any investigation was concluded and a final decision was reached regarding a person's status as citizen or permanent resident, it prejudiced *bona fide* citizens and permanent residents as much as it prevented illegal immigrants who fraudulently obtained identity numbers to reap the benefits of being issued with an identity number and identity document.
- [3] This application is a review application of the DHA's practice of placing a marker against the identity number (ID) of a person registered in the national population

¹ IOM UN Migration <https://www.iom.int/countries/south-africa> [Accessed 29 December 2023].

register as a South African citizen or permanent resident, which automatically results³ in the marked ID being blocked, without advising the affected party of it despite all of its prejudicial consequences. It is not disputed that the impugned conduct of the DHA amounts to administrative action and that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) applies.

- [4] The litigation concerns the legality of the respondents' practice of blocking South African identity numbers prior to the correct investigation and procedural steps being followed. Markers are placed against IDs as an administrative tool to highlight concerns regarding the identity of the person involved due to suspected fraudulent activity or duplicate IDs. The current system utilised by the Department of Home Affairs (DHA) is developed so that placing a marker against an ID automatically blocks the ID where the individual concerned is suspected to be an illegal immigrant.
- [5] Counsel for the respondents explained that the system used by the DHA was developed to attend to this prevalent issue and that it is not possible to change the system to allow for a dual system where the placing of a mark against the ID is at a later stage followed by the blocking of the ID. The practice is so prevalent that the respondents confirmed during the court proceedings that it recently unblocked more than 1.8 million blocked IDs, with more than 700,000 still being blocked at the time the application was heard.
- [6] On a practical level, this means that when a person against whose ID a marker has been placed approaches any office of the DHA, a bank, SASSA office, or any other institution that requires an ID, they will be denied the service they seek, and be informed that their ID is blocked. The blocking of IDs prevents individuals from engaging with the world in any way that requires that person to use their ID. These individuals cannot obtain passports to travel, and they can't vote, access healthcare or education systems, or open bank accounts.
- [7] If one considers that these consequences are experienced by individuals recorded in the national population register as either citizens or permanent residents, the

prejudicial effect of ID blocking is contextualized.² Khampepe J affirmed that citizenship and equality of citizenship are matters of considerable importance in South Africa.³ It is equally valid that interference with a person's status as a permanent resident goes to the core of that person's identity, sense of belonging in a community, and security of the person. ID blocking, if implemented during the investigative phase of an inquiry regarding the validity of a person's status as a citizen or permanent resident, deprives a person of the benefits of being a citizen or permanent resident before it is found that such person is indeed not a citizen or permanent resident.

- [8] Until recently, the process of placing a marker and blocking IDs entailed a unilateral act performed by the DHA in which affected persons were not notified that there was a process of investigation into their identity status, the outcome of which may result in their IDs being blocked, or that a decision had been made to have their IDs blocked. Affected persons were neither granted an opportunity to make representations nor provided with written reasons as to why their IDs have been blocked.
- [9] During the litigation, and relatively close to the trial date, the respondents conceded that blocking IDs without a fair and just administrative process is inconsistent with the Constitution. This concession was preceded by the unblocking of approximately 1.8 million IDs. The respondents contend, however, that the benefit of placing markers against specific identified IDs is more valuable than dispensing with the practice of placing a marker against an ID that results in the ID being blocked. They submit that with a procedurally fair and just process being introduced into the system, the violation of individuals' constitutionally protected rights will be justified and acceptable in a free and democratic society based on the principles embedded in the Constitution. The respondents essentially submit that a case is to be made for

² Section 25 of the Immigration Act 13 of 2002 grants the holder of a permanent residence permit all the rights, privileges, duties, and obligations of a citizen, save for those rights, privileges, duties, and obligations which a law or the Constitution explicitly ascribes to citizens. The rights in the Bill of Rights are equally afforded to both categories of individuals affected by the practice of ID blocking.

³ *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) at para 28.

the limitation of any of the affected persons' fundamental rights as provided for in ⁵ section 36 of the Constitution.⁴

- [10] The respondents explain that the DHA is currently developing a procedurally fair system that will introduce and implement a transparent process that will still entail placing markers or blocking IDs. In the answering affidavit to the third applicant's founding affidavit, the respondents state that this transparent system has been implemented.
- [11] The applicants' stance is that the belated concession by the DHA regarding the lawfulness of the decision to place markers and block IDs does not render any of the remaining issues moot. Counsel for the first applicant ('Ms. Mazibuko'), contends that the concession addresses the issue of procedural fairness⁵ but fails to address the issues relating to Ms. Mazibuko's reliance on sections 6(2)(a)(i)⁶, (ii),⁷ (b),⁸ (d),⁹ (e)(iii),¹⁰ (e)(v)¹¹ and (vi)¹² of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and the purported constitutional invalidity of the decision. To a great extent, the other applicants support this viewpoint.

⁴ Section 36 provides that: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

⁵ S 6(2)(c) of PAJA.

⁶ "The administrator taking the decision was not authorised to do so by the empowering provision."

⁷ "The administrator who took the decision acted under a delegation of power which was not authorised by the empowering provision".

⁸ "A mandatory and material procedure or condition prescribed in by an empowering provision was not complied with".

⁹ "The action was materially influenced by an error of law".

¹⁰ "The action was taken because irrelevant considerations were taken into account or relevant considerations were not considered".

¹¹ "The action was taken in bad faith".

¹² "The action was taken arbitrarily or capriciously".

- [12] In my view, the respondents' concession, coupled with the unblocking of a large⁶ number of IDs and undertaking to develop a system underpinned by Constitutional principles, did not settle the dispute between itself and the applicants, although it narrowed down the contentious issues. Accordingly, the issue of ID blocking is not a moot issue. The main substantive question that remains is whether there is any legal justification for ID blocking at all.
- [13] The primary issues that need to be determined are the constitutional validity of the practice of placing markers against and blocking IDs, the granting of a just and equitable remedy that the Court should fashion for the applicants with regard to the respondents' concession, should it be appropriate, and whether the Court should confirm Ms. Mazibuko's status as a permanent resident.
- [14] The necessity to fashion a just and equitable remedy follows the respondents' concession that no fair administrative process was followed before blocking IDs, at least not before November 2022. The relief sought by the various applicants requires a multidimensional approach, and relief should be fashioned to address the plight of-
- i. Ms. Mazibuko;
 - ii. The identified clients of Legalwize ("LW");
 - iii. The unidentified or anonymous clients of Lawyers for Human Rights ("LHR") and LW;
 - iv. Members of the general public whose IDs were blocked before November 2022 and to date remain blocked; and
 - v. Affected minor children.
- [15] When a court must fashion a remedy, the issue of separation of powers arises. An interesting feature of this application is that the applicants and the respondents emphasised the court's power to fashion a just and equitable remedy in terms of section 172 of the Constitution. However, their views regarding the extent of such a remedy differ substantially. In considering their respective submissions I am mindful of Sach J's warning in *Prince v President, Cape Law Society and Others*¹³ that:

¹³ 2002 (2) SA 794 (CC) at para 156.

‘The search for an appropriate accommodation in this frontier legal territory accordingly imposes a weighty responsibility on the Courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity... Both extremes need to be avoided.’

[16] The Constitutional Court recently reaffirmed that a court must keep in mind the principle of the separation of powers and, flowing therefrom, the deference it owes to the Legislature in devising a remedy for a breach of the Constitution in a particular case.¹⁴

[17] The same court emphasised that:

‘[W]hile the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.’¹⁵

Accordingly, the relief granted in this matter is justified and takes into account the separation of powers doctrine while weighing very carefully the court’s duty not to shirk away from preventing a violation of the rights of those affected persons referred to in this application.

¹⁴ *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* [2023] ZACC 45 (24 Augustus 2023) at para 50.

¹⁵ *Minister of Health and Others v Treatment Action Campaign and Others (No2)* 2002 (5) SA 721 (CC) at para 99, *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 200.

Background

[18] The application commenced when the first applicant, Ms. Mazibuko, approached the Court seeking relief to:

- i. Interdict the respondents from threatening to take or taking any steps to revoke her status as a permanent resident, confiscate her South African identity document, or deport her pending a final decision to do so in terms of section 8(3) of the Immigration Act 13 of 2002. This includes any review of a decision by the respondent in terms of section 8(6) of the Immigration Act, and any review or appeal of the decision to the Director General in terms of s 8(4) of the Immigration Act;
- ii. Review and set aside the respondents' decision to place markers and block her ID and substitute such decision with a decision confirming her status as a lawful South African permanent resident, alternatively remitting the decision to the respondents for reconsideration within 30 days;
- iii. Declare the decision to place markers and block the first applicant's ID unconstitutional inconsistent with sections 10,¹⁶ 12(1),¹⁷ 20,¹⁸ and 21¹⁹ of the Constitution.

Ms. Mazibuko also seeks condonation for the late filing of the application or the extension of the time period provided for in section 7 of PAJA to the extent that it might be necessary.

[19] The LHR and LW applied to be joined as applicants to these proceedings. While the first applicant sought relief for herself, the LHR and LW intervened in this application in the public interest and on behalf of their clients whose IDs were blocked by the respondents. LHR and LW seek an order declaring the respondents' conduct unconstitutional and invalid and obliging them to remove the markers placed on their clients' IDs. LHR further seeks the unblocking of every ID that is currently blocked.

¹⁶ 'Everyone has inherent dignity and the right to have their dignity respected and protected'.

¹⁷ 'Everyone has the right to freedom and security of the person ...'.

¹⁸ 'No citizen may be deprived of citizenship.'

¹⁹ Right to freedom of movement and residence.

While the LW sought an order unblocking its clients' IDs and provided a list to the respondents with the names of their affected clients and affidavits from those clients, LHR's clients remained anonymous.⁹

[20] The LHR and LW, in addition, seek that the respondents be ordered to promulgate Regulations that implement a fair and just process before blocking or marking a person's ID, that is aligned with fair and established administrative procedures and meets the following minimum standards:

- i. Affected persons are provided with prior notice that there is an investigation pertaining to their IDs, including details of the nature or purpose of the investigation, which may have the effect of their ID being blocked;
- ii. Affected persons are given an opportunity to be heard and provide information/documentation before the decision to block or mark their ID is made;
- iii. Affected persons are provided with written reasons for the decision to block or mark their ID and
- iv. Affected persons are provided with an opportunity to internally appeal the decision to block or mark their IDs and are made aware of the appeal process.

Pending the promulgation of the Regulations, the respondents must be ordered to safeguard the affected persons' rights. The LHR, in addition, seeks an order obliging the respondents to provide an affidavit with information regarding, amongst others, the number of persons affected as a result of their IDs being marked and blocked, the duration that affected persons have had markers placed on their IDs, the number of cases resolved, the time and steps necessary in the initiation and completion of a process regarding the blocking or marking of affected persons' IDs.

[21] The Children's Institute (CI) requested all parties' written consent to enter as *amicus curiae* in these proceedings. The applicants consented, and the respondents abided by the Court's decision. The CI undertook to illustrate that the blocking of the ID's of mothers significantly affects the children of those mothers. The CI also sought to provide recommendations for relief that would ensure that measures taken by the respondents to resolve duplicate or suspected fraudulently obtained ID's of mothers

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does not disproportionately disadvantage children by preventing their births from being registered timeously or by preventing them from obtaining South African citizenship *via* their mother's citizenship and an ID after they have turned 16 years old. The CI was admitted as *amicus* because it is in a position to make submissions on the relevant facts necessary to understand the impact of ID blocking on children, a vital aspect highly relevant to the issues before the court that the other parties did not address.²⁰

Context

The first applicant, Ms. Mazibuko

- [22] Ms. Phindile Mazibuko is an adult citizen of the Kingdom of Swaziland. She is a permanent resident of South Africa. She holds a Swaziland passport and a South African identity document. Ms. Mazibuko has been a permanent resident of South Africa since 1998. Her permanent residency status has been updated as and when necessary.
- [23] Ms. Mazibuko states that she was born in Swaziland. She met her husband in 1993 while studying at the University of Swaziland. They got engaged and concluded a marriage by traditional rites in 1996. Her husband thereafter returned to South Africa to take up employment. She stayed behind to complete her degree. Upon completing her degree in August 1997, she travelled to South Africa using a valid visitor's visa. She concluded a civil marriage with her husband in Pretoria on 13 August 1997. She was granted permanent residency in South Africa on 12 March 1998, and received her identity document on 19 March 1998. Two children were subsequently born of the marriage.
- [24] During 2012, Ms. Mazibuko received a notification from her bank that money had been fraudulently deducted from her account. She was informed that it appeared to the bank that someone had accessed her personal details, including her full name, fingerprints, and a photograph, and was using this information to impersonate her.

²⁰ See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 99, and *Institute for Security Studies In Re S v Basson* 2006 (6) SA 195 (CC) at para 6.

She was advised to approach the offices of the DHA for assistance in investigating a possible case of identity theft.

[25] Ms. Mazibuko attended the offices of the DHA in Centurion around 28 November 2012. She informed officials of her ordeal and asked them to assist her. She was informed that the DHA's records reflect two identity numbers linked to her name, the one she used and one unfamiliar to her. Ms. Mazibuko was requested to attend to her local Police Station to depose to an affidavit setting out the facts of her situation. She was to provide an affidavit accompanied with copies of her permanent residency permit, identity document, marriage certificate, and her husband's identity book to the DHA in Pretoria Central to investigate the matter. She duly complied and provided the documents to the DHA in or around the period between November and December 2012. She received a case number and was advised that the DHA would investigate the situation. She was told to return in four to six months to ascertain the outcome of the investigation. Ms. Mazibuko returned to the Centurion offices of the DHA in March 2013 and was informed that the investigation was ongoing. The matter was assigned to Mr. Msiza and Mr. Baloyi of the DHA.

[26] Since March 2013, various attempts have been made to ascertain the outcome of the investigation. On 10 December 2018, Ms. Mazibuko and her husband attended the DHA office in Centurion to apply for a new passport for one of their daughters. She approached Mr. Baloyi for an update on the investigation and was referred by him to the office manager, a man by the name of Bongani. She was informed that the investigation was completed. The investigation revealed that the unfamiliar identity number was obtained in 1997 by an unknown individual at the Mbunzini Immigration Office in Mpumalanga. She was told that it appeared that her permanent residency and South African identity document were obtained unlawfully, and the matter had been handed over to the legal department at the DHA's headquarters in Pretoria. She was informed that she would be contacted between February or March 2019, and in all likelihood, her permanent residency permit would be withdrawn and her identity document revoked, resulting in her being deported and criminally charged. Despite numerous requests, Ms. Mazibuko was not furnished with reasons for the allegations that her permanent residency permit and South African Identity document were unlawfully obtained.

- [27] Ms. Mazibuko's husband attended to the DHA offices Centurion on 14 January 2019 to apply for his new smart South African identity card. Mr. Baloyi questioned him for approximately two hours regarding his relationship with her. Ms. Mazibuko approached her attorney shortly after this incident. The attorney conducted a Windeed search but found no record of the second, unfamiliar to her, identity number. The attorney sent further correspondence to the officials of the DHA to inform them of same. On 27 February 2019, Ms. Mazibuko's attorney was informed that the DHA's records indicate that she applied for a birth certificate on 12 February 1997 and a non-citizen identity document in 1998. Ms. Mazibuko denied applying for a birth certificate and informed the DHA that she was a student attending the University of Swaziland at the time. She provided her academic transcripts as proof of her attendance during the said period.
- [28] A significant body of correspondence was exchanged between the DHA and Ms. Mazibuko's attorney, each time initiated by the attorney having not received a response from the DHA. All meetings held with the DHA were occasioned at her instance. Since the DHA remained of the view that Ms. Mazibuko's fingerprints appeared on all the relevant submitted documents, and because a witness who was ostensibly involved during the application for the fraudulent unfamiliar identity number does not know her, Ms. Mazibuko's attorney was informed that her identity number would remain marked and thus blocked. At the request of the DHA, Ms. Mazibuko provided her fingerprints for a second time. By 16 March 2021, Ms. Mazibuko had still not received formal feedback except for a letter from DHA dated 27 October 2020 wherein she was informed that:

'I had referred your matter to investigation to provide response. However, if same has not yet been sent to you by now, I can indicate to you that the decision is that your client's fingerprints matched the ones on record, the markers will not be removed ... The matter will then be dealt with in terms of the Immigration Act, and I will accordingly refer same to the inspectorate.'

[29] Ms. Mazibuko explained that she lives in constant fear that she will be unable to apply for permanent citizenship, that she will be deported and separated from her family, and arrested. Since the start of this ordeal, she has been unable to travel to Swaziland to visit her family. The effect of the DHA's conduct was not only detrimental to Ms. Mazibuko's personal health and finances but also to her husband and her children, who did not know whether and if their mother would be separated from them. One can but contemplate the effect of this measure of uncertainty on Ms. Mazibuko's children's sense of security in the country of their birth.

[30] The respondents provided their record of decision after the notice of motion was served on them. The respondents regard Ms. Mazibuko as a *'perpetrator of fraud'* despite not formally charging her with misrepresentation or any criminal offence. She laments the fact that she is a victim of identity theft and that the matter has not been referred to the DHA's corruption branch. She avers that the DHA's witness's denial that she knows her or ever assisted her in applying for an identity document is proof of her innocence.

[31] In a second supplementary affidavit, Ms. Mazibuko deals with the correspondence received from the DHA wherein she was informed that the DHA:

'... has internally reviewed the matter and is of the considered view that it has not followed full administrative process in line with [the] Promotion of Administrative Justice Act (PAJA). The Department still maintains that there is prima facie case to subject yourself to investigations based on the documents in possession thereof. However, it is paramount that the Department follow due process when faced with such matters.

In line with the above, the Department has decided to remove markers on identity number [xx] and [xx] so as to follow due process by furnishing yourself with an *audi et alteram partem* letter and afford you the opportunity to respond to the letter by making representations to the Department setting out reasons why the Department must not proceed with the withdrawal of your citizenship status, within 14 (fourteen) days after receiving the *audi*

et alteram partem letter in terms of section 3 of the Promotion of Administrative Justice Act, No. 3 of 2000. Thereafter the Department will make an informed decision based on the information at hand as well as representation made by yourself.'

- [32] Ms. Mazibuko persisted in the relief sought in a further amended notice of motion. She submits that the issues were adequately ventilated in the affidavits filed, and the respondents still threaten to revoke her status as a permanent resident. The primary relief she seeks now is substituting the DHA's decision to block her ID with a decision confirming her status as a permanent resident.

The respondents' response re Ms. Mazibuko

- [33] The respondents initially raised several points *in limine* in answer to Ms. Mazibuko's founding affidavit. They only persisted with the point that Ms. Mazibuko failed to exhaust all internal remedies before approaching the Court for the relief sought. The respondents contend that section 8 of the Immigration Act 13 of 2002 ("Immigration Act") provides an internal remedy that she failed to exhaust. It suffices to state that the DHA did not conduct any investigation or make any decision in terms of the Immigration Act before Ms. Mazibuko's ID was blocked – that much is confirmed by the DHA's concession and the latest communication she received from the DHA. The internal remedies provided in the Immigration Act thus do not find application in this review application.
- [34] The respondents' stance expressed in the answering affidavit filed in response to Ms. Mazibuko's founding affidavit is that the court '*has no power to lift a marker against an identity number where a person has more than one identity number*' and that '*it is not competent for a court to order a reconsideration by the respondent*'. The respondents essentially argue that a court's jurisdiction is ousted in the face of a flagrant contravention of the Bill of Rights.
- [35] The respondents remain steadfast in their view that Ms. Mazibuko provided both sets of fingerprints for the respective identity document applications, as she is

'physically the only person who could have supplied the fingerprints.' They aver that it is not for the Court to consider whether Ms. Mazibuko has met the requirements to become a South African citizen and not for this Court to grant permanent resident status.

The first intervening party, the second applicant: Lawyers for Human Rights

- [36] LHR applied for and was granted leave to intervene as the second applicant. The application was brought on the contention based on their objectives as an organization and clientele that they act in the public interest and on behalf of specific clients who find themselves in the same precarious position as Ms. Mazibuko. The LHR intervened in this matter as an institutional applicant to seek a broader remedy on behalf of its clients and similarly situated persons.
- [37] I am satisfied that the LHR has the necessary *locus standi* to participate in this application, not only on behalf of its clients but in the public interest. The nature of the rights infringed upon through the blocking of IDs, the consequences of the infringement of these rights that themselves render individuals vulnerable, the fact that ID blocking indiscriminately affects innocent *bona fide* citizens and permanent residents and illegal immigrants who fraudulently obtained identity numbers alike, and the range of adults and children directly and indirectly affected, justify LHR's legal standing to act in the public interest.²¹
- [38] LHR avers that it has been dealing with individuals who have discovered that their IDs have been blocked through its Statelessness Project. LHR refers to specific case studies and claims to have 134 case files, all involving clients who have had their IDs blocked without the DHA having followed the necessary due process. LHR equates blocking an ID with '*stripping a person of their citizenship*' and submits that the DHA must follow a just and fair administrative process before placing a mark against and blocking an ID. LHR's case studies indicate that children are often

²¹ See, amongst others, *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at para 234, and *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at para 8.

affected if one of their parents' IDs is blocked. The cases also indicate that a block is usually placed on an affected person's ID because:

- i. There are duplicate IDs assigned to more than one person or multiple IDs attributed to a single person;
- ii. The affected person is suspected or accused of being an 'illegal immigrant' or non-South African citizen or
- iii. The affected person is suspected of or accused of obtaining their ID fraudulently (through misrepresentation or false registration of birth, death, or marriage).

[39] The LHR contends that there is no legal basis or legal authority empowering the DHA to block IDs. LHR submits that the Identification Act and the Births and Deaths Registration Act 51 of 1992 ("Births and Deaths Registration Act") have limited provisions on the issues of 'verification,' investigation', or 'cancellation' of IDs. In addition, these statutes do not set out an administrative procedure to be followed when the DHA wants to place a marker against an ID with the effect of blocking the ID.

[40] The LHR attempted to engage with the DHA to find an amicable solution to the problem without the need for court intervention. LHR informs that the DHA has been battling with blocked ID cases since 2010 and has yet to implement a sustainable solution and administrative process to address blocked ID cases efficiently. In March 2021, LHR conducted a parliamentary briefing on statelessness to the Portfolio Committee on Home Affairs (PC). The PC requested the DHA to respond to this issue in writing and to highlight, in particular, the number of blocked ID cases DHA was dealing with, the criteria used to block IDs, and the steps to be taken in resolving a blocked ID case. At the time the LHR's founding affidavit was deposed to, the DHA had not provided any response to the PC. The LHR relentlessly attempted to engage DHA on this subject but to no avail.

[41] The LHR highlights that the South African Human Rights Commission (SAHRC) found in 2018 that the DHA had unnecessarily infringed the rights of a complainant whose ID had been blocked. The SAHRC recommended that the DHA:

- i. review and align all operational systems relating to the issuing of IDs and investigations of fraud relating to IDs with legislation such as PAJA and judicial precedent;
- ii. identifies and provides to the Commission the number of IDs affected by suspected fraudulent activity, the number of investigations of such alleged fraud, and the duration of such investigations in a report to be provided within 60 days;
- iii. includes in the report referred to above details of the steps to be taken in responding to complaints regarding delays in the issuing of findings in respect of blocked IDs;
- iv. outline the consultative process the DHA will put into place;
- v. commits not to block or mark IDs without consultation with the ID holders and to contravene applicable constitutional provisions.

[42] The LHR contends that the DHA failed to provide any response to the SAHRC. They further aver that the DHA is consistent in ignoring instructions and recommendations from parliament and the SAHRC, and its failure to provide reasons for its decisions. LHR thus seeks an order declaring the DHA's conduct in placing markers on IDs that have the effect of blocking IDs unlawful, unconstitutional, and invalid to the extent that it is inconsistent with the Constitution. LHR, in addition, seeks what it coined procedural relief, which requires the DHA to implement a systematic, accountable, and transparent process entailing that it will not block an ID unless a person:

- i. Is made aware of and has been provided with prior notice that there is an investigation that may have the effect of their ID being blocked;
- ii. Is given an opportunity to be heard and provide information and/or documentation before the decision is made;
- iii. Receives written reasons for the decision to block their IDs and
- iv. Is provided with an opportunity to internally appeal the decision to block their IDs and /or is made aware of the appeal process, if any exists.

- [43] The LHR further seeks an order in terms of which the DHA is directed to review and align its operational systems relating to 'the issuing' [blocking] of IDs and investigations of ID fraud with legislation, such as PAJA and judicial precedent.
- [44] As a remedy to prevent continuing infringements from unfair process, the LHR seeks an order that the DHA must provide a report to the Court identifying the number of IDs affected due to suspected fraudulent activity, the number of investigations conducted of such alleged fraud, and the duration of such investigations; the steps taken in responding to complaints regarding delays in the issuing of findings in respect of blocked IDs, an outline of the consultative process the DHA will put into place and a written commitment that the DHA will henceforth not block any IDs without consultation with the affected ID holders, or take steps that will be in contravention of the constitutional provisions outlined.
- [45] The LHR proposes that interim measures be put in place pending the DHA finally implementing an administratively fair process, which measures should entail that the DHA must remove the blocks on the IDs of its clients, of which a list will be provided; send a formal notice to LHR's clients whose IDs the DHA still intend to continue to block; and provide a record and reports that form the basis for or are relevant to the blocking of LHR clients' IDs as identified in the list provided by LHR. Where it is necessary to block an ID, and the DHA cannot contact the affected person whose ID it intends to block, the LHR proposes that the DHA obtain a court order authorising such drastic measures.

The amicus curiae: The Children's Institute

- [46] The CI's interest in the matter is to promote equality and realise children's rights. One of the CI's objectives is to provide legal services to parents and caregivers of children without birth certificates by assisting them in obtaining birth certificates and social grants. The CI identified specific categories of children who are more likely to struggle to obtain birth certificates or IDs. One of these categories is children whose mothers or grandmothers have IDs blocked by the DHA.

[47] The CI sought to demonstrate, amongst others, that blocking a mother's ID significantly affects the mother's children by depriving the mother of her rights and, subsequently, affecting her means to support her children sufficiently and by automatically blocking the child's birth from being registered. The CI highlights the plight of mothers who are victims of identity fraud or Home Affairs' clerical errors that result in their ID becoming a duplicate. The affected parties are already vulnerable, and the blocking results in the women whose IDs are blocked bearing the responsibility and financial costs to prove their IDs were lawfully obtained before their IDs are unblocked.

[48] The CI proposed recommendations for relief that would ensure that measures taken by the respondents to resolve duplicate or suspected fraudulently obtained IDs of mothers, do not disproportionately disadvantage children by preventing their births from being registered timeously or by preventing them from obtaining South African citizenship through their mothers' citizenship and an ID after turning 16.

The second intervening party, the third applicant, Legalwize South Africa (RF) (Pty) Ltd

[49] The LW applied for and was granted leave to intervene as the third applicant. Many of LW's members have been or will be affected by the blocking of their identity numbers and documents by the DHA system. In its submissions, the LW claims to have standing due to public interest and the interests of its members. This Court finds that LW has legal standing to act in the public interest.²²

[50] LW submits that it is unclear what Statute or Regulation empowers the DHA to place a marker against IDs that result in their blocking. LW contends that no explicit provision in the Identification Act or the Regulations refers to 'markers,' 'blocking,' or any similar scheme.

[51] LW contends that placing markers is problematic because the blocking system does not differentiate between persons who are merely suspected of wrongdoing and those who have been found to have committed an illegal act. The block imposed

²² See the discussion at para 37 above, the same reasoning applies to LW.

while being under investigation is *de facto* the same as one imposed after a final determination.

- [52] The LW identified the following clients as individuals with blocked IDs – MB Simelane, TF Posholi, and MH Matsaba. These individuals provided affidavits setting out their cases and replied to the respondents answering affidavit. It suffices to state that the respondents unblocked Mr. Matsaba's ID number and issued him an ID in July 2023. The respondents aver that there are discrepancies regarding Posholi and Simelane's IDs, and both are under investigation and suspected to be illegal immigrants.

The respondents' responses regarding LHR, CI, and LW

- [53] The respondents explained that the DHA implemented the blocking and marking of IDs through the Home Affairs National Identification System (HANIS). The HANIS is an authentication system that verifies fingerprints of South African citizens against the national population register. The system has proven efficient for private and public external stakeholders who rely on the records and documents of the DHA when dealing with their clients. Some of these external stakeholders include the South African Social Service Agency (SASSA), the National Department of Human Settlement, TransUnion, and the South African Bank Risk Information Centre. These institutions can verify the authenticity of the identity of a prospective client using their fingerprints.
- [54] In contrast to the answer filed to the first applicant's founding affidavit, the respondents, answering the second and third applicants, do not dispute that using a marker resulting in the blocking of an ID involves taking an administrative step that should be communicated to those likely to be materially and adversely affected by it. To this end, the respondents aver, the DHA is busy carrying out a process establishing a procedurally fair system that will introduce and implement a transparent process that will still entail the use of markers and the consequent blocking of IDs, provided that the persons affected:

- i. are given prior notice informing them that there is a *prima facie* case against them and investigations may result in the placing of a marker and the blocking of their ID;
- ii. are afforded a fair and meaningful opportunity to make representations and provide information on the substance of the case before the decision is made;
- iii. are informed about the decision and furnished with reasons for the decision to block their ID numbers;
- iv. are provided with an opportunity to challenge the decision to block their IDs through an internal appeal process and be made aware of the existence of such an appeal process.

[55] The process referred to as Standard Operating Procedures, which the DHA initiated to render the blocking of IDs in a procedurally fair process and in line with constitutional prescripts, was ostensibly implemented. However, the respondents did not feel the need to share the content thereof with the Court. The respondents only state that:

'The status of dealing with suspicious ID's have improved. Prior to the marking of the number implicated, clients is (sic) notified of the suspicious ID, informed of investigations underway, and given an opportunity to make a presentation and produce requested documents. DHA thereafter considers the evidence produced in the written presentation against the information in the NPR. In the event that the outcome is in favor of the client the identity number will not be blocked.'

An Amendment Bill is stated to be in the pipeline, but a copy of the document as it currently stands was not provided.

[56] The DHA explained that before 1994, and in preparation for the first democratic election, a call was made by the DHA for all citizens who were not in possession of IDs to apply to be issued IDs. The DHA was overwhelmed with the number of applications and employed temporary workers to assist with processing the applications. As a result, non-South Africans obtained South African IDs. The DHA

further submits that it '*had a large hope*' that illegal foreigners issued with IDs would approach the DHA offices to regularise their position. DHA could not track down the holders of those IDs for several reasons. The DHA did everything it could to encourage people to come forward, including engaging with external stakeholders.

- [57] The second respondent, the Director General ('DG'), relies on the fact that the DG's duties include but are not limited to being the functionary who must, amongst others, ensure that the integrity of the population register is maintained. This is done through various means, amongst others, by placing a marker to draw attention to a particular identity number. The marker serves different purposes, including indicating the death status of a person, that a person is a foreign national, that a person is under investigation, that there is a change in relation to the identity number, that there are multiple identity numbers, and that the person is sharing an identity number with another person. When a marker is placed against a suspicious ID, that is, the ID of a person suspected to be an illegal foreigner, the ID number cannot be used in any transaction with any institution that requires ID identification. The DHA confirms that placing a marker results in the holder of the implicated ID being unable to access the rights, privileges, and benefits of citizens.
- [58] The respondents contend that the benefit of placing markers is more valuable than it would be if markers were dispensed with. The respondents submit that blocking IDs is an indispensable method that benefits and protects the State and law-abiding citizens. While the blocking of IDs is undesirable, it is indispensable. It is aimed at protecting the broader public from ID fraud, curbing illegal immigration, and ensuring the integrity and credibility of the national population register. If there are no markers that can be utilised, the following will inevitably occur:
- i. The fraud in obtaining ID documents, which is presently prevalent, will continue to proceed unabated and even grow in severe proportions. This will be disastrous for the country;
 - ii. The impact of theft using false IDs will weaken the economy;
 - iii. The use of incorrect ID numbers will affect the information on the population registry, e.g., undesirable clients will be granted citizenship under false pretenses;

- iv. The DHA will not be able to trace IDs that are fraudulent, and suspicious persons who commit contraventions as set out in section 18 of the Identification Act will be able to continue to do so undetectable;
- v. Problems relating to the unlawful accessing of social grants and housing benefits will escalate;
- vi. Some countries have already placed restrictions on South Africa because it is easy to obtain falsified IDs. The risk exists that existing cooperative agreements may be nullified;
- vii. the risk exists that human trafficking will increase;
- viii. fraud detection and crime prevention efforts by the banking industry's fraud risk management services will be hampered.

[59] The respondents acknowledge that as far as children are concerned, the '*chain of markers has to break somewhere as the infringements by undocumented adults should be separated from those of undocumented children*'.

[60] The respondents submit that sections 18 and 19 of the Identification Act deal with the consequence of tampering with identity cards or documents, obtaining an identity card *via* fraud, and allowing someone else to use one's card. They assert that it is evident from the provisions of section 19 of the Identification Act that the DG has a broad discretion to recall, cancel, and replace IDs of eligible persons with clerical errors in the prescribed manner and cancel the IDs of ineligible persons. The respondents submit that the Immigration Act and the Identification Act identify the DG as the custodian of the national population register and impose on it the duty to protect the integrity of the population register. The DG is of the belief that sections 18 and 19 of the Identification Act vest him with the authority to rectify, correct, and cancel IDs. This legislation is regarded as empowering the DG to place markers against and block IDs.

[61] The respondents submit that section 172 of the Constitution provides that a Court, when deciding a constitutional matter within its power, can declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency and may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity, and/or suspending the

declaration of invalidity for a period of time on any conditions to allow the competent authority to correct the defect.

- [62] The respondents contend that currently, the only IDs that remain blocked relate to cases that pose a security risk. Therefore, it would not be in the public interest to have an order to set aside all the current blocks. The respondents, therefore, submit that pending the implementation of an administratively fair procedure in dealing with the blocked IDs that pose security threats to the country, the declaration of invalidity be suspended for a period of 90 days to allow the DHA to *'finalise all the in persons appearing on the list that LHR and LW would have provided'*.

Condonation

- [63] Ms. Mazibuko avers that the review application was issued within the 180-day period referred to in PAJA, since the impugned decision was taken on 27 October 2020. Ms. Mazibuko further explained that to commence legal proceedings against the respondents, she had to accumulate sufficient funds to approach attorneys to assist her.
- [64] The decision taken on 27 October 2020 was that the markers would not be uplifted from Ms. Mazibuko's identity number. The date on which a decision was taken to place a marker against her ID is unclear, but a block was already imposed on her ID by 12 September 2019.
- [65] I am, however, of the view that the respondents' approach to this matter, aptly described as a *'cloak-and-dagger approach'*, contributed to the delay in instituting the review proceedings. When it became clear that the respondents were unyielding, the review proceedings were instituted within 180 days. Since the matter involves the infringement of constitutionally entrenched rights of public importance, condonation is granted.

The blocking of identity numbers in a Constitutional South Africa

[66] Identity numbers are only assigned to South African citizens and permanent residents. The blocking of a person's ID undeniably infringes several constitutional rights. The respondents' concession in this regard renders it unnecessary to engage in a discussion as to whether and which rights in the Bill of Rights are infringed upon when a person's ID is blocked. To grasp the impact that the blocking of a person's ID can have on a person's life, it suffices to repeat the statement from the LHR's founding affidavit:

'[T]his practice effectively prevents them from engaging with the world. They become ghosts in the system – they cannot obtain passports and travel, they cannot access education and healthcare, they cannot open or operate bank accounts. In many cases, the inequity stretches to the children of LHR's clients, who, by implication, have the same consequences thrust upon them. As a result, they live lives of indignity and inequality, dependent on others to function in society and vulnerable to abuse as a result.'

[67] Counsel for the respondents reiterated the importance of an ID in South Africa. He states:

'In South Africa, an ID is essential, for *inter alia*, getting access to housing, education, participation in elections, healthcare services as a citizen, access to public services and freedom of movement and economic life.'

[68] As indicated above, the respondents contend that placing markers and blocking suspicious IDs is legally correct and critical in safeguarding the national population register. The respondents claim that if the placing of markers against IDs is declared unconstitutional and invalid, the DHA will have no alternative remedy for dealing with identity theft, fraud, and duplicate IDs. This will create an immense security risk for the country. In addition to the DHA, various State departments and private

institutions rely on the Department's records. The marking of IDs forms an integral and indispensable part of the banking industry's fraud risk management programs, crime detection, and crime prevention efforts. The respondents submit that the banking industry relies on the DHA as the primary data source for customer verification to combat identity theft and fraud.

- [69] Despite the laudable objective and purpose for placing markers against IDs, the reality is that placing a marker against an ID not only highlights or 'marks' a specific ID as suspicious, it automatically results in the blocking of the ID, with its concomitant prejudicial consequences.²³ Any limitation of rights guaranteed in the Bill of Rights must be sanctioned in terms of law of general application. One of the main points of contention between the parties is whether the practice of placing markers against and the blocking of IDs is sanctioned by law of general application.
- [70] I pause a moment to draw an analogy between the blocking of IDs and the arresting of persons suspected of having committed crimes. It is trite that arrest constitutes a drastic infringement of a person's right to freedom. The Criminal Procedure Act 51 of 1977 (the CPA) provides that arrest may take one of two forms, arrest with a warrant in terms of sections 40 and 43 of the CPA, and arrest without a warrant as provided for in section 40(1)(b) of the CPA. Certain jurisdictional facts must be satisfied for an arrest without a warrant to be lawful.²⁴ These facts include the principle that the infringement of a person's right to freedom through arrest is constitutionally valid because it is provided for in a law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Without the empowering statutory provision, any arrest would have been unconstitutional.
- [71] Nugent JA enunciated a principle important to the matter at hand in *S v Mabena and Another*.²⁵

²³ This is the position as it relates to suspected illegal immigrants.

²⁴ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H, *Louw v Minister of Safety and Security* 2006 (s) SACR 178 (T) at 185A-187G, and *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA).

²⁵ 2007 (1) SACR 482 (SCA) at para 2.

‘The Constitution proclaims the existence of a state that is founded on the rule of law. Under such regime legitimate state authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity. That is the cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the state. Far from conferring authority to disregard the Law, the Constitution is the imperative for justice to be done in accordance with law. As in the case of other state authority, the exercise of judicial authority otherwise than according to law is simply invalid.’

[72] The Constitutional Court in *Affordable Medicine Trust v Minister of Health*²⁶ reiterated that:

‘... both the legislature and the executive “are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.” In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.’

The applicable legislative framework

[73] The applicable legislative framework consists not only of the Identification Act but includes the Identification Regulations promulgated in terms of the Identification Act, the Births and Deaths Registration Act with its concomitant Regulations on the Registration of Births and Deaths,²⁷ and the Immigration Act 13 of 2002 (‘Immigration Act’). This framework is amplified by the South African Citizenship Act 88 of 1995. These legislative frameworks are rooted in the Constitution.

²⁶ 2006 (3) SA 247 (CC) at para 49. Also see *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.

²⁷ GNR 128 of 26 February 2014 *Government Gazette* No. 37373.

- [74] The Identification Act was promulgated to provide for the compilation and maintenance of a national population register in respect of the population of the Republic, for the issue of identity cards and certain certificates to persons whose particulars are included in the population register, and for matters connected therewith. The Identification Act applies to all South African citizens and persons who are lawfully and permanently resident in the Republic. The DG is tasked with compiling and maintaining the population register²⁸ and must assign an identity number to every person whose particulars are included in the population register.²⁹ The identity number must consist of a reproduction, in figure codes, of the individual's date of birth and gender and whether or not they are a South African citizen.³⁰ The Act requires South African citizens and persons who are lawfully and permanently resident in the Republic to apply for an identity card after the age of 16 years has been attained.³¹
- [75] As its title indicates, the Births and Deaths Registration Act regulates the registration of births and deaths. The Act, amongst others, provides for the registration of births of South African citizens and children of parents with permanent residence status to be included in the national population register.³² Particulars obtained in relation to non-South African citizens who '*sojourns temporarily*' in the country are not to be included in the population register, and the issuing of a certificate containing the particulars relevant to the birth of a non-South African citizen is deemed to be the registration of birth. Section 7 of the Births and Deaths Registration Act provides for verifying, supplementing, and rectifying particulars. Regulation 6(9) of the Regulations on the Registration of Births and Deaths authorises and compels the DG to '*cancel the birth registration, birth certificate, and any other documents, including an identity document or passport issued*' if it becomes apparent that a birth certificate was issued erroneously to any person'.

²⁸ Section 5 of the Identification Act.

²⁹ Section 7(1) of the Identification Act.

³⁰ Section 7(2) of the Identification Act.

³¹ Section 3 and 15 of the Identification Act.

³² S 5 of the Births and Deaths Registration Act.

- [76] The Immigration Act regulates, amongst others, the process of obtaining permanent resident status and, conversely, provides for the withdrawal of such status. Its preamble provides, amongst others, for the setting in place of a migration control system, which ensures that a *'human rights-based culture of enforcement is promoted.'* The South African Citizenship Act regulates the acquisition and loss of citizenship.
- [77] These statutes are interrelated, and each plays a significant role in ensuring that the population register correctly reflects the particulars of every citizen and permanent resident. In addition, each of the statutes creates several statutory offences which, if successfully prosecuted, could lead to a person's status as a citizen or permanent resident being revoked.
- [78] A summary of the above illustrates that the Identification Act provides for the creation of the population register. It requires the registration of particulars of citizens and persons who obtain permanent residence to be taken up in the population register. The Births and Deaths Registration Act provides for the registration of births of children of citizens, permanent residents, and persons who hold refugee status in the population register and for parents to be issued their children's birth certificates with identity numbers.³³ The Immigration Act regulates the process through which permanent residence status is obtained or withdrawn. Once citizenship is obtained or permanent residence status is afforded, an identity number is provided in terms of the Identification Act.
- [79] The aforementioned demonstrates that the awarding of an ID in terms of the Identification Act and the inclusion of particulars in the national population register are thus interlinked with processes authorised in the other applicable statutes. The converse is also true, with the exception of the rectification of clerical errors or successful prosecution of any of the statutory offences created in the Identification Act, no action can be taken solely in terms of the Identification Act as it currently stands, that will result in an ID being blocked. Except for rectifying clerical errors, a decision in terms of section 19 of the Identification Act must be interlinked or preceded by a final decision in terms of the Births and Deaths Registration Act, the

³³ Regulation 7 of the Regulations on the Registration of Births and Deaths, 2014.

Immigration Act, or the South African Citizenship Act. A decision could include, amongst others, a decision to cancel a birth certificate or withdraw, revoke, or deprive a person of their citizenship status or status as a permanent resident.

- [80] As custodian of the population register, the DG is empowered by legislation to ensure the correctness of the information contained therein. To achieve this objective, the DG is authorised to require proof that information furnished in terms of the Births and Deaths Registration Act and the Identification Act are correct. Persons in possession of documents that do not correctly reflect particulars are obliged to hand over such documents to the DG.³⁴ The DG is empowered to cancel a birth certificate, identity document, or passport issued based on such a birth certificate if it becomes apparent that the birth certificate was erroneously issued to a person.³⁵ Likewise, the Identification Act and Identification Regulations provide that an identity document that does not correctly reflect particulars to be seized.³⁶
- [81] Since the legislative framework is embedded in the Constitution, any decision to seize, revoke, or cancel any birth certificate, identity document, or permanent resident status must, however, adhere to the principles of administrative justice enshrined in section 33 of the Constitution and PAJA.

Evaluating the respondents' proposition

- [82] As stated above, the respondents relied on sections 18 and 19 of the Identification Act as the enabling legislation authorising them to block IDs. Reference was made to the DG's duty to maintain the integrity of the population register and the applicability of the Births and Deaths Registration Act, but emphasis was placed on section 19 of the Identification Act. Section 19 of the Identification Act provides for the correction, cancellation, and replacement of an identity card that does not correctly reflect the particulars of the person to whom it was issued. The relevant sub-sections read as follows:

³⁴ Section 7 of the Births and Deaths Registration Act, s 19 of the Identification Act.

³⁵ Regulation 6(9) and regulation 7 of the Regulations on the Registration of Births and Deaths, 2014.

³⁶ Section 19 of the Identification Act read with regulation 12(2).

'(1) If—

(a) an identity card does not reflect correctly the particulars of the person to whom it was issued; or

(b) a temporary identity certificate or any certificate does not reflect correctly the particulars of the person to whom it was issued,

the person concerned or the guardian of the person to whom the card or certificate was issued, as the case may be, shall within the prescribed period hand over or send by registered post the identity card, temporary identity certificate or certificate, as the case may be, to the Director General.

(2) If the identity card, temporary identity certificate or certificate referred to in subsection (1) is not handed over or sent in accordance with that subsection, the Director General may in the prescribed manner obtain restoration thereof or seize it.'

[83] Section 19 must be read with Regulation 12(2) of the Identification Regulations³⁷, it provides that:

'Any person authorised thereto by the Director-General, may, when it comes to his or her attention that someone is in possession of an identity card or a certificate referred to in section 19 (1), seize such card or certificate, and the person to whom such card or certificate has been issued, or his or her guardian or any person who is in possession of the card or certificate, shall surrender it to such an authorised person without delay.'

[84] Regulation 13 provides for the cancellation and destruction of an ID card. Regulation 13(2) provides that an identity card:

³⁷ GNR. 978 of 31 July 1998, as amended.

'shall be destroyed by shredding or cutting the card in such a manner that any of the parts cannot be utilized for purposes of an identity card'.

- [85] The applicants are correct in stating that the phrases 'place a marker against' or 'block an ID' do not appear in section 19 of the Identification Act. This section, however, empowers the DG to seize an ID that does not correctly reflect the particulars of the person to whom it was issued³⁸ if it is not returned to the DG. Having regard to the DG's responsibility to protect the integrity of the national population register, I am of the view that the placing of a marker against an ID to establish if it is an ID that needs to be investigated cannot be faulted. The issue arises, however, when placing a marker prejudicially affects the individual to whom the ID was assigned to without following just administrative procedures. It is thus the ensuing blocking of the ID that constitutes the mischief that needs to be considered and addressed.
- [86] The purpose of section 19 of the Identification Act, read with Regulations 12 and 13, is to prevent the use of an ID that does not correctly reflect the particulars of the person to whom it was issued. A law of general application provides that such an ID may be seized and subsequently destroyed. The dictionary meaning of 'seize' includes to *'take hold of suddenly and forcibly'*, *'to take something quickly and keep or hold it'* or *'to take using sudden force'*.³⁹ The meaning of 'seize' is explained in Merriam-Webster⁴⁰ as *'... when there is an act of taking possession, control or hold of something or someone, seize is the word.'*
- [87] How, then, can an ID be seized? What measures can be implemented to prevent someone from using an ID that does not correctly reflect the particulars of the person

³⁸ Section 8 of the Act prescribes the particulars to be included in the population register. S 14 of the Act provides that the identity card must reflect the particulars referred to in s 8(a), (b), (d) and (f), the prescribed fingerprint(s) and any other particulars in the population register determined by the Minister.

³⁹ *Cambridge Dictionary* <https://dictionary.cambridge.org/dictionary/english/seize> [Accessed on 27 November 2023].

⁴⁰ <https://www.merriam-webster.com/grammar/usage-of-cease-vs-seize#:~:text=Generally%2C> [Accessed on 27 November 2023].

[%20cease%20is%20the%20word,someone%2C%20seize%20is%20the%20word.](https://www.merriam-webster.com/grammar/usage-of-cease-vs-seize#:~:text=Generally%2C%20cease%20is%20the%20word,someone%2C%20seize%20is%20the%20word.) [Accessed on 27 November 2023].

to whom it was issued to for the purpose of identification, to access banking services, etc? In a technologically advanced society, it does not make sense to limit the seizing of an ID to the physical act of confiscating the document. Although it is not spelled out in the Act, considering the purpose of section 19 of the Identification Act read with Regulations 12 and 13 of the Identification Regulations, the act of seizing an ID to prevent its use an ID, must, of necessity, include the placing of a marker against the ID and the ensuing blocking thereof.

- [88] Section 19 of the Identification Act provides for an ID that *'does not reflect correctly the particulars of the person to whom it was issued'* to be seized. Before an ID can be seized, it must be found that the particular ID does not correctly reflect the particulars of the person to whom it was issued. If an ID reflecting that a person is a South African citizen was issued to a non-citizen, it does not reflect the particulars correctly. When an individual uses the identity number assigned to another person, the ID does not reflect the user's particulars correctly. While it is an offence to record any particulars in the population register which are in a material respect false, section 19 of the Identification Act does not require that an individual must have been prosecuted and found guilty by a court of law for providing materially false information, before an ID can be seized.
- [89] While section 19 of the Identification Act and the applicable Regulations do not authorise the random confiscation of identity documents, it empowers the respondents to seize an ID in specific circumstances. As stated above, the blocking of an ID amounts to the seizure thereof. The Identification Act, as a law of general application, provides for the placing a marker or blocking an ID in circumstances that fall within the ambit of section 19 of the Identification Act.
- [90] In addition, Regulations 6 and 7 of the Regulations on the Registration of Births and Deaths, 2014, empowers the DG to cancel an ID issued in terms of a birth certificate that was erroneously issued. In appropriate circumstances, the blocking of an ID can equate to its cancellation. Although the respondents did not rely explicitly on these Regulations, the court cannot merely ignore the existence of these Regulations.
- [91] As a result, and in the absence of an attack against the constitutional validity of section 19 of the Identification Act, the practice of blocking IDs cannot be declared

constitutionally invalid without regard to the facts and context of each individual matter. As a result, a general declarator, as sought by LHR and LW, that the conduct of the First and Second Respondents in placing markers against a person's identity document of number ("ID") that has the effect of blocking those IDs is unconstitutional and invalid, is not justifiable. This is, however, not the end of the matter.

Blocking of an ID while investigating a suspicious ID

- [92] The decision to place a marker against an ID, which will inevitably result in the ID being blocked, must, however, be preceded by or linked to a decision that the ID does not correctly reflect the particulars of the person to whom it was issued. In the context created by the applicable legislative framework, an ID will not correctly reflect the particulars of the person to whom it was issued, amongst others, if a non-South African citizen who has not lawfully obtained permanent resident status is issued with an identity number indicating that the person is a citizen or permanent resident, or if a person's citizenship or permanent residence status is revoked or withdrawn.⁴¹
- [93] Before any decision can be made regarding the issues referred to herein, the DHA must investigate the matter. The principles of administrative justice require that an affected person be informed of the investigation, be provided an opportunity to put their case forward, be informed of any decision and the reasons for that decision, and be provided with an internal appeal or review mechanism to challenge any adverse decision.⁴²
- [94] The existing legal framework does not provide for placing a marker against an ID that will inevitably result in the concerned individual's ID being blocked during the investigation stage of any inquiry. A mere suspicion that the ID does not correctly reflect the particulars of the person to whom it was issued because the ID might have been fraudulently obtained does not justify the blocking of the ID in the current legislative framework.

⁴¹ See section 8 of the South African Citizenship Act and section 28 of the Immigration Act.

⁴² Section 7 of PAJA

- [95] The blocking of an ID during the investigative phase of any inquiry relating to the legitimate issue of an ID inherently limits an individual's constitutional rights. It should be authorised by a law of general application. Unless the blocking of an ID during the investigative stage is authorised in terms of a court order, the respondents act *ultra vires* the current empowering legislative framework. To phrase this in language consistent with the terminology of the PAJA, the administrator who decides to place a mark against an ID that automatically results in the blocking of the ID during the investigative phase of an inquiry is not empowered to do so by a law of general application.
- [96] The PAJA prescribes that administrative action that materially and adversely affects any person's rights or legitimate expectations must be procedurally fair.⁴³ On the DHA's own version, decisions taken before November 2022 to place markers against persons' IDs that automatically resulted in blocking such IDs were taken without regard to administrative justice. As such, placing markers against IDs that inevitably resulted in the blocking of the IDs in the absence of a fair administrative process preceding the placing of such marker against an ID constitutes unjust and irregular administrative action and infringes the constitutionally entrenched right to procedurally fair administrative action. Such conduct stands to be reviewed.

Just and equitable remedy

- [97] A finding of reviewability under the grounds of review in section 6(2) of PAJA amounts to a finding that section 33 of the Constitution has been infringed.⁴⁴ Section 8 of PAJA provides that a court may, in proceedings for judicial review, grant any order that is just and equitable. Section 8 needs to be applied within the context provided by section 172 (1) of the Constitution and with due regard to the principle of separation of powers. Section 172 of the Constitution is mandatory in that it prescribes that a court '*must declare*' that conduct inconsistent with the Constitution

⁴³ Section 3(1) of PAJA

⁴⁴G. Quinot and P.J.H. Maree 'The Puzzle of Pronouncing on the Validity of Administrative Action on Review' *Constitutional Court Review* (2015) 7, 27-42, 31.

is invalid to the extent of its inconsistency.⁴⁵ However, a distinction exists between the declaration of constitutional invalidity and the just and equitable remedy that is to follow.⁴⁶

[98] The consequential relief following the declaration of invalidity now needs to be determined. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Agency and Others (Allpay2)*,⁴⁷ the court explained that a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position.⁴⁸ This view indicates that an order declaring that the administrative action at issue remains in force and effect may be a just and equitable remedy following a declaration of invalidity.⁴⁹ The position was aptly explained by Jafta J in *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye Laser Institute*⁵⁰ when he stated that a court has a discretion to order a just and equitable remedy, '[i]f the coming into effect of an order invalidating an administrative action would result in injustice'.

[99] Although it is ostensibly the default position that administrative action that does not withstand constitutional scrutiny is set aside, the Supreme Court of Appeal (SCA) held that:

'Considerations of public interest, pragmatism, and practicality should inform the judicial discretion whether to set aside administrative action or not.'⁵¹

⁴⁵ See *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) at par [103].

⁴⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (Allpay 1)* 2014 (1) SA 604 (CC) at para [26].

⁴⁷ 2014 (4) SA 179 (CC).

⁴⁸ *Ibid* at para [39].

⁴⁹ See Quinot and Maree, *supra*, at 37.

⁵⁰ 2014 (3) SA 481 (CC) at para 52.

⁵¹ *Chief Executive Officer, SASSA v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) at para 29. See also, *Judicial Service Commission v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 13 where the same court held that '... even if an administrative decision is challenged and found wanting, courts still have a residual discretion to refuse to set that decision aside.'

[100] In the course of this litigation, some individuals were identified. These individuals are the first applicant, Ms. Mazibuko, and three LW clients, Mr. Mbuli, Ms. Posholi, and Mr. Matsaba. They participated by putting their cases before the Court in affidavits in such a manner that the DHA could meaningfully engage with the cases, and the Court could consider their versions, applying the principles applicable in motion proceedings. The relief granted to assist these individuals and the extent to which this Court can deal with the issues raised by the CI are set out and discussed below. Where LHR provided examples of the effect of the DHA's practice without individuals confirming their versions on affidavit and without sufficient detail to provide the DHA to engage with the respective matters meaningfully, no individual specific order can be granted. These individuals' interest forms part of the general public interest in the matter.

[101] The question that now stands central regarding the latter group is what the appropriate remedy is to grant in relation to the relief sought in the public interest regarding unidentified IDs that remain blocked because the respondents contend that the unblocking thereof poses a security risk.

Remaining unidentified blocked IDs

[102] The respondents contend that the 702,000 IDs that were still blocked when the application was argued were not unblocked because their unblocking will cause an *'immense security risk'* for the country. The respondents submit that *'pending the implementation of an administratively fair procedure in dealing with the blocked IDs that pose security threats to the country, the declaration of invalidity be suspended for a period of 90 days, to allow the DHA to finalise all those in person's appearing in the list that shall have been provided by the co-applicants in this matter'*.

[103] The applicants submitted that because the limitation of the affected constitutional rights is not empowered by a law of general application, this Court cannot suspend the declaration of invalidity. As indicated, I am of the view that the blocking of IDs is justified after a fair administrative procedure is followed and a final decision is taken

to revoke, cancel or withdraw a birth certificate or ID in terms of the applicable statute, be it the Births and Deaths Registration Act, the Immigration Act or the South African Citizenship Act, or after the successful prosecution of an applicable statutory offence. The empowering legislation exists, it is the DHA that 'jumped the gun' by acting in terms of section 19 of the Identification Act before any inquiry in terms of the applicable statutes was finalised. The nature and content of the just and equitable remedy are determined from this perspective.

[104] In crafting a just and equitable remedy, the public interest in this matter pertaining to the blocking of IDs goes both ways. It is a well-established principle that the individual's interest must, in certain circumstances, yield to the public interest.⁵² This does not mean that individual rights and the public interest are inherently competing interests or values, as if the two are in a zero-sum equation.⁵³ The different components of the public interest must be harmonised in order to determine its weight in a given situation. When conflicting components of the public interest are harmonised, *in casu* the individual right to just administrative action before a block is placed on an ID *versus* the community's interest in being protected against identity fraud and the protection of the integrity of the national population register, the individual and its expectations must first be removed from the equation. The public interest in protecting individual rights is then balanced against the public interest in the conflicting matter.

[105] In the circumstances of this litigation, considerations of public interest militate against an order that will have the immediate unblocking of the remaining blocked IDs as a result. The issue is considered in circumstances where the affected individuals either did not approach the court for relief or were referred to anonymously and where the DHA contends and provides evidence that the abrupt uplifting of markers poses security risks to the South African community.

[106] In the circumstances, it is fair and just to suspend the declaration of invalidity for a period of 12 months from the date of this order. In this period, the DHA must

⁵² *Colonial Development (Pty) Ltd v Outer West Local Council and Others* 2002 (2) SA 589 (N) 611A.

⁵³ See S.S. Yuen 'Through the public interest lens: An evaluation of surveillance law in Hong Kong' (2008) 2 *Hong Kong Journal of Legal Studies* 1-27, 6.

determine whether the identity numbers against which markers have been placed before November 2022 and which identity numbers to date remain blocked, correctly reflect the particulars of the persons to whom the identity number was assigned, alternatively obtain court orders in terms of which the IDs of these affected persons remain blocked before any investigation or inquiry is finalised, failing which the block must be uplifted

- [107] Clients of LHR and LW whose IDs have yet to be unblocked and who fall in this category must, however, be processed within 90 days after LHR and LW provide detailed lists containing the names and particulars of their affected clients. The respondents indicated that they would be able to consider the list of clients provided by LHR and LW and ensure that a fair administrative process is followed. This order will, however, not prevent the DHA from acting in terms of the Identification Act or any other applicable law in obtaining a court order allowing IDs to remain blocked. It will also not prevent affected individuals from approaching the court to uplift a block on their ID.

Identified Legalwise Clients

- [108] Three individuals were identified by LW, *to wit*, B. Mbuli, T.F. Posholi and M. Matsaba. Mr. Matsaba's issue was resolved. The DHA provided an explanation as to why Mr. Mbuli and Ms. Posholi's IDs were blocked. Material disputes of fact exist in the evidence provided by the DHA and, Mr. Mbuli and Ms. Posholi, respectively. The DHA, however, did not allege that either Mr. Mbuli or Ms. Posholi constitute a security risk. Insofar as the DHA has not yet lifted the block on Mr. Mbuli and Ms. Posholi's IDs and followed fair administrative procedure in determining whether their IDs correctly reflect their particulars, specifically pertaining to their nationality and status, the markers against their IDs must be uplifted with immediate effect and their IDs must be unblocked.

- [109] Ms. Mazibuko's ID was unblocked less than three months before this matter was heard. Her counsel submits that she is still entitled to relief in terms of sections 6 and 8 of PAJA and section 172 of the Constitution, interdictory relief required to protect her rights prospectively, and with a punitive costs order. Considering the inordinate delay of 11 years in finalising the issue caused by the DHA regarding Ms. Mazibuko that arose because she reported a case of identity theft, I agree with her counsel that she is entitled to just and equitable relief, despite the impugned unjust and irregular administrative action having been withdrawn belatedly. The unblocking of Ms. Mazibuko's ID did not cause the prior decision taken to evaporate in thin air. The decision taken by the respondents remains inconsistent with the Constitution at the time it was taken.
- [110] Ms. Mazibuko initially approached the Court seeking, amongst others, an interdict that the respondents are restrained from threatening to take, or taking, any steps to revoke her status as a permanent resident, confiscate her South African identity document or deport her pending a final decision to do so in terms of section 8(3) of the Immigration Act, including any review of a decision in terms of section 8(6) of the Immigration Act and any review or appeal in terms of section 8(6) of the Immigration Act.
- [111] Having regard to the respondents' prior conduct and the issue at hand, I am of the view that it is just and equitable to grant the interdict sought by Ms. Mazibuko. Not only does section 8 of PAJA provide for granting an interdict as just and equitable relief, but a case has been made out for the granting of the interdict. As long as Ms. Mazibuko's status as a permanent resident is recognised she has a clear right to an identity number and document. She also has a clear right to administrative action relief while the respondents consider her status as a permanent resident in terms of the Immigration Act, a process that has ostensibly now commenced. By blocking her ID, an actual injury was committed, and, in the circumstances, she made out a case that there is a well-grounded basis for believing that she will suffer irreparable harm if the protection she seeks through the interdict is not granted. The balance of

convenience favours Ms. Mazibuko. No alternative remedy is available to her to protect her interests.

- [112] As stated above, Ms. Mazibuko received a communication from the DHA shortly before the matter was heard, wherein she was requested to provide reasons as to why her status as permanent resident should not be revoked. When the application was argued, counsel for Ms. Mazibuko submitted that the primary remedy now sought by Ms. Mazibuko is the substitution of the impugned decision to place a marker against her ID with a decision confirming her status as a lawful permanent South African resident. The applicant's amended notice of motion dated 1 September 2022 already contained this prayer.
- [113] Ms. Mazibuko's counsel submitted that exceptional circumstances exist justifying the court to substitute the DHA's decision to block Ms. Mazibuko's ID with a declarator regarding her status. The circumstances include the inordinate delay in prosecuting the alleged anomaly on how Ms. Mazibuko acquired her permanent resident status, the respondents unwavering expressed view that Ms. Mazibuko misrepresented herself when she first applied for an identity document as South African citizen, and because all the relevant facts are before the Court.
- [114] The respondents submitted that the principle of separation of power prevents the Court from considering Ms. Mazibuko's status as a permanent resident. They point out that no decision to revoke Ms. Mazibuko's permanent resident status has, to date, been made. They also took issue with the illegibility of the marriage certificate attached to the papers.
- [115] Although the issues of the validity of an identity document and Ms. Mazibuko's status as a permanent resident conflate in this application, the issue of Ms. Mazibuko's status as a permanent resident is governed by the provisions of the Immigration Act, while the Identification Act provides for IDs being issued, cancelled and seized. The issues may be interrelated, but they are distinct. To grant an order that confirms Ms. Mazibuko's status as a permanent resident and bypass the machinery of the Immigration Act would infringe on the terrain of the DG. Ms. Mazibuko is now in a position where she has comprehensive knowledge of the DHA's view, and she is

well-equipped to supplement the documentary proof she already submitted to allay the DHA's suspicions.

Children's Institute

- [116] As stated above, the CI was not a party to the proceedings but participated mainly to draw the court's attention to the host of children directly or indirectly affected by ID blocking. The DHA conceded in their answering affidavit to the *amicus's* affidavit that there are children who may be unable to obtain their birth certificates and/or ID cards because their parents' IDs have been marked or blocked. The DHA explained that as soon as the investigation regarding the parents' suspicious ID is finalised '*this kind of complaint will be resolved.*'
- [117] The practice of blocking a parent's ID impacts such parent's children. A child's status as citizen, refugee, permanent resident, or illegal foreigner is tied to its parents' status. Since the South African approach regarding attaining citizenship or permanent residence connects the child's status to that of at least one of its parents, it is unavoidable that a child cared for by a single parent whose ID is blocked will inevitably be prejudicially affected by the blocking of that parent's ID. In addition, a child whose birth is not registered in terms of the Births and Deaths Registration Act because there is uncertainty as to whether a birth certificate with an identity number must be issued or a certificate without an identity number because the child's parents *sojourn* temporarily in the Republic, may face almost insurmountable obstacles if such child, when attaining majority, wants to apply for citizenship in terms of section 4(3) of the South African Citizenship Act.⁵⁴ This is untenable, having regard to the Constitutional Court's view in *Centre for Child Law v Media 24 Ltd*⁵⁵ that it is unjust to penalise children for matters over which they have no power or influence.

⁵⁴ 'A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if- (a) he or she has lived in the republic from the date of his or her birth to the date of becoming a major; and (b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992.'

⁵⁵ 2020 (1) SACR 469 (CC) at para 72.

[118] The plight of children born to undocumented parents falls outside the scope of this application. ID blocking, however, occurs in relation to documented individuals. Where one parent is a South African citizen, the ID blocking of the other parent should not affect the child. Where a child is born to parents of whom at least one is registered in the national population register, such child must be privy to the benefits associated with being linked to parents who are so registered until its parents' status as citizens or permanent residents is revoked, such parents are deprived of their South African citizenship, or the child's birth certificate and ID is cancelled. Such an approach promotes the '*best interests of the child*' principle enshrined in the Constitution.⁵⁶ The population register can be updated once the parents' or child's status is finally determined, if the need arises.

[119] The principle that no child could be denied the right to basic education simply because he or she has no documentation has been confirmed by a Full Court in *Centre for Child Law and Others v Minister of Basic Education and Others*.⁵⁷ The issues raised by the *amicus* that undocumented children do not have access to social grants and are barred from attending school and from being immunized should thus be addressed with the relevant national departments since access to these benefits is not restricted to South African citizens or the holders of permanent residence permits. Having said this, however, the DHA is obliged to recognise the status of the children concerned until their parents' status has finally been determined, their citizenship or permanent residence withdrawn or revoked, and the child's birth certificate cancelled if a birth certificate with identity number was issued.

Future blocking of IDs

[120] The respondents aver that a new process has been implemented since November 2022 in relation to ID blocking. Unfortunately, they did not feel the need to share the details of this new process with the Court. In the event that IDs are only blocked after final decisions are taken in terms of the applicable legislation, following a fair

⁵⁶ Section 28 of the Constitution. See *Rayment and Others v Minister of Home Affairs and Others; Anderson and Others v Minister of Home Affairs and Others* (CCT 176/22) [2023] ZACC 40 (4 December 2023).

⁵⁷ 2020 (3) SA 141 (ECG) (12 December 2019),

administrative process, that an individual is deprived of their status as a South African citizen or that its permanent residence status is revoked, or birth certificate is cancelled, or after the successful prosecution of a statutory offence relating to the issue, the DHA's conduct is in accordance with enabling legislation. Where the blocking of an ID is authorised in terms of a court order the issue will not arise.

[121] Due to the conditions that gave rise to this application, e.g., the blocking of an ID before a final decision is taken on a person's status as citizen or permanent resident of the Republic of South Africa, it is, however, necessary to prevent any future infringement of rights afforded by the Constitution that are not empowered by enabling legislation.

Conclusion

[122] This application was necessitated by the DHA's prolonged and persistent failure to develop and implement a constitutionally compliant process empowering it to place markers against IDs that result in the inevitable and automatic blocking thereof.

[123] Even though the applicants did not raise it, I am acutely aware that in blocking IDs in the manner that it did, the DHA ignored the jurisprudential value of ubuntu. Moseneke DCJ reaffirmed in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*⁵⁸ that the Constitutional Court had regard to the meaning and content of the concept of ubuntu. The court held that:

'It emphasises the communal nature of society and "carries in it the idea of humaneness, social justice, and fairness" and envelopes "the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity."' (References excluded.)

⁵⁸ 2012 (1) SA 256 (CC) at para 71.

Ms. Mazibuko, in particular, and other people in similar circumstances were, at the very least, entitled for consideration by the DHA in the spirit of fairness and ubuntu embedded in the Constitution during this prolonged period of uncertainty.

[124] The respondents' belated concession that the process they followed until November 2022 did not promote administrative justice is of no consolation to the hundreds of thousands of individuals affected by the practice of blocking IDs. The order that stands to be granted cannot erase the hardship suffered due to the respondents' conduct. In the circumstances, I deem it just and equitable.

[125] While the passive violation of human rights by a State that fails to take steps to promote and advance human rights is unacceptable in a constitutional dispensation, the active violation of human rights by a State that infringes constitutionally entrenched human rights violates public trust in the institution of the State and undermines the Constitution. This violation of constitutionally enshrined rights by the respondents, the prejudice caused particularly to minor children when there is ample law on the rights of children, and the respondents' lackadaisical approach to investigate and resolve the underlying issues in any manner other than randomly blocking IDs, justify the granting of a punitive costs order against the respondents.

Order

In the result, the following order is made:

1. The first applicant's late institution of the review application is condoned.
2. It is declared that the placing of markers by the Department of Home Affairs, against identity numbers or identity documents (hereafter collectively referred to as identity numbers) resulting in the blocking of identity numbers (the affected identity numbers):
 - 2.1. in the absence of fair administrative process preceding the placing of such markers against the affected identity numbers, and/or

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

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

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

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

alternatively

3.2. to obtain court orders authorising the identity numbers of the affected persons to remain blocked prior to any investigation or inquiry having been finalised, failing which the blocks shall be uplifted;

3.3. This order shall not impede on the right of affected persons to approach the court for an order uplifting the block on their identity numbers;

3.4. The matter is retained for case management by Van der Schyff J, or any other judge appointed by the Deputy Judge President of this Division, and, subject to paragraph 6 below, the respondents are to file an affidavit by 1 March 2025 with this Court and the second and third applicants confirming that the terms of paragraph 3 of this order have been executed.

4. Lawyers for Human Rights and LegalWise South Africa (RF)(Pty) Ltd shall, within 20 days of this order, furnish the second respondent with a comprehensive list of their clients whose identity numbers were blocked before November 2022 and remain blocked to date hereof;

5. The second respondent shall, within 90 days of receipt of the lists referred to in paragraph 4 above, determine whether the identity numbers of the persons whose names appear on the lists, pose security risks in the event that the block is uplifted, and in regard to those persons found to pose a security risk, obtain court orders authorising their identity numbers to remain blocked pending the finalisation of an investigation as to whether the impugned identity number correctly reflects the particulars of the person to whom the identity number was assigned, failing which the blocks shall be uplifted;

5.1 This order shall not impede on the right of an affected persons to approach the court for an order uplifting a block on their identity numbers.

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

6.1. the number of identity numbers that were blocked at the time of the granting of this order;

6.2. the steps taken to procure the unblocking of identity numbers;

6.3. the reason(s) why the remaining identity numbers remain unblocked;

6.4. the remaining number of blocked identity numbers;

6.5. the proposed steps to be implemented to ensure the blocks are lifted; and

6.6. The proposed timeframe for the finalisation of the process.

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

- 7.1. the respondents are to file an affidavit within 12 weeks of this order being granted, with this Court, the second and third applicants and the *amicus curiae*, confirming that effect was given to paragraph 7 of this order.
8. In the absence of a court order or legislation to the contrary being promulgated, any minor child born from parents who are registered in the national population register as South African citizens or permanent residents, shall be issued with a birth certificate and an identity number, irrespective of whether any investigation regarding the validity of the minor child's parents' status as citizen or permanent resident is pending.
9. In the absence of a court order or enabling legislation being promulgated, no block may be imposed on any minor child's identity number before a final decision is made in terms of the applicable legislation, to:
- 9.1. revoke the minor child's parents' citizenship or permanent resident status; and/or
- 9.2. deprive the minor child's parents of such citizenship or permanent residence status; and/or
- 9.3. cancel the child's birth certificate and identity document in terms of Regulation 6(9) of the Regulations on the Registration of Births and Deaths, 2014.
10. The respondents shall, within 10 days of the date of this order, uplift the blocks imposed on the identity numbers of Mavela Brian Mbuli, and Tselane Francina Posholi.
11. The respondents are interdicted and restrained from blocking the identity numbers of Mavela Brian Mbuli and Tselane Francina Posholi, pending a final decision being taken regarding their status after the finalisation of an investigation or inquiry in terms of the applicable empowering legislation.
12. In the absence of a court order authorising the placing of a marker against a specific identity number that will automatically result in that identity number being blocked, the respondents are interdicted from proceeding with the practice of placing markers against any identity number that will result in the automatic blocking of such identity number or identity document, and any blockage shall be invalid unless and until a final decision is taken on the correctness of the information reflected in the national population register regarding any suspicious identity number, which decision needs to

be authorised in terms of the applicable enabling legislation and after following a procedurally fair administrative process, in which:

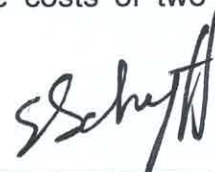
- 12.1. effect is given to section 3 of the Promotion of Administrative Justice Act 3 of 2000;
- 12.2. the affected person is informed, with sufficient detail, of the reasons why an investigation is undertaken that might result in a marker being placed against the person's identity number that will result in the identity number being blocked;
- 12.3. an opportunity is afforded to the affected person to be heard and provide information and/or documents to be considered by the decision maker before the decision is made;
- 12.4. the affected person is informed that written reasons will be provided to the affected person after the decision has been made that a marker will be placed against an identity number that will automatically result in the identity number being blocked;
- 12.5. the affected person is informed of the right of an appeal against, or review of the decision to place a marker against the identity number that will automatically result in the identity number being blocked, as well as the procedure applicable to such appeal or review.

13. The respondents are interdicted and restrained from:

- 13.1. revoking the first applicant, Ms. Phindile Philile Mazibuko's status as a permanent resident; and/or
- 13.2. confiscating her South African identity document/s; and/or
- 13.3. placing a marker against her identity number that will automatically result in her identity number being blocked; and/or
- 13.4. deporting her,

pending a final decision to revoke or withdraw her status as a permanent resident in terms of the applicable provisions of the Immigration Act 13 of 2002, communicated in accordance with section 8(3) of the Immigration Act 13 of 2002, including any review or appeal in terms of section 8(4) of the Immigration Act 13 of 2002 and/or an appeal or review of a decision in terms of section 8(6) of the Immigration Act 13 of 2002.

14. The respondents shall pay the costs of the application, including the costs of two counsel, where so employed, on an attorney and client scale.



E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the first applicant:	Adv. B.R. Edwards
Instructed by:	Shepstone and Wylie Attorneys
For the second applicant:	Adv. J. Bhima
With:	Adv. C. Makhajane
And with:	Adv. T. Moosa
Instructed by:	Bowmans Attorneys
For the third applicant:	Adv. D. Simonz
Instructed by:	De Saude-Darbandi Attorneys
For the first and second respondents:	Adv. A.T. Ncongwane SC
With:	Adv. N. Rasalanavho
Instructed by:	State Attorney
For the <i>amicus curiae</i>	Adv. L. Muller

Instructed by:

Centre for Child Law

Date of the hearing:

20 September 2023

Date of judgment:

16 January 2024