IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-044685

In the matter between:

KOPANANG AFRICA AGAINST XENOPHOBIA AND OTHERS	Applicants
and	
OPERATION DUDULA AND OTHERS	First to Fourteenth Respondents

APPLICANTS' HEADS OF ARGUMENT

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"Xenophobia presents a serious challenge towards the protection of human rights. … Government should send out clear messages that violence against foreign nationals and xenophobic attacks will not be tolerated and that those involved in such activities will be prosecuted."[1]

INTRODUCTION

1 This application concerns a campaign of xenophobic violence and unlawful conduct perpetrated by a vigilante group known as “Operation Dudula”.

2 Operation Dudula’s systemic conduct has included sustained patterns of:

2.1 intimidation, harassment and assault;

2.2 making public statements that constitute hate speech;

2.3 wearing apparel that resembles the uniforms of the security forces;

2.4 interfering with access to health care services;

2.5 interfering with access to, or the operations of, schools or harassing learners, teachers or parents;

2.6 unlawfully evicting people from their homes;

2.7 unlawfully removing informal traders from their stalls or interfering with the employment of persons in shops and businesses.

[1] Government’s 2019 National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance p 04-205 para 82.

3 The applicants provided extensive evidence of instances of each of these forms of unlawful conduct, in affidavits the anonymity of which is preserved by the order made by Windell J in Part A. That order precludes the publication of the names or identities of any of the deponents to the founding and supporting affidavits, while allowing all the parties and the court full access to those names and identities.

4 The application also concerns the government's obligations to take reasonable and effective steps to address Operation Dudula's unlawful conduct and the broader threat of xenophobia in our society.

5 The applicants seek five categories of relief, as reflected in the amended notice of motion:[2]

5.1 Interdictory relief against Operation Dudula: the applicants seek interdictory relief against Operation Dudula and its named office-bearers, coupled with declaratory orders, to address its pattern of unlawful conduct;[3]

5.2 The National Action Plan: the applicants seek an order compelling the government to take reasonable and effective steps to implement its National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (National Action Plan);[4]

[2] Amended Notice of Motion (NOM) p 02-26.
[3] NOM pp 02-30 to 02-31 prayers 1 – 3, 5 – 6.
[4] NOM p 02-32 prayer 7.

5.3 The South African Police Service (SAPS): the applicants seek relief against the SAPS, requiring it to fulfil its constitutional obligations to prevent, combat, and investigate criminal conduct;[5]

5.4 Interdictory relief against the SAPS and the Department of Home Affairs (DHA): to prevent the SAPS and the DHA from colluding with or supporting Operation Dudula;[6]

5.5 Section 41 of the Immigration Act: a constitutional challenge to section 41 of the Immigration Act 13 of 2002, to the extent that it is not capable of being interpreted in a constitutionally compatible manner.[7]

6 The first respondent, Operation Dudula, and its named representatives, the eleventh and twelfth respondents, have elected not to oppose the application. In public statements following its launch, they confirmed that they were aware of it and had decided to ignore the court proceedings.[8] As a result, the core of the interdictory relief against Operation Dudula, as reflected in prayers 2, 5 and 6 of the amended notice of motion, is unopposed.

7 The Minister of Home Affairs and the South African Police Service (SAPS) are the only parties to have filed notices of opposition. Their opposition is narrowly confined

[5] NOM pp 02-30 and 02-32 prayers 4 and 8.
[6] NOM p 02-32 prayers 9 – 10.
[7] NOM pp 02-30 and 02-33 to 02-34 prayers 1 and 11 – 14A.
[8] Supplementary FA pp 03-621 to 03-623 paras 12-17, and annexures "SA2" and "SA3" pp 03-652 and 03-655. In the statements, Operation Dudula referred to the applicants as "*fraudsters*", denounced the application and said that "*the organisation [Operation Dudula] did not intend to oppose the application and that the applicants (NGOs) were merely grandstanding*."

to certain portions of the relief. The Minister of Home Affairs opposes the application only "*as against the DHA*".[9] The SAPS's opposition is also limited to the declaratory orders and relief sought against SAPS.[10]

8 In what follows, we address the following topics:

8.1 First, we outline the relevant factual and legal context to this application.

8.2 Second, we address the unopposed interdictory relief.

8.3 Third, we address the only prayer for interdictory relief against Operation Dudula that is opposed by the SAPS: the prohibition on wearing clothing resembling military uniforms.

8.4 Fourth, we address the government's failure to implement key components of its 2019 National Action Plan, which has created fertile ground for Operation Dudula's xenophobic conduct.

8.5 Fifth, we address the SAPS's specific failures to comply with its constitutional and statutory duties to prevent, combat, and investigate Operation Dudula's unlawful activities.

8.6 Sixth, we address the evidence of the SAPS and Department of Home Affairs' (DHA) support for or collusion with Operation Dudula.

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[9] Home Affairs AA pp 06-246 to 06-247 paras 27 to 29. We assume that this is a reference to the relief sought in prayers 7, 10 and 11 to 14 of the amended notice of motion.
[10] SAPS AA p 06-35 para 207. The SAPS opposes prayers 1, 3, 4, 8, 9 and 11 of the notice of motion.

8.7 Seventh, we address the relief sought in respect of section 41 of the Immigration Act.

XENOPHOBIA, THE STATE'S OBLIGATIONS, AND OPERATION DUDULA'S CONDUCT

9 Xenophobia is "*an unreasonable fear, distrust, or hatred of strangers, foreigners, or anything perceived as foreign or different*" that manifests in different ways, including intimidation, harassment, and physical violence.[11]

10 This is a complex form of unfair discrimination[12] that targets individuals based on intersecting protected characteristics, including actual or perceived citizenship, race, colour, language, and ethnic or social origin, among other grounds.[13]

11 Xenophobia is linked to racism. International instruments and government's own 2019 National Action Plan deal with xenophobia as a form of discrimination associated with racism. The form of xenophobia experienced in South Africa, and with which this

[11] National Action Plan p 04-204 para 80.
[12] See further Shreya Atrey "Xenophobic Discrimination" (2024) 87 *Modern Law Review* 80, who addresses the complexities of adequately describing this wrong.
[13] Sections 9(3) and 9(4) of the Constitution prohibit unfair discrimination by the state and private persons on grounds including "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth". These prohibitions on unfair discrimination are reinforced by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act). Citizenship and refugee status have been recognised as analogous grounds of discrimination, see *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* [1997] ZACC 16; 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC) at para 19 (citizenship); *Union of Refugee Women* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 45 (assuming, albeit not deciding, that refugee status is an analogous ground).

application is concerned, is best understood as *xeno-racism*, as it is directed predominantly at black African foreign nationals.

12 The government's National Action Plan acknowledges the scourge of xenophobia in South African society:

> "South Africa has, in the past and more recently, experienced widespread and violent forms of xenophobia resulting in the deaths and injuries to people as well as looting and destruction of property."[14]

13 The National Action Plan further acknowledges that xenophobia is largely directed at fellow Africans, which has deep roots in South Africa's history of anti-black racism during the colonial and apartheid periods. The National Action Plan notes that:

> "The many years of a racist and isolationist policy of apartheid have planted seeds of xenophobia, particularly towards Africans, undoing centuries of brotherhood and sisterhood among Africans in South Africa and those from other parts of the continent. This is how Africans have come to be the worst victims of xenophobia in contemporary South Africa." [15]

14 The country has experienced successive waves of xenophobic violence in the last two decades.[16] A report by an independent monitor, Xenowatch, finds that from 2008 to 2021, xenophobic violence had resulted in at least 612 deaths, the displacement of 122 298 persons, and looting or damage to 6 306 shops or properties.[17] The report notes that "*Gauteng is by far the most affected by the violence. With 329 incidents, it accounts for almost 40% of all incidents recorded in the county*."[18] These figures are

[14] National Action Plan p 04-205 para 81.
[15] National Action Plan p 04-182 (preamble).
[16] FA pp 03-20 to 03-22 paras 39 – 49. Not denied.
[17] FA p 03-21 para 45. Annexure KX 2 p 04-3. Not denied.
[18] Id.

likely a significant underestimation due, in large part, to victims' reluctance to report criminal conduct, out of fear of further victimisation and a lack of confidence in the state authorities.[19]

The state's obligations

15 Xenophobia presents a serious threat to human rights, as acknowledged in the government's National Action Plan.[20] The state is subject to both constitutional and international law obligations to address this threat.

16 The rights afforded by the Bill of Rights apply to all persons within South Africa's borders, regardless of their nationality or immigration status.[21] These protections include the rights to life, dignity, equality, freedom and security of the person, education, housing, and healthcare, which are afforded to "*everyone*", without distinction.

17 The state has corresponding obligations, under section 7(2) of the Constitution, to respect, protect, promote and fulfil these rights, requiring the state to take "*reasonable and effective*" measures to prevent and address rights violations.[22]

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[19] FA p 03-21 para 46. Not denied.
[20] National Action Plan p 04-205 para 82.
[21] *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 12.
[22] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) at para 189: "*Implicit in section 7(2) is the requirement that the steps that the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective*".

18 These constitutional duties are reinforced by South Africa's international law commitments. Sections 39(1)[23] and 233[24] of the Constitution require courts to draw guidance from international law in giving content to constitutional rights and obligations, an obligation that extends to both binding ("hard") and non-binding ("soft") international instruments.[25]

19 South Africa is party to, and is bound by, a range of international treaties that impose relevant obligations, including:

19.1 the International Covenant on Elimination of All Forms of Racial Discrimination ("ICERD");[26]

19.2 the International Covenant on Economic, Social, and Cultural Rights ("ICESCR");[27]

19.3 the International Covenant on Civil and Political Rights ("ICCPR");[28] and

19.4 the African Charter on Human and Peoples' Rights ("African Charter").[29]

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[23] Section 39(1)(b) provides that when interpreting the Bill of Rights, a court "*must consider international law*".
[24] Section 233 of the Constitution requires that "*[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*" This requires that a court to prefer an interpretation that aligns with international law standards, rather than that which is inconsistent with such standards.
[25] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 35; *Glenister II* above n 22 at para 178, fn 28.
[26] International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195.
[27] International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.
[28] International Covenant on Civil and Political Rights 1966, 999 UNTS 171.
[29] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

20 While xenophobia is not mentioned by name in these instruments, the rights and protections they contain all impose obligations to combat and address xenophobia.[30]

21 South Africa has committed itself to implementing the Durban Declaration and Programme of Action, adopted at the 2002 United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.[31] That declaration recognises that "*xenophobia against non-nationals, particularly migrants, refugees and asylum seekers, constitutes one of the main sources of contemporary racism*"[32] and commits states to concrete action to combat xenophobia and related discrimination.

22 In bringing this application, the applicants seek to give effect to these constitutional and international commitments.

Operation Dudula

23 Since 2021, Operation Dudula has emerged as one of the most visible and violent proponents of xenophobia, targeting foreign nationals and those perceived to be foreign.

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[30] See Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 'The Phenomenon of Xenophobia and its Conceptualization, Trends and Manifestations' (2016) A/HRC/32/50 at paras 6 to 14. All of these instruments prohibit discrimination on relevant grounds, including race, colour, language, religion, and national or social origin, and further require that states parties secure the rights of all persons within their territory.
[31] United Nations, Durban Declaration and Plan of Action, adopted at the World Conference Against Racism, Racial Discrimination,Xenophobia and Related Violence, 8 September 2001, endorsed by the UN General Assembly Resolution 56/266 of 15 May 2002 (Durban Declaration).
[32] Id at para 16.

24 *"Dudula"* means *"to force out"* in isiZulu.[33] The name refers to Operation Dudula's stated objective of expelling foreign nationals from South Africa, regardless of their immigration status.[34]

25 Operation Dudula was formed in June 2021 when a group of people marched through Soweto on a *"clean-up mission"* to shut down businesses run by foreign nationals.[35]

26 This group formalised as a voluntary association that is registered as a non-profit company.[36] It has office bearers,[37] social media accounts,[38] and it stages highly organised gatherings, attended by members wearing branded t-shirts and military-style uniforms, displaying Operation Dudula banners and slogans.[39]

Operation Dudula's conduct

27 Operation Dudula and its members have engaged in violent and unlawful activities across the Gauteng Province. The undisputed evidence of these activities is extensively documented in the founding papers, with over 30 supporting and confirmatory affidavits from victims and witnesses.[40] The undisputed incidents include the following:

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[33] FA p 03-23 para 52. Not denied.
[34] FA pp 03-23 to 03-24 paras 54 - 58. Not denied.
[35] FA p 03-11 para 13. Not denied.
[36] FA p 03-11 para 13. Not denied.
[37] The eleventh and twelfth respondents are the secretary general and deputy chairperson of Operation Dudula.
[38] Operation Dudula has been most active on Twitter (now rebranded as "X"), where it uses the official twitter handle @Operation_Dudula.
[39] FA p 03-24/25 para 59. Not denied.
[40] Supporting affidavits 03-436 to 03-613. In terms of the order granted in Part A, these affidavits have been anonymised to protect the deponents. See Part A order p 14-19.

27.1 On 6 April 2022, Operation Dudula's then leader, Mr Nhlanhla "Lux" Dlamini, addressed a crowd in Diepsloot, blaming foreigners for high crime rates and calling for those present to deal with foreign nationals. Later that evening, a mob formed and went from house-to-house demanding passports or money from people suspected of being foreign nationals. The mob beat, stoned and burnt to death a Zimbabwean national, Mr Elvis Nyathi, with some bystanders laughing and recording the attack on their mobile phones.[41]

27.2 Operation Dudula has conducted unlawful raids on buildings in Johannesburg, involving threats, intimidation, assaults, and the eviction or attempted eviction of residents. For example:

27.2.1 On 6 February 2022, members of Operation Dudula, led by Nhlanhla "Lux" Dlamini and escorted by the SAPS, raided a church-run shelter, the Tsietsi Mashinini Centre in Jabavu, Soweto. They went door-to-door demanding that residents provide their identification documents. Operation Dudula members became violent and started harassing the residents and damaging their goods.[42]

27.2.2 In August 2022, Operation Dudula issued eviction notices to residents of Msibi House in New Doornfontein, giving them five days to vacate the building. In December 2022, men in military-style uniforms and Operation Dudula t-shirts returned to the building, wielding machetes

[41] FA p 03-26 para 67. Not denied SAPS AA p 06-9 para 25 ("the content of this paragraph is unknown").
[42] FA p 03-31 para 85; Supporting Affidavit pp 03-504 to 03-521 para 8. Supporting Affidavit 03-540 to 03-548 para 6. Not denied: SAPS p 06-11 -12 paras 42 – 44; SAPS AA p 06-20 para 104.

and whips, they assaulted the residents and evicted them from the building.[43]

27.2.3 On 30 November 2023, Operation Dudula arrived at Eastleigh Court in Hillbrow and demanded by way of a loudspeaker that all foreign nationals in the building must vacate with immediate effect or will be forcibly removed. This group returned on 7 December 2022, evicted people and put their own tenants in the building.[44]

27.2.4 Operation Dudula members repeatedly raided and harassed residents of the Usindiso Building. A fire broke out at the building in August 2023, killing 76 people and injuring many more.[45] On the morning after the fire, Operation Dudula members celebrated outside the building.[46]

27.3 Operation Dudula has repeatedly threatened and attacked informal traders and businesses that are perceived to be owned and run by non-South Africans:

27.3.1 In January 2022, Operation Dudula members attacked and threatened informal traders at the Chris Hani Baragwanath Taxi Rank in Soweto. These attacks took place almost every day for approximately a week.[47]

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[43] FA p 03-44 paras 112 – 114; Supporting Affidavits pp 03-437 to 03-457; pp 03-465 to 03-467. Not denied: SAPS 06-17 paras 83 – 84 (no knowledge).
[44] FA p 03-69 – 70 paras 178 – 179. Supporting Affidavits p 03-534 to 03-03-539, 03-550 to 03-553. Not denied
[45] SFA p 03-624 para 21; Annexures SA5 to SA10 pp 03-659 to 03-684. Not denied.
[46] SFA p 03-625 para 22.
[47] FA p 03-29 para 78; Supporting Affidavit pp 03-521 to 03-530 paras 9 - 13. Not denied.

27.3.2 On 30 January 2022, Operation Dudula marched in Rosettenville delivering notices to shop owners, warning them to hire South Africans only or close their shops, otherwise they would be forcefully removed.[48]

27.3.3 Throughout 2022, Operation Dudula targeted traders in Orange Grove. In March 2022, an Operation Dudula member attacked a pregnant Zimbabwean informal trader. When members of the public intervened, Operation Dudula members threatened them with assault.[49]

27.3.4 In June 2022, Operation Dudula members went door-to-door in Orange Grove issuing "shut down" notices to businesses, demanding that all businesses owned by non-South Africans close their doors within seven days. These notices were printed on an official Operation Dudula letterhead, bearing its non-profit company registration number.[50]

27.3.5 On 21 June 2022, a fire broke out at the Yeoville Market involving a suspected arson attack, which gutted about a third of the market. This incident took place a week after Operation Dudula had marched to the market and threatened informal traders, telling them to leave the

[48] FA p 03-27 paras 72 - 73. Supporting Affidavit p 03-525 – 526 paras 14 – 15. SAPS AA p 06-10 – 06-11 paras 32 – 34: Bald denial of SAPS's failure to intervene, by a deponent with no personal knowledge.
[49] FA p 03-32 para 91.1.1; Annexure KX7 p 04-69. SAPS AA p 06-12 paras 50 – 53: Denial by deponent with no personal knowledge.
[50] FA p 03-33 para 91.2. Not denied: SAPS AA p 06-13 para 55.

market. The traders resisted Operation Dudula and refused to leave. The arson attack followed shortly after this march.[51]

27.4 Operation Dudula has also targeted public healthcare facilities, using threats and violence to prevent foreign nationals from accessing healthcare:

27.4.1 In August and September 2022, Operation Dudula picketed the Kalafong Hospital and the Hillbrow clinic, refusing access to those they deemed to be foreign nationals.[52]

27.4.2 In January 2023, Operation Dudula picketed the Jeppe Clinic, resulting in many patients being turned away, including pregnant women. As a result, at least two women were forced to give birth at home, without any proper health care.[53]

27.5 Operation Dudula has also targeted schools, demanding the removal of non-South African teachers and undocumented learners. Operation Dudula's conduct resulted in the permanent closure of at least one school in Jeppestown, which had 300 learners and 40 staff. The school was forced to close after concluding that it could not guarantee the safety of its staff and learners, following threats by Operation Dudula and the intimidation of its employees.[54]

[51] FA p 03-16 para 30.5, 03-40 paras 92 – 97. Not denied: SAPS p 06-15 paras 72 – 76.
[52] FA p 03-71 paras 182 – 188. Not denied.
[53] FA 03-72 paras 189 – 192. Supporting Affidavit p 03-485 – 488.
[54] FA p 03-75 para 200; Supporting Affidavit p 03-605 – 613. Not denied.

28 These incidents follow a common pattern, revealing Operation Dudula's *modus operandi*.[55] It routinely incites hatred against foreign nationals on public platforms, particularly through social media, blaming foreigners for all manner of social ills. It then leads unauthorised gatherings and raids directed at threatening and harassing foreign nationals and those who are perceived to be foreign.[56] Operation Dudula's conduct has included chasing patients out of public hospitals and clinics, targeting schools, evicting people from their homes, removing traders from stalls, and further acts of violence, intimidation, harassment and incitement.

This application

29 On 29 April 2022, the applicants' attorneys, SERI, served a letter of demand on Operation Dudula, on behalf of the applicants. The letter documented Operation Dudula's unlawful activities in the preceding months, called upon Operation Dudula to desist from this conduct, and requested a written undertaking that it would do so. Operation Dudula ignored this demand.[57]

30 Also in April 2022, the applicants' attorneys wrote to the Minister of Home Affairs and the SAPS,[58] noting that immigration officials and police officers had conducted dragnet raids on communities that had been targeted by Operation Dudula, in which officials went door-to-door, searching for foreign nationals. These letters recorded

[55] These events are summarised in FA pp 03-26 to 03-03-47 paras 66 to 129. Apart from disputing the involvement of SAPS and Home Affairs officials in these incidents, the material facts of Operation Dudula's involvement are not denied by the respondents.
[56] FA p 03-25 para 61 to 62. Not denied.
[57] FA p 03-77 to 03-78 paras 210 – 212. Annexures KX 62 and 63 pp 04-173 and 04-177.
[58] FA p 03-95 para 256. Annexure KX 68 p 04-299.

that these raids served to inflame tensions in these communities. In his response, the former Minister of Home Affairs confirmed that these raids had taken place and sought to rely on section 41 of the Immigration Act as the legal basis for these operations.[59]

31 This application was launched on 12 May 2023, following significant efforts to secure supporting affidavits from victims of and witnesses. The application was brought in two parts:

31.1 Part A involved an interlocutory application to protect the anonymity of deponents to affidavits in these proceedings, due to the threat of retaliation and further victimisation. Windell J granted that order on 7 February 2024.[60]

31.2 These proceedings concern Part B of this application, in which the applicants seek final relief.

32 In response to this application, Operation Dudula has elected not to oppose or otherwise participate in the proceedings, despite receiving service.[61] Its office bearers and members have nevertheless expressed open defiance of this court process and have made public statements disparaging the applicants and their attorneys.[62]

33 Despite the seriousness of this matter, both the SAPS and the DHA inexplicably delayed in filing their answering papers, despite repeated undertakings to file. Their

[59] FA p 03-96 para 257. Annexure KX 69 p 04-303.
[60] Order of Windell J on 7 February 2024, Caselines p 14-19.
[61] The Sheriff's return of service indicates that the papers were served at Operation Dudula's registered address.
[62] Supplementary Founding Affidavit (SFA) pp 03-621 to 03-623 paras 12 – 17.

answering affidavits make no attempt to explain their delays nor have they sought condonation.[63] Despite claiming that the delays were to enable them to investigate and take instructions on their responses, their answering papers fail to respond to material factual averments and provide scant factual response to the detailed averments made in the founding papers.

THE UNOPPOSED INTERDICTORY RELIEF AGAINST OPERATION DUDULA

34 The interdictory relief sought against Operation Dudula is unopposed,[64] with the sole exception of the relief relating to wearing military uniforms. In what follows, we summarise the uncontested grounds for this interdictory relief.

35 As a non-profit company, with separate juristic personality, there is no question that Operation Dudula can be sued in its own name and subjected to interdictory relief. This Court has previously granted an interdict against Operation Dudula in an application brought by PRASA, concerning unlawful activities at Park Station in Johannesburg.[65] Operation Dudula has also previously litigated in its own name.[66]

[63] Replying Affidavit (RA) pp 07-12 to 07-15 paras 16 – 27.
[64] NOM pp 02-30 to 02-31 prayers 2, 5 and 6.
[65] See Annexure KX13 p X. Order granted by Adams J on 4 April 2022, under case number 12290/2022.
[66] See, for example, *Operation Dudula v Electoral Commission of South Africa and Another* [2024] ZAEC 9 (8 May 2024) (dismissing Operation Dudula's Electoral Court challenge); *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 75; 32323/2022 (10 February 2023) (refusing an application by Operation Dudula for leave to intervene).

The test

36 The requirements for a final interdict are well settled. An applicant must show a clear right; an injury actually committed or reasonably apprehended; and the absence of suitable alternative remedies.[67]

37 The Constitutional Court has explained the importance of interdicts in the constitutional dispensation as follows:[68]

> *"In a constitutional order, interdicts occupy a place of importance. In granting an interdict a court enforces "the principle of legality that obliges courts to give effect to legally recognised rights". The purpose of injunctive relief is to "put an end to conduct in breach of the applicant's rights". An interdict is intended to protect an applicant from the actual or threatened unlawful conduct of the person sought to be interdicted."*

Clear rights

38 The applicants rely on a range of clear rights which, if not protected by an interdict, will continue to be violated and threatened by Operation Dudula, including the rights to equality[69], human dignity,[70] life,[71] freedom and security of the person,[72] education,[73] housing,[74] and healthcare.[75]

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[67] *Setlogelo v Setlogelo* 1914 AD 221 at 227; see also *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* (CCT 301/20) [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC) (Oak Valley) at para 18.
[68] *Oak Valley* id at para 19.
[69] Section 9 of the Constitution.
[70] Section 10 of the Constitution.
[71] Section 11 of the Constitution.
[72] Section 12 of the Constitution.
[73] Section 29(1) of the Constitution.
[74] Section 26 of the Constitution.
[75] Section 27 of the Constitution.

39 Operation Dudula's vigilante conduct also constitutes a clear violation of the rule of law. In *Chief Lesapo*,[76] the Constitutional Court emphasised that:

> *"No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails, as envisioned by section 1(c) of our Constitution, which provides:*
>
> > *"The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
> >
> > *…*
> >
> > *(c) Supremacy of the constitution and the rule of law."*
>
> *Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law."*

Actual harms

40 The undisputed evidence reveals a clear pattern of unlawful acts perpetrated by Operation Dudula, its public representatives, and its members, including:[77]

40.1 Incitement of violence and hate speech:[78] Operation Dudula has engaged in the incitement of violence, the propagation of hate speech and other unlawful conduct both at gatherings and on its social media platforms. This is in clear contravention of section 8(6) of the Regulation of Gatherings Act 205 of 1993 (Gatherings Act).[79] Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) further prohibits speech that

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[76] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 11.
[77] FA pp 03-22 to 03-46 paras 50 – 125, SFA pp 03-623 to 03-642 paras 19 - 68.
[78] FA pp 03-49 to 03-03-53 para 133 – 137. Not denied.
[79] Section 8(6) provides that: "*No person present at or participating in a gathering or demonstration shall perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons.*"

incites harm on grounds that include nationality, social origin, race and ethnicity.

40.2 Targeting informal traders, shopkeepers and employees:[80] Operation Dudula has, in a sustained pattern of activity, targeted informal traders, shopkeepers and employees, by attacking traders and unlawfully directing businesses and traders to cease to operate, or directing businesses to dismiss foreign employees. This is in clear violation the right to dignity. In *Informal Traders*,[81] concerning an interim interdict to halt the eviction of traders, the Constitutional Court confirmed that "*the ability of people to earn money and support themselves and their families is an important component of the right to human dignity*". Operation Dudula's conduct is also in breach of the right to freedom and security of the person, which includes the right to be free from all forms of violence, from both public and private sources.[82]

40.3 Unlawful evictions and threats:[83] Operation Dudula has evicted foreign nationals (and South African nationals living with them) from their homes or has attempted to do so. This is in clear violation of section 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act), which provide that no person may be evicted from

[80] FA p 03-48 para 130.4, pp 03-66 to 03-67 paras 164 – 167. Not denied.
[81] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) at para 31.
[82] Constitution, section 12(1)(c).
[83] FA p 03-48 para 130.5, pp 03-67 to 03-70 paras 168 – 180. Not denied.

their home without an order of court, in addition to other substantive and procedural requirements.

40.4 Interference in access to healthcare: Operation Dudula has interfered with access to health care at public health facilities, including threatening and forcibly removing foreign nationals from facilities.[84] This is in violation of the section 27(1)(a) right of access to health care services and reproductive health care, which imposes an obligation on private persons to desist from preventing or impairing this right of access.[85]

40.5 Interference with access to education:[86] Operation Dudula has interfered with access to education, including by threatening foreign teachers and learners at public schools, resulting in the closure of at least one school in Jeppestown, Johannesburg.[87]

40.5.1 This is in direct breach of the right to basic education under section 29(1)(a) of the Constitution, which imposes a "negative obligation" on private persons to refrain from impairing the existing enjoyment of this

[84] FA p 03-48 para 130.6, pp 03-70 to 03-74 paras 181 – 196. Not denied.
[85] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (TAC) para 46 ("*That "negative obligation" applies equally to the section 27(1) right of access to "health care services, including reproductive health care*"), citing *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 1; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 34.
[86] FA p 03-48 para 130.7, pp 03-75 to 03-77 paras 197 – 209. Not denied.
[87] See the supporting affidavit at pp 03-605 to 03-613.

right.[88] The right to a basic education is afforded to all children, regardless of their immigration status.[89]

40.5.2 This conduct is further in breach of the compulsory school attendance requirements under section 3(6)(b) of the Schools Act 84 of 1996, which prohibits any person "*who, without just cause, prevents a learner who is subject to compulsory attendance from attending a schoo*l". This conduct is an offence, which is subject to a fine or imprisonment for a period not exceeding six months.

40.6 Unlawful demands for identification:[90] Operation Dudula has routinely demanded private persons to produce their personal identity documents establishing legal status in South Africa, and inciting other private persons to so demand personal identity documents, a topic we return to below.

40.7 Clothing resembling military uniforms:[91] Operation Dudula members and representatives have routinely attended public gatherings whilst wearing uniforms resembling the uniforms of the South African National Defence Force (SANDF), a matter we address in the next section.

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[88] *Governing Body of the Juma Musjid Primary School v Essay NO* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) at paras 58: "*[S]ocio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection.*"

[89] *Centre for Child Law and Others v Minister of Basic Education and Others* [2019] ZAECGHC 126; 2020 (3) SA 141 (ECG); [2020] 1 All SA 711 (ECG), striking down a policy that barred undocumented learners from attending public schools.

[90] FA p 03-48 para 130.2, pp 03-57 to 03-59 paras 147 – 152. Not denied.

[91] FA p 03-48 para 130.3, pp 03-59 to 03-66 paras 153 – 163. Not denied.

41 Operation Dudula's former and current leaders have also actively participated in and / or supported such unlawful conduct. For example:

41.1 Its former leader, Nhlanhla "Lux" Dlamini, incited hatred of foreigners in Diepsloot, blaming them for criminal conduct, shortly before a violent mob murdered Mr Nyathi.[92] He also participated in a violent and unlawful raid, in which he and other Operation Dudula members harassed foreign nationals and demanded that they provide identification documents.[93]

41.2 The eleventh respondent, Ms Zandile Dabula, Operation Dudula's Secretary General, has repeatedly posted messages on social media, spreading hate speech and incitement,[94] and has been seen wearing clothing resembling military uniforms at gatherings.[95]

42 The Constitutional Court has held that such conduct by an organisation's "*leader[s] and mouthpiece*" establishes a sufficient link between the unlawful activities and the organisation sought to be interdicted.[96]

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[92] FA p 03-26 para 67. .
[93] FA p 03-31 para 85; Supporting Affidavit pp 03-504 to 03-521 para 8. Supporting Affidavit 03-540 to 03-548 para 6. Not denied: SAPS p 06-11 -12 paras 42 – 44; SAPS AA p 06-20 para 104.
[94] See, for example, FA p 03-68 para 172, annexures "KX52" and "KX53" pp 04-154 and 04-155. See also FA p 03-51 paras 137.3 and 137.4, p 03-75 para 202, p 03-69 para 174, annexures "KX20" p 04-96, "KX58" p 04-161, and KX62 p 04-173.
[95] FA p 03-60 para 160.1, annexure "KX25" p 04-104.
[96] Analogous circumstances arose in *Oak Valley* above n 67 at para 64, where a trade union's "leader and mouthpiece" was implicated in unlawful conduct in a strike action which, the Constitutional Court held, established a sufficient link between the injury and the trade union to warrant interdictory relief.

Reasonable apprehension of ongoing and future harms

43 The applicants have further established a reasonable apprehension of future injuries if interdictory relief is not granted.[97] The requirement of a "*reasonable apprehension*" was explained by the then Appellate Division in *Minister of Law and Order v Nordien* as follows:[98]

> *"A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However, the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant."*

44 The reasonable apprehension of further harm in this case is supported by three undisputed facts.

45 First, when served with a formal letter of demand, Operation Dudula failed to provide any undertaking to desist from this unlawful conduct and it has persisted with that unlawful conduct.

46 Second, the evidence presented in the supplementary founding affidavit demonstrates that, since launching these proceedings, Operation Dudula and its

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[97] *Oak Valley* para 19.
[98] *Minister of Law and Order v Nordien en* 1987 (2) SA 894 (A) at 896G-I, restated with approval in *Oak Valley* id at para 19.

members have continued to act unlawfully and have engaged in the very conduct impugned in these proceedings.[99]

47 This is illustrated by the events before and after the Usindiso Building fire of 31 August 2023, in which 76 residents tragically lost their lives and many more were injured.

47.1 Operation Dudula engaged in a pattern of harassment and intimidation of residents of the Usindiso Building.[100] In affidavits submitted to the Khampepe Commission on 15 December 2023, residents of the building stated that members of Operation Dudula had on more than one occasion conducted raids of the Usindiso Building and assaulted residents prior to the fire.[101]

47.2 On the morning after the fire, Operation Dudula members were present, singing and celebrating the fire and the deaths of the foreign national residents of the building. Their conduct is documented in a series of media reports.[102]

48 The supplementary founding affidavit details further and persisting incidents of incitement and hate speech,[103] unlawful demands for personal identity documents,[104] attending public gatherings whilst wearing military uniforms,[105]directing traders to cease to operate,[106] unlawful evictions,[107] and acts of vigilantism.[108]

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[99] SFA p 03-623 para 18. Not denied.
[100] SFA pp 03-623 to 03-624 para 19 - 20. Not denied.
[101] SFA p 03-624 para 21, Annexures "**SA5**" to "**SA10**" pp 03-659 to 03-684..
[102] SFA p 03-625 para 22.
[103] SFA pp 03-627 to 03-635 paras 31 – 44.
[104] SFA pp 03-635 to 03-636 paras 45 – 49.
[105] SFA pp 03-636 to 03-637 paras 50 – 55.
[106] SFA pp 03-637 to 03-638 paras 56 – 59.
[107] SFA pp 03-638 to 03-639 paras 60 – 63.
[108] SFA pp 03-639 to 03-642 paras 64 – 68.6.

49 Third, the unlawful conduct documented in the founding papers demonstrates a repeated pattern, involving a clear *modus operandi*, that is consistent with Operation Dudula's publicly stated aims. Following the launch of the proceedings, Operation Dudula confirmed that it intends to ignore the court proceedings.[109]

No suitable alternative relief

50 There is no suitable alternative to interdictory relief, as it would be impossible for the applicants or affected persons to approach a court for a discrete order in response to every single separate incident of harassment or unlawful conduct, nor would that be an appropriate use of judicial resources.

51 Discrete interdicts against Operation Dudula, such as the interdict obtained by PRASA to stop Operation Dudula's unlawful conduct at Park Station in Johannesburg, have failed to address the broader pattern of its unlawful conduct.[110]

52 The DHA faintly suggests that that the applicants have an alternative remedy, as they ought to report these incidents to the SAPS.

53 This suggestion is misconceived in law and was decisively rejected by the SCA in *Hotz*.[111]

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[109] SFA pp 03-621 to 03-623 paras 12 – 17
[110] FA pp 03-42 to 03-43 paras 105 – 106.
[111] *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA).

53.1 The SCA confirmed that an alternative remedy refers to a suitable alternative judicial remedy:

> *"[T]he alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court. The fact that one of the parties, or even the judge, may think that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict."*[112]

53.2 The SCA further rejected the suggestion that a criminal charge was an effective alternative remedy, holding that:

> "In any event the suggested alternatives were not a proper or effective alternative to the grant of an interdict. Disciplinary proceedings would not have prevented the appellants from continuing their actions and those who were not registered students and not subject to the university's disciplinary procedures. Criminal charges would have been protracted and not have affected matters while pending."[113] (Emphasis added)

53.3 The SCA explained that "*the existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended.*"[114] (Emphasis added)

53.4 Therefore, alternative relief refers to suitable alternative *judicial* remedies. Criminal procedures are not, in general, an effective alternative to the grant of an interdict restraining unlawful conduct.

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[112] Id at para 36.
[113] Id at para 78.
[114] Id at para 36.

54 In any event, the evidence set out in the founding papers demonstrates that the SAPS has failed to take proper and effective steps to prevent, investigate and combat Operation Dudula's unlawful activities and has frequently refused to assist victims.[115] We return to this topic below, in addressing the SAPs' failure to discharge its obligations.

55 Moreover, interdictory relief and further action by SAPS are not mutually exclusive. The interdictory relief sought by the applicants would empower the SAPS to take effective action in future to address Operation Dudula's unlawful conduct, by providing the SAPS with clear guidance on the type of activities that are prohibited.[116]

[115] Replying Affidavit: p 07-16 para 31.
[116] Replying Affidavit: p 07-17 para 32.

CLOTHING RESEMBLING MILITARY UNIFORMS

56 The only portion of the interdictory relief against Operation Dudula that is opposed concerns Operation Dudula members wearing clothing resembling military uniforms.[117] The SAPS, with apparent support from the DHA, contests this relief.

57 South Africa has a painful history of civilians donning military-style uniforms as a means of intimidation, harassment and violent display. Such uniforms convey power, threat and, most significantly, official state sanction.

58 For this reason, both the Gatherings Act[118] and the Defence Act[119] contain separate prohibitions on such activities.

58.1 Section 8(8) of the Gatherings Act prohibits the wearing of "*any form of apparel*" that "*resembles*" the uniform worn by, *inter alia*, the SANDF. Section 12(1)(c) read with 12(1)(j) of the Gatherings Act makes it a criminal offence to contravene section 8 and empowers the SAPS to ensure compliance with the Gatherings Act.

58.2 Section 104(5) of the Defence Act prohibits "*[a]ny person who, without authority, possesses or wears prescribed uniforms distinctive marks or crests, or performs any prohibited act while wearing such uniform or with such uniform,*

[117] NOM p 02-30 and 02-31 prayers 3, 4 and 5.3.
[118] Regulation of Gatherings Act 205 of 1993 ("**Gatherings Act**").
[119] Defence Act 42 of 2002 ("**Defence Act**").

distinctive marks or crests". Contravening that provision is an offence carrying a fine or imprisonment for a period not exceeding five years.

59 There is no dispute on these papers that members of Operation Dudula have routinely attended gatherings in military camouflage clothing that closely resembles the SANDF uniform. The undisputed evidence of this apparel and its close resemblance to the SANDF uniform was set out in detail in the founding affidavit, together with accompanying photographs.[120]

60 While the facts are not in dispute, both the SAPS and the DHA claim that there is no legal basis to take steps to prevent or arrest Operation Dudula members wearing clothing resembling the SANDF uniform at gatherings. The National Commissioner goes so far as to state that "*the SAPS … cannot simply arrest individuals who are at in a public space or public gathering wearing camouflage and / or clothing resembling the defence uniform.*"[121]

61 This contention is based on two erroneous grounds:

61.1 First, the SAPS and DHA baldly deny that wearing camouflage that resembles the SANDF uniform is an offence. They appear to read section 104 of the Defence Act to require, as a jurisdictional fact, existence of a 'distinctive mark' or 'crest' determined by the Chief of Defence Force before there can be criminal offence.

[120] FA pp 03-59 to 03-66 paras 153 – 162; Annexures KX 25 to KX51 pp 04-104 to 04-153. Not addressed or denied in the SAPS and DHA AAs.
[121] SAPS AA p 06-5 para 6.2.

61.2 Second, even if the military apparel has such distinctive marks or crest, SAPS contends, a complaint should be laid with the SANDF because it is a transgression in terms of the Defence Act.

62 Both the SAPS and the DHA are mistaken in their understanding of the relevant provisions. The proper approach to statutory interpretation is well settled, requiring consideration of the text, purpose, context and constitutional values.[122]

63 First, neither SAPS nor the DHA make any attempt to address the relevant provisions of the Gatherings Act.

63.1 Section 8(8) of the Gatherings Act prohibits the wearing of "*any form of apparel*" that "*resembles*" the uniform worn by, *inter alia*, the SANDF.

63.2 The word "resembles" is defined in the Oxford English Dictionary as "*to be like, to have a likeness or similarity to, to have some feature or property in common with*" another thing.[123]

63.3 This extends the prohibition beyond wearing actual SANDF uniforms. Clothing that has sufficient likeness or similarity to that uniform is equally prohibited.

63.4 This prohibition serves a clear purpose of prohibiting paramilitary displays and the associated public intimidation and threat, of the kind routinely performed by Operation Dudula.

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[122] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Road Traffic Management Corporation v Waymark Infotech* (Pty) Ltd [2018] ZACC 12 ("RTMC") para 29.
[123] Oxford English Dictionary (OED) "resembles" (verb).

64 Given the uncontested evidence that Operation Dudula wore military-style uniforms in its public gatherings that resembles the SANDF uniform, the SAPS clearly failed in its duties to ensure compliance with the Gatherings Act. It failed to make arrests or to demand members of Operation Dudula to stop wearing these uniforms. Given that Operation Dudula is centrally organised, it would be a straight-forward matter for the SAPS to advise them that wearing such apparel at gatherings is unlawful and that they should desist. Arrest at gatherings is therefore not the only option available to the SAPS.

65 Second, the SAPS's reading of section 104(5) of the Defence Act is simply incorrect. Section 104(5) does not only speak "*to the illegality of the uniform or part thereof which has distinctive mark or crest",* but criminalises several discrete acts:

65.1 possession and wearing of the uniform or part thereof that has been determined by the Chief of the Defence Force as official attire in the Defence Force, without the written authority of the Chief of the Defence Force;

65.2 possession and wearing of a distinctive mark or crest that has been determined by the Chief of the Defence Force as official attire in the Defence Force, without written authority;

65.3 performing any prohibited act while wearing such uniform or with such uniform; and

65.4 performing any prohibited act while wearing or with such a distinctive mark or crest.

66 The section does not require the uniform or any part of it to bear distinctive marks or crests. Possessing or wearing any part of the defence force uniform attracts criminal liability.

67 Section 104(5) of the Defence Act is meant to serve a similar purpose as section 8(8) of the Gatherings Act. However, unlike the Gatherings Act, section 104(5) of the Defence Act is not limited to gatherings.

68 On the facts of this case, the intention of wearing military camouflage by Operation Dudula is obvious. It was to convey a threat and to purport to act with state authority.

69 As has been shown in the founding affidavit, members of Operation Dudula are often armed when they carry out their operations.[124] This, coupled with the military-style uniform, is intended to intimidate members of the public. There is no reason why SAPS would require more in order to make an arrest or at the very least to intervene to prevent Operational Dudula members from engaging in ongoing criminal conduct in their presence.

70 It is therefore just and equitable to grant the declaratory and interdictory relief sought in prayers 3 and 4 of the notice of motion, to confirm the correct legal position, to disabuse the SAPS of its mistaken understanding of the law, and to ensure proper compliance with the law.

[124] FA p 03-60 para 159. Not addressed or denied in the SAPS and DHA AAs.

THE FAILURE TO FULLY IMPLEMENT THE NATIONAL ACTION PLAN

71 The government's stated policy position, in line with its constitutional and international law obligations, is to take all reasonable measures to combat xenophobia, racism and related forms of unfair discrimination.

72 That commitment is reflected in the National Action Plan, to which we have already made extensive reference, which was adopted and approved by Cabinet on 28 February 2019 and formally launched on 25 March 2019.[125] This Plan expressly seeks to give effect to South Africa's commitments under the 2002 Durban Declaration and Programme of Action.

73 The government has also adopted a National Action Plan Implementation Plan, representing the steps to be taken to implement the National Action Plan over a five-year period from 2019/2020 to 2023/2024.[126]

74 The UN Guidelines on the Development of National Action Plans Against Racial Discrimination (UN Guidelines), which are referenced throughout our National Action Plan, describe the purpose of such plans as being to "*help States give effect to their international human rights obligations related to the elimination of racial discrimination*."[127] These Guidelines emphasise that "*State bodies, including the national institution for racial equality, ministries or departments of justice, foreign*

[125] FA Annexure KX 64 p 04-178.
[126] FA Annexure KX 65 p 04-245.
[127] UN Guidelines, Annexure NG08 p 07-75.

affairs, defence, education, health and so on, are responsible for implementing the plan."[128]

75 More than five years after its adoption, critical aspects of the National Action Plan and its Implementation Plan have not been implemented. There is no dispute on the papers that the government has failed in three critical respects:[129]

75.1 It has not operationalised an early warning system and rapid response mechanism in respect of racist and xenophobic violence and hate crimes;

75.2 It has not established or operationalised a system to collect disaggregated data on racist and xenophobic offences and hate crimes; and

75.3 It has not taken proper steps to roll out social mobilisation campaigns to combat racism, xenophobia and related forms of intolerance.

76 The Plan specifically emphasised the need for proper monitoring, data collection and an effective response to acts of xenophobic violence:

> *"It is imperative to monitor and report on attacks and to reach out to communities affected by violence to reduce fear, assist victims, and improve reporting of incidents. It is equally important to promote a spirit of integration through engaging communities where xenophobia is most rampant. Government should send out clear messages that violence against foreign nationals and xenophobic attacks will not be tolerated and that those involved in such activities will be prosecuted."*[130]

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[128] Id at p 07-78.
[129] FA p 03-93 para 245. Not denied: Home Affairs AA p 06-273 paras 94ff (not addressed); SAPS AA p 06-18 paras 93 – 94 (not addressed).
[130] National Action Plan p 04-205 para 82.

77 The National Action Plan's Implementation Plan further set dates and targets for the rollout of these mechanisms, recording that:[131]

77.1 The Department of Justice (or other government entity) was to conduct a baseline study on the levels of racism, racial discrimination, xenophobia and related tolerance by 31 March 2020, and to analyse the disaggregated data to determine patterns, trends and challenges by 30 September 2020;

77.2 The DOJ (or other government entity) was to establish an *"effective governance structure"* in the form of a National Focal Point to implement the National Action Plan, by 1 April 2020;

77.3 The DOJ was to secure funding for the implementation of the National Action Plan by 31 March 2020;

77.4 The DOJ and Statistics South Africa were to collect disaggregated data on racism, racial discrimination, xenophobia and related tolerance in the form of a virtual data repository for ongoing use, to be operationalised by 31 March 2021;

78 The National Action Plan further recorded government's commitments that police would *"prioritise"* the investigation of xenophobic hate crimes, that the prosecuting authority would deal with such cases *"efficiently and speedily'* and that such cases would be monitored.[132] However, without proper data collection, monitoring and early warning systems, such commitments cannot be meaningfully implemented. Indeed,

[131] FA p 03-81 para 220. Not denied. Implementation Plan, Annexure KX 65 pp 04-245 to 04-04-269.
[132] National Action Plan p 04-218 para 142.

as we detail below, there have been persistent failures to bring perpetrators of xenophobic violence to justice.

79 The government's failure to fully implement its own National Action Plan constitutes a breach of its section 7(2) constitutional obligations to respect, protect and promote rights. As emphasised above, this requires the state to take "*reasonable and effective*" steps.

80 That requires more than the mere adoption of a plan. It also requires action to implement those plans. In *Grootboom*,[133] in the context of the right to adequate housing, the Constitutional Court emphasised that:

> "The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations." (Emphasis added)

81 This is echoed in the UN Guidelines, which stress that "*[e]very effort should be made to avoid a situation in which the plan is launched with great fanfare but is then left to wither because of lack of follow-through."*[134]

82 It is therefore not enough to have a reasonable plan. Both the plan and its implementation must be reasonable and effective.

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[133] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 42.
[134] UN Guidelines, Annexure NG08 p 07-78.

83 The respondents have offered no explanation for their failures to fully implement the National Action Plan, compounding the unreasonableness of their conduct and the breach of constitutional duties through a further lack of transparency and accountability. They have also offered no indication of when, if ever, they intend to give full effect to the National Action Plan.

84 In its answering affidavit, the DHA instead engages in a strategy of confession and avoidance, seeking to shift the blame for these failures. That deflection is unavailing.

85 First, the DHA goes as far as to assert that the government bears no responsibility for the implementation of that Plan.[135] This is a shocking failure to understand the contents and purpose of the National Action Plan, which explicitly place the burden of implementation on the shoulders of government.

85.1 The Plan specifically acknowledges, at paragraph 159, that *"[g]overnment is responsible for creating a legal and policy framework for the prevention of racism, racial discrimination, xenophobia and related intolerance as well as for the effective implementation of the prevention measures and practices*."[136]

85.2 While the National Action Plan calls for the engagement and assistance of civil society and private actors, this does not detract from the government's primary legal responsibility for the protection, promotion and fulfilment of rights. The buck stops with the government for any failures to implement the Plan, as it is

[135] Home Affairs AA pp 06-269 to 06-271 paras 86 – 87.
[136] National Action Plan p 04-223 para 159.

the primary bearer of constitutional obligations under section 7(2) of the Constitution.

86 Second, the DHA suggests that some steps have been taken to implement the National Action Plan, as it points to a baseline study conducted by the Institute for Justice and Reconciliation on the National Action Plan on Women, Peace and Security.[137] This is an embarrassing confusion of two entirely separate plans dealing with different national issues. The National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance and the National Action Plan on Women, Peace and Security are separate documents, giving effect to separate constitutional and international commitments.

87 In these circumstances, the government's unexplained failures to give proper effect to critical components of the National Action Plan are an unconstitutional violation of its duties.

88 The just and equitable remedy that must follow is a *mandamus*, requiring the government to take reasonable steps to implement its own plan, as is sought in prayer 7 of the notice of motion.[138]

89 Such an order is consistent with this Court's just and equitable remedial powers under section 172(1)(b) of the Constitution:

[137] Home Affairs AA Annexure DH2 p 06-352.
[138] NOM p 02-32 prayer 7.

89.1 In *Treatment Action Campaign*,[139] the Constitutional Court noted that, where the state has failed to give effect to its constitutional duties, the Constitution obliges the Court to say so and that "*[i]n so far as that constitutes an intrusion into the domain of the [E]xecutive, that is an intrusion mandated by the Constitution itself.*"

89.2 The Court further emphasised that the Court's just and equitable remedial powers extend to issuing mandatory orders against the state:[140]

> *"Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus …"*

90 Such an order raises no separation of powers concerns in this case, as it requires no more than directing government to carry out its existing plans. This Court is not asked to prescribe a new plan nor is it asked to dictate precisely how these plans are to be carried out.

91 In any event, as the Constitutional Court held in *Mwelase*,[141] the "*bogeyman of separation of powers concerns should not cause courts to shirk from their constitutional responsibility*" to give just and equitable relief.

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[139] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 99.
[140] Id at para 106.
[141] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) at para 51.

92 It is submitted that it is just and equitable to grant the order sought in prayer 7 directing the government (as second respondent) to take reasonable steps to implement the National Action plan, including by taking steps to establish an early warning and rapid response mechanism and by collating and publishing disaggregated data. These simple steps will go a long way.

THE SAPS' FAILURES TO COMBAT, PREVENT AND INVESTIGATE CRIMINAL CONDUCT

93 In addition to its general section 7(2) constitutional obligations, the SAPS has a specific duty under section 205(3) of the Constitution "*to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law*".

94 The SAPS's constitutional duties are reinforced by section 13 of the South African Police Services Act 68 of 1995 (SAPS Act). Section 13 (1) to (3)(a) provides that:

> "*(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.*
>
> *(2) Where a member becomes aware that a prescribed offence has been committed, he or she shall inform his or her commanding officer thereof as soon as possible.*
>
> *(3) (a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.*"

95 The SAPS is therefore one of the primary state agencies responsible for the protection of the public in general, including foreign nationals, against the invasion of their fundamental rights by perpetrators of criminal conduct.[142]

96 However, the founding papers detail numerous instances where the SAPS failed in its duties to adequately protect the public from Operation Dudula's unlawful conduct, falling into three broad categories:

96.1 The failure to act when crimes were committed in the presence of the police;

96.2 The refusal to assist or accept complaints when foreign nationals went to police stations to lay charges; and

96.3 The failure to take reasonable and effective steps to investigate crimes reported to the police.

97 The relevant evidence of these failures is not genuinely in dispute.

97.1 The National Commissioner, who deposed to the answering affidavit on behalf of the SAPS, has no personal knowledge of the specific incidents and events detailed in the founding papers, nor was his affidavit accompanied by <u>any</u> supporting or confirmatory affidavits from the relevant police officers involved in these events.

[142] *AK v Minister of Police* [2022] ZACC 14; 2023 (2) SA 321 (CC); 2022 (11) BCLR 1307 (CC) at para 3.

97.2 Our courts have repeatedly deplored such pleading by state officials without personal knowledge, disregarding it as inadmissible hearsay.[143]

97.3 Moreover, the National Commissioner's bare denials do not suffice on basic principles of pleading, particularly where information about the SAPS's response to Operation Dudula's criminal conduct is uniquely in the knowledge of the SAPS.[144]

Failure to prevent / respond to crimes committed in the SAPS' presence

98 There are multiple instances on the papers where the police stood passively by while Operation Dudula members engaged in unlawful conduct. We highlight three examples.

98.1 On 6 February 2022, at the Tsietsi Mashinini Centre, in Jabavu, Soweto, members of the SAPS accompanied Operation Dudula members in a raid of the Centre, in which Operation Dudula members went door-to-door, harassing residents and demanding that they produce documentation. The supporting affidavit deposed to by a resident of the Centre stated that "*Mr. Nhlanhla 'Lux'*

[143] See, for example, *Director-General: The Department of Home Affairs and Others v Dekoba* [2014] ZASCA 71; 2014 (5) SA 206 (SCA); [2014] 3 All SA 529 (SCA) at para 6; *Freedom Under Law v Judicial Service Commission and Another* [2023] ZASCA 103; [2023] 3 All SA 631 (SCA) at para 27.

[144] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) at para 13: "When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied [i.e. that there is no real genuine and bona fide dispute of fact]".

Mohlauli was accompanied by armed members of the South African Police Service (SAPS) who asked me to come out for more questions."[145]

98.2 In response to this, the National Commissioner provides contradictory versions, again without any supporting affidavits from those with personal knowledge.

98.2.1 The National Commissioner initially denies that SAPS members accompanied Operation Dudula,[146] before later admitting that the SAPS was indeed present on the day.[147]

98.2.2 No explanation is provided for why SAPS officers were present, nor is there any explanation as to why the SAPS officers failed to intervene to prevent Operation Dudula's unlawful conduct, which included the harassment and intimidation of residents and the destruction of property.[148]

98.3 SAPS officers were also present in Diepsloot on 6 April 2022, when the then leader of Operation Dudula addressed a crowd and incited violence against foreign nationals, calling for people to deal with foreign nationals in their community.[149] Mr Elvis Nyathi was murdered by a mob in Diepsloot later that evening after the mob went door to door demanding passports from people.[150]

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[145] Supporting Affidavit pp 03-505 to 03-509.
[146] SAPS AA p 06-11 para 42.
[147] SAPS AA p 06-20 para 104.
[148] FA p 03-31 para 85.
[149] FA p 03-26 para 67.
[150] FA p 03-27 para 68.

In the gathering earlier in the day, Nhlanhla Lux acknowledged the presence of the police when he said:

> *"we will wait for the police to leave and then disperse to the streets and our approach will depend on the people we are fighting, if those people have guns and weapons we also have guns and weapons".*

98.4 The National Commissioner's response to these allegations is simply to deny knowledge of these events: "*[t]he content of this paragraph is unknown*".[151] That does not suffice to establish a genuine dispute of fact.

98.5 The SAPS again failed to intervene in mid-2002, when Operation Dudula was attacking waiters in the Maboneng precinct in Johannesburg, accusing them of stealing their jobs.[152] The supporting affidavit deposed to by a leader of the first applicant, Kopanang, states that when he and other members arrived at the scene, they "*called Jeppe Police Station. Members of SAPS came and monitored the situation, but did not intervene*".[153]

98.6 The SAPS's response to these allegations is dismissive, suggesting that there was no violence.[154] However, these denials are again made without any supporting affidavits from members of the SAPS who were present at the scene on the day and/or assigned to Jeppe Police Station.

99 The SAPS appear to regard themselves as mere spectators, rather than bearing duties to respond appropriately to criminal conduct. However, a police officer "*when*

[151] SAPS AA p 06-9 para 25.
[152] FA p 03-28 para 75.
[153] Supporting Affidavit pp 03-522 to 03-529.
[154] SAPS AA p 06-11 para 39.

performing a duty or function, is enjoined to act reasonably in the circumstances" and *"to exercise any power bestowed on such member subject to the Constitution and with due regard to the fundamental rights of every person*".[155]

Refusal to assist or receive complaints

100 The papers also detail evidence of the police refusing to assist foreign nationals in laying charges against Operation Dudula members. Two examples from the papers illustrate the problem:

100.1 On 13 June 2022, at the Norwood police station, SAPS members initially refused to open cases against Operation Dudula members who had threatened informal traders in Orange Grove. At the time, a Sergeant Mtshali made xenophobic remarks that "*foreign nationals are tiring*".[156] Instead of addressing this issue, and filing an affidavit from Sergeant Mtshali or any other officers present on the day, the National Commissioner makes generic and bald statements about the functioning of the police station, ignoring the specific incident referred in the founding affidavit.[157]

100.2 Residents of Msibi House,[158] who suffered violent eviction by Operation Dudula members, state that in the early hours of the morning of 18 December 2022, the police at Jeppe police station refused to talk to them or assist them in laying

[155] *WSL and Another v Minister of Police and Others* 2024 (1) SACR 546 (GJ) at para 28.
[156] FA p 03-37 para 91.2.15. Supporting Affidavit pp 03-500 to 03-503.
[157] SAPS AA p 06-14 paras 63 to 66.
[158] Supporting Affidavits p 03-437 to 03-457, and pp 03-465 to 03-467.

complaints. The residents had to sleep at the police station without any assistance, and SAPS members told them to go back to their home countries.[159]

100.3 The National Commissioner again makes a bald denial of these allegations, suggesting that SAPS does "*not tolerate this kind of behaviour from its members".*[160] No affidavit is provided by any of the officers on duty at the Jeppe police station to deny, confirm or provide context to these allegations.

101 It is submitted that the papers accordingly disclose that the SAPS failed to assist or receive complaints.

Failure to properly investigate

102 In *AK v Minister of Police*,[161] the Constitutional Court provided the most extensive analysis of the police's duty to investigate criminal conduct:

102.1 The Court endorsed the European Court of Human Rights' (ECtHR) jurisprudence on these duties, which holds that there is a positive obligation to conduct "*efficient and effective*" investigations where fundamental rights are threatened.[162] The Court quoted with approval from the following summary of the principles:

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[159] FA p 03-45 para 118.
[160] SAPS AA p 06-17 paras 87 to 88.
[161] *AK v Minister of Police* above n 142 paras 87 – 96.
[162] Id at para 90.

> *"The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence. A requirement of promptness and reasonable expedition is implicit in this context. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness*."[163]

102.2 The Constitutional Court endorsed this standard and distilled the relevant requirements as follows:[164]

> *"Therefore, the police are under a duty to act promptly and expeditiously, and they must furthermore take all reasonable measures which are available to them in the circumstances. It is not sufficient that they mobilise the resources at hand; they must also deploy those resources diligently and effectively. They must act with haste, they must take appropriate steps to secure the available evidence, including eyewitness accounts, potential leads and suspects, and they must subject relevant evidence to forensic analysis. They must never act in a cavalier manner or display indifference to the plight of women in the position of the applicant.*"[165]

103 These obligations to conduct effective and expeditious investigations apply with equal force where fundamental rights are threatened by xenophobic violence and similar criminal acts. The 2002 Durban Declaration specifically commits states to ensure that "*criminal … investigations and prosecutions of offences of a racist or xenophobic nature are given high priority and are actively and consistently undertaken*".[166] The

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[163] Id at para 91, citing *Makaratzis v Greece* (2004) ECHR 50385/99 at para 74.
[164] *AK v Minister of Police* id at para 95.
[165] *AK v Minister of Police* at para 95.
[166] Durban Declaration para 89.

National Action Plan reflects similar undertakings to "*prioritise*" the investigation of xenophobic hate crimes and to address these cases "*efficiently and speedily*".[167]

104 However, the SAPS has repeatedly failed to act promptly and expeditiously in investigating complaints against Operation Dudula and its members.

105 To the applicants' knowledge, there have been only <u>two</u> successful prosecutions of Operation Dudula members, of which only one related to criminal acts associated with Operation Dudula's activities. This is not denied.[168]

106 The National Commissioner makes the startling assertion that the SAPS has no duty to investigate or respond to crimes where there is no formal complaint.[169] That is a shockingly supine attitude in the face of widespread violence and unlawful conduct, that fails to show any appreciation for the SAPS' constitutional and statutory obligations to take proactive measures to prevent and combat criminal activities.

107 In any event, the National Commissioner fails to acknowledge that in most of the incidents documented in the founding papers, the victims <u>*did*</u> make formal complaints to the SAPS, which have not been properly investigated.

108 The applicants have provided detailed accounts of the complaints lodged with the SAPS regarding Operation Dudula's conduct, including the specific police station, the names of the relevant police officers (where known), and the times and dates of

[167] National Action Plan p 04-218 para 142.
[168] SFA p 03-643 para 70. Not denied SAPS p 06-33 paras 197 – 198.
[169] SAPS p 06-21 and 06-23 paras 118 and 132.

incidents.[170] In the supplementary founding affidavit, the SAPS was pointedly invited to provide a full account of its handling and investigation of these complaints. However, the SAPS has chosen to ignore this invitation and no information is forthcoming.[171]

109 This lack of transparency and candour on the part of the SAPS is inconsistent with its duties in constitutional litigation. The Constitutional Court has emphasised the state's special duty to be forthright with the Court:

> *"The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court."*[172]

110 Instead of addressing the factual details of these investigations with candour, the National Commissioner makes a series of allegations and bald denials of facts that are not within his personal knowledge, without any supporting or confirmatory affidavits from members of the SAPS with first-hand knowledge of the incidents.

111 The SAPS's unreasonable inaction and its lack of transparency is illustrated by its response to the murder of Mr Nyathi in Diepsloot in April 2022 following an Operation Dudula gathering, a crime which caused national and international outrage:

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[170] FA p 03-25 para 60.
[171] SFA p 03-644 para 73. No response: SAPS AA p 06-33 para 199.
[172] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 152, citing *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 107.

111.1 In the aftermath of Mr Nyathi's murder, the SAPS proceeded to conduct a "*joint operation*", not to investigate the murder and the vigilante violence, but instead to target foreign nationals.[173]

111.2 The SAPS further admits that while arrests were subsequently made, the murderers remain at large and there have been no successful prosecutions.[174] No details are provided about the status of the investigations and what steps, if any, the SAPS is taking to continue these investigations.

111.3 This indicates that the manner in which the SAPS investigated the murder of Mr Nyathi falls far below the standard set by the Constitutional Court:[175]

111.3.1 firstly, an investigation must be prompt and expeditious, the police must act promptly, lest they be seen to be colluding or tolerating the unlawful acts;[176] and

111.3.2 secondly, an effective investigation, although they may be obstacles at times standing in the way, must be capable of establishing the cause of the injuries and the identification of those responsible with a view of bringing them to book.[177]

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[173] SAPS AA p 06-10 para 29.
[174] SAPS AA p 06-22 paras 123 – 125.
[175] *AK v Minister of Police* at para 94, *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).
[176] *AK v Minister of Police* above n 142 at para 92.
[177] Id at para 93.

112 Instead of proceeding with haste, and instead of securing evidence and witnesses to investigate Mr Nyathi's murder, the SAPS showed an attitude of indifference, verifying residents' nationalities rather than carrying out the required investigations.

The appropriate relief

113 Once this Court finds that the SAPS has failed in its constitutional duties, it is obliged by the Constitution to say so,[178] and if it agrees that rights in the Bill of Rights have been infringed by the SAPS, this Court may grant "appropriate" and "just and equitable" relief under sections 38[179] and 172(1)(b) of the Constitution.[180]

114 The relief sought by the applicants, requiring the SAPS to fulfil its constitutional obligations to prevent, combat, and investigate crimes committed by Operation Dudula and/or its members, is no doubt an appropriate and effective remedy in the circumstances.

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[178] *TAC* above n 85 at para 99.
[179] Section 38 of the Constitution provides that: "*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights*."
[180] See TAC above n 85 at para 101.

SAPS AND DHA COMMUNICATIONS AND COLLUSION WITH OPERATION DUDULA

115 Both the DHA and the SAPS issue a series of bald denials of any support for or collusion with Operation Dudula. However, their affidavits disclose that there has been ongoing engagement and communication between state officials and Operation Dudula, the details of which have not been provided to the court, despite express invitation and demand.

116 First, the SAPS admits that it has previously "*escorted*" Operation Dudula members.[181] The National Commissioner states that "*where requested the SAPS to escort a march or protest, it has an obligation to do so to ensure it remains peaceful.*"[182]

117 The National Commissioner fails to provide any further details of these escort operations, despite a Rule 35(12) request for this information[183] and an express invitation to file a further supplementary affidavit on these operations.[184] Critical details of these "*escort operations*" remain undisclosed, including:

117.1 When and where these escort operations were conducted;

117.2 Who requested the escort;

117.3 Who considered and approved the escort;

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[181] SAPS AA p 06-19 para 101.
[182] SAPS AA p 06-24 para 137.
[183] Rule 35(12) notice p 11-38 para 7.
[184] RA p 07-26 para 58.

117.4 The nature of the communications and requests made by Operation Dudula or its representatives.

117.5 How these escort operations were ultimately conducted.

118 Second, the DHA admits that it has had communications and meetings with Operation Dudula, but again elects not to disclose any details, disturbingly suggesting that it has no records of these engagements. The Director General states that:

118.1 "*[T]he DHA does admit communicating from time to time and when necessary with civic organisations, including Dudula…"*[185]

118.2 "*The DHA admits having communicated with Dudula in the past, however there is no record of any correspondence letters between the two"*;[186] and

118.3 "*I can confirm that one of Dudula's officials requested, and was granted, a meeting with the DHA. I do not have any details of this meeting as it was not a meeting engaging in issues, but was organised to afford DHA space to listen to Dudula, without any agreements concluded or resolutions made."*[187]

119 The DHA accordingly admits communicating with Operation Dudula and meeting with them, but withholds from the court even the most basic details of who communicated and met with Operation Dudula (from both Operation Dudula and DHA) and what was discussed in these communications and meeting.

[185] Home Affairs AA p 06-273 para 95.
[186] Home Affairs AA p 06-276 para 105.
[187] Ibid.

120 The DHA belatedly responded to the applicants' Rule 35(12) request.[188] In its response, delivered on the day that these heads of argument were due to be filed, DHA stated that "*there are no records (documents or tape recordings) in the DHA's possession for any communication between the DHA and Operation Dudula*".[189] The court is left to guess whether: the communications with Operation Dudula were verbal or telephonic; the records of any written communications have been lost or destroyed.

121 The DHA's criticism that the applicants are unable to place full details of the DHA's communications with Operation Dudula before the court in these circumstances – when the DHA has withheld that information, which is in its exclusive knowledge and control – is contrived and unreasonable.

122 Third, both the SAPS and DHA admit conducting joint operations in areas that had been specifically targeted by Operation Dudula. For example, the National Commissioner specifically admits a "*joint operation between the SAPS and immigration officials*" in Diepsloot, immediately following the murder of Mr Nyathi, with the purpose of "*verify[ing] the status in the particular area*".[190] Once again, no details are provided as to how this operation was planned, who gave the orders to conduct these operations, for what reasons, and whether there were communications with Operation Dudula in the process. Disturbingly, in the aftermath of a murder allegedly instigated by Operation Dudula (as described in the founding papers), the response

[188] Rule 35(12) notice p 11-37-38 paras 1 – 2.
[189] DHA Reply to the applicants' notice in terms of rule 35(12) dated 9 December 2024 para 5.
[190] SAPS AA p 06-10 para 29.

of the SAPS was to conduct an operation in the area to "*verify the status*" of non-national residents.

123 These are again very serious breaches of the respondents' heightened duties of candour and transparency in constitutional litigation.[191] Faced with a threat to human rights on this scale, involving unlawful vigilante action, the respondents had a duty to provide a full and frank account of their dealings with Operation Dudula.

124 It is submitted that the common cause facts, coupled with the deliberate refusal to disclose relevant engagement with Operation Dudula by both the SAPS and the DHA, a sufficient basis has been laid for an order in terms of prayers 9 and 10 of the notice of motion prohibiting collusion with Operation Dudula including the conduct of raids at its instigation. On the common cause facts: the SAPS has regularly "*escorted*" Operation Dudula while it conducts its gatherings targeting specific communities; the DHA has communicated with and met with Operation Dudula (but gives no details of the discussions); and the SAPS and the DHA have conducted joint operations in areas that had previously been targeted by Operation Dudula, including an operation in Diepsloot in the immediate aftermath of the murder of Elvis Nyathi.

125 The order sought would prohibit support for or collusion with Operation Dudula interdict the SAPS and the DHA from "*conducting raids targeting whole communities at the instigation of [Operation Dudula] or any of its office-bearers or members in the*

[191] See *Public Protector* above n 172.

absence of a warrant or a reasonable suspicion that identified individuals have committed a criminal offence."

126 This order seeks to strike an appropriate balance between prohibiting unlawful conduct instigated by Operation Dudula, while allowing the SAPS and the DHA to perform their lawful functions. The order is also related to the relief sought in respect of section 41 of the Immigration Act, which relief seeks to clarify the powers of the SAPS and the DHA to conduct warrantless raids in communities generally.

127 In the alternative, if the court were to conclude that the interests of justice require fuller disclosure from the SAPS and the DHA before determining this issue, the just and equitable order in the circumstances, we submit, would be to direct both the DHA and the SAPS to file further affidavits, providing full details of their engagements with Operation Dudula, including details of the SAPS's escort operations and the planning of relevant joint operations. Such an order to provide further information on affidavit plainly falls within this Court's just and equitable remedial powers under section 172(1)(b) of the Constitution and its inherent jurisdiction under section 173 of the Constitution.[192]

128 If this alternative relief is granted, the determination of the interdictory relief sought in prayers 9 and 10 of the notice of motion, prohibiting collusion with Operation Dudula,

[192] Such orders requiring the filing of further affidavits have been frequently granted in the Constitutional Court. See, for example, *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at paragraph 5 of the order.

would then stand over for later determination, once the respondents have made a full and frank account of their dealings with Operation Dudula.

129 However, our primary submission is that a case has been made out for the relief in paragraphs 9 and 10.

SECTION 41 OF THE IMMIGRATION ACT

130 We now turn to address the section 41 powers under the Immigration Act, which have been frequently used by SAPS and the DHA to conduct dragnet, warrantless raids and operations in public streets but also in private homes and businesses.

131 The applicants seek two forms of relief to ensure the effective protection of rights:

131.1 First, declaratory and interdictory relief, confirming that these section 41 powers may not be exercised by private individuals, other than police officers and immigration officials.[193] This addresses the question of *who* is entitled to exercise these powers.

131.2 Second, a constitutional challenge to section 41, alternatively declaratory orders on the proper interpretation of these powers, to ensure that these powers are exercised by state officials in a manner that is consistent with human rights.[194] This addresses the question of how these powers may be lawfully exercised.

132 We begin with a brief overview of section 41 before addressing these two components of the relief.

[193] NOM p 02-30 prayers 1 and 2.
[194] NOM p 02-33 to 02-34 prayers 11 – 14A.

Section 41 of the Immigration Act

133 Section 41 of the Immigration Act gives immigration officials and police officers the power to request any person to identify themselves and their immigration status, in the following terms:

> *"41 Identification*
>
> *(1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34."*

134 This power has five components:

134.1 *Stop and identification*: An immigration officer or police officer may request that any person identify themselves as a citizen, permanent resident or foreigner, without any restrictions or guidance on the time, place, or reasons for this demand.

134.2 *Interview*: After this request for identification, if "on reasonable grounds" an immigration or police officer is not satisfied that the person is entitled to be in the Republic, they may interview the person about their identity or status.

134.3 *Arrest and detention without a warrant*: The person may then be arrested and taken into custody without a warrant, for purposes of further steps to verify their identity or status.

134.4 *Verification*: While in custody, the immigration officer or police officer will then take steps to assist the person in verifying their identity, following the procedure prescribed in regulation 37 of the Immigration Regulations.[195]

134.5 *Section 34 detention:* The person may, if "*necessary*", be further detained in terms of section 34 of the Immigration Act, which is the provision regulating detention of illegal foreigners pending deportation. Section 34 permits the arrest and detention of a person, without a warrant, for a period of up to 48 hours, which may later be extended by a court for an initial period of up to 30 days and a further period of up to 90 days.[196]

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[195] Regulation 37, headed "Identification", provides that:

> *"An immigration officer or police officer shall take the following steps in order to verify the identity or status of the person contemplated in section 41(1) of the Act:*
> *(a) access relevant documents that may be readily available in this regard;*
> *(b) contact relatives or other persons who could prove such identity and status;*
> *(c) access Departmental records in this regard; or*
> *(d) provide the necessary means for the person to obtain the documents that may confirm his or her identity and status."*

[196] In *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC), the Constitutional Court declared section 34 to be constitutionally invalid, it suspended that order for 24 months, and granted an interim reading-in order to ensure protections pending the enactment of amendments. When Parliament failed to pass amending legislation in time, the Constitutional Court granted further supplementary relief, expanding the interim protections pending the enactment of remedial legislation. See *Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2023] ZACC 34; 2024 (1) BCLR 70 (CC); 2024 (2) SA 58 (CC).

135 Any failure or refusal to comply with a section 41 request for identification carries harsh criminal sanctions under section 49(6) of the Immigration Act, punishable by up to five years' imprisonment.[197]

Section 41 powers may not be exercised by members of the public

136 There is no dispute that Operation Dudula members have routinely conducted door-to-door searches and have confronted people in public and private places, demanding that they identify themselves and produce identity documents for inspection.[198]

137 Operation Dudula members have acted in this way, despite the fact that the section 41 powers are expressly confined to police officers and immigration officials. Private actors such as Operation Dudula are not empowered to demand the production of immigration documents from a private person, absent some other express lawful basis to do so. In doing so, they are engaging in impermissible self-help and vigilantism.

138 The applicants accordingly seek both declaratory and interdictory relief to address this unlawful conduct.[199]

139 The SAPS readily accepts that section 41 does not authorise such vigilante action by private individuals.[200]

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[197] Home Affairs AA p 06-258 para 54.
[198] FA pp 03-57 to 03-59 para 147 – 152. Not addressed in the SAPS AA or Home Affairs AA.
[199] NOM p 02-30 prayers 1 and 2.
[200] SAPS AA p 06-29 para 170: "*The provision in no way includes legitimising unlawful vigilante activity…".*

140 As a result, the SAPS does not oppose the interdictory relief, sought in prayer 2 of the notice of motion, to prohibit this unlawful conduct by Operation Dudula and its named representatives.

141 Nevertheless, the SAPS inexplicably opposes the complementary declaratory relief sought in prayer 1 of the notice of motion, confirming that section 41 powers are confined to police officers and immigration officers. This opposition appears to be inadvertent or in error, and the SAPS will be invited to clarify its position in argument.

142 The DHA appears to misunderstand the declaratory relief sought in relation to who may act under section 41, stating that the declaratory in prayer 1 "*contradicts*" the constitutional challenge to section 41 in prayer 11 of the notice of motion.[201] It does not. The declarator in prayer 1 is concerned with who may act under section 41, seeking to confirm that it is limited to police officers and immigration officers (as a precursor to prayer 2, seeking to interdict Operation Dudula and its members from requesting people's status documents). The constitutional challenge is directed at the circumstances in which police officers and immigration officers may exercise these powers.

143 The text of section 41 is clear. It is limited to immigration officers and police officers. No party suggests that the provision can be interpreted to empower private persons (or any other actor) to act.

[201] Home Affairs AA p 06-243 para 15.

144 The applicants maintain that this declaratory relief is just and equitable in the circumstances.[202] There remains a live dispute with Operation Dudula and its members, who evidently consider themselves at large to make demands for identification. Operation Dudula has failed to offer any undertaking that it will desist from this conduct. It is therefore in the interests of justice to confirm the legal position and interdict this unlawful conduct.[203]

The constitutional challenge to section 41

145 There remains the question of <u>how</u> these section 41 powers ought to be lawfully exercised by immigration officials and police officers, in a manner that is consistent with constitutional rights.

146 The applicants have identified three constitutional defects in section 41 of the Immigration Act and its application:

146.1 These powers are not confined to public places, but have been used to conduct warrantless searches in private places that include the home and places of study, work or business;

146.2 Section 41 does not impose any guidance, internal safeguards, or constraints for when or how these section 41 powers may be used. For instance, it does not require that an immigration officer or police officer act reasonably or hold a

[202] See the factors relevant to declaratory relief outlined in *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v Director of the Financial Intelligence Centre* [2017] ZAGPPHC 576; [2017] 4 All SA 150 (GP); 2018 (3) SA 515 (GP) at para 59.
[203] FA p 03-77 to 03-78 paras 210 – 212. Annexures KX 62 and 63 pp 04-173 and 04-177.

reasonable suspicion that a person is unlawfully in South Africa, in order to request them to identify themselves as a citizen, permanent resident or foreigner.

146.3 Section 41 authorises the arrest and detention of children, without adequate safeguards that are consistent with the children's constitutional rights.

147 The applicants contend that section 41 should either be declared invalid due to these unconstitutional defects, alternatively it should be read down to preserve its constitutional validity, with appropriate declaratory relief to give proper guidance on its application.

148 Any declaration of invalidity would be suspended, to allow Parliament to correct the constitutional defects, with an appropriate interim reading-in order. Any such orders would be subject to confirmation by the Constitutional Court.

The genesis of this constitutional challenge

149 Section 41 of the Immigration Act has been repeatedly used by the Department of Home Affairs and SAPS to conduct so-called "*joint operations*", in which communities that had previously been targeted by Operation Dudula are subjected to raids.[204]

[204] See, for example, SAPS AA p 06-10 para 29.

150 In his May 2022 letter, the former Minister of Home Affairs confirmed that these raids had involved warrantless searches and invoked section 41 as the legal basis for this conduct.

150.1 In its letter to the Minister on 29 April 2022, SERI notified the Minister of raids conducted in Alexandra, Soweto, Diepsloot and Hillbrow and requested the Minister to provide warrants and / or written authorisations for these raids.[205]

150.2 In his response on 16 May 2022, the then Minister acknowledged that "*joint operations*" were conducted in Alexandra, Hillbrow, Soweto, Diepsloot "*and other areas*".[206]

150.3 At paragraph 4 of its letter, SERI specifically stated "*We are instructed that, to the knowledge of our clients, the searches of homes and businesses conducted by members of the SAPS and officials of the Department of Home Affairs are conducted without a warrant*."

150.4 In direct response to this paragraph, the Minister confirmed that warrantless raids and searches had been conducted, stating "*section 41 permits an immigration officer or a police officer to exercise the powers bestowed upon him or her <u>without a warrant</u>. More particularly if the affected person has been detained*."[207]

[205] Annexure KX 68 p 04-299.
[206] Annexure KX 69 p 04-306 para 14.
[207] Id p 04-306 para 17.

150.5 The Minister insisted that no warrants were needed: "*The immigration officers and members of the SAPS do not require any warrant to request someone to identify himself or herself. Section 41 even permits detention of a person so identified without a warrant."*[208]

151 This use of section 41 in conducting dragnet raids is not a new phenomenon. Since the 1990s, the South African Human Rights Commission (SAHRC) has reported on and expressed concern about these practices. It has noted that:[209]

> *"Since 1994, there have been numerous dawn raids by the South African Police Services into areas that are known to be inhabited by foreigners, both legal and illegal, and in which many foreigners who are legally in the country have been arrested due to their failure to immediately produce the necessary identification documentation. The SAHRC has expressed concern about such raids as they promote racism and xenophobia."*

152 The indiscriminate nature of these section 41 powers means that any person may be arrested and detained if they are unable to provide documentation, including citizens and children. That is confirmed by the further evidence presented by the SAHRC of the arrest of a 16-year-old girl, who is a South African citizen, when she was unable to provide identification to police officers. We address this evidence further below.

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[208] Id p 04-307 para 23.
[209] SAHRC AA p 06-86 para 29.4.

First challenge: Private spaces and warrantless raids

153 The Constitutional Court has repeatedly confirmed that warrantless searches and raids are a severe violation of constitutional rights, including the rights to privacy and dignity.[210]

154 Section 14 of the Constitution grants everyone the right to privacy, which specifically includes the right not to have one's person, home, or property searched.[211] This right is intimately connected with the right to dignity, guaranteeing a "*right to a sphere of intimacy and autonomy that should be protected from invasion*".[212]

155 This right to privacy is not confined to the home.[213] As the Court confirmed in *Hyundai*:[214]

> *"[T]he right, however, does not relate solely to the individual within his or her intimate space . . . when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied."*

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[210] See *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2021] ZACC 37; 2023 (3) SA 329 (CC); 2022 (1) BCLR 46 (CC) (Residents of Industry House) at paras 49 to 57, and the cases cited there.

[211] Section 14 provides that:

> *"Everyone has the right to privacy, which includes the right not to have—*
> *(a) their person or home searched;*
> *(b) their property searched;*
> *(c) their possessions seized; or*
> *(d) the privacy of their communications infringed."*

[212] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27.

[213] *Residents of Industry House* above n 210 at paras 42 to 43.

[214] *Investigating Directorate: Serious Economic Offences v Hyundai Motors Distributors (Pty) Ltd: In re Hyundai Motors Distributors v Smith* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (Hyundai) at para 16.

156 In *Industry House*, in a constitutional challenge to a provision of the South African Police Service Act[215] that permitted warrantless raids of buildings targeting foreign nationals, Mhlantla J (for a unanimous Constitutional Court on these issues) held:

> "*The rights to privacy and dignity in the Constitution attach to "everyone" and not just citizens. Human dignity has no nationality. It appears to me that the respondents were under the impression that because the applicants were largely suspected to be non-citizens or undocumented, they could repeatedly over many months, at any hour of the day or night, violate their rights without consequence. This cannot be so.*"[216]

157 It appears that the SAPS and DHA are now using section 41 of the Immigration Act to do what is no longer possible under the SAPS Act. This appears from the Minister of Home Affairs' letter to SERI, which confirms that the SAPS and DHA have been conducting warrantless raids in terms of section 41 as joint operations in several parts of Johannesburg.[217]

158 To the extent that section 41 of the Immigration Act authorises warrantless raids on homes and businesses, as contended for by the Minister, it constitutes a severe limitation of these rights, for which no justification is provided, that stands to be declared invalid.

159 In response, both the DHA and the SAPS now adopt a different interpretation of section 41, that directly contradicts their conduct and position before the litigation:

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[215] South African Police Service Act 68 of 1995.
[216] *Residents of Industry House* above n 210 at para 124.
[217] Annexure KX 69 p 04-306 para 17.

159.1 The DHA Director-General, Mr Makode, attempts to distance himself from any reliance on section 41 for warrantless raids on homes and businesses. He states that "*[i]t is not correct that section 41 permits warrantless raids of people's homes and other places. There is no provision for such in the section, and there are no words in the section approximating such an effect.*" He further states that "*[i]mplicit to the provisions of section 41 are the guidelines and guiding principles set out in section 33 of the Act for searches and arrest.*"[218]

159.2 The deponent for the SAPS, the National Commissioner, also distances himself from any reliance on section 41, stating that "*[o]n [a] reasonable reading and interpretation of the section it does not permit warrantless raids of any kind.*"[219]

160 These concessions appear to have been belatedly made in the answering papers to insulate section 41 from constitutional scrutiny. The SAPS and the DHA do not disavow their earlier conduct. Prior to the answering papers being filed, both the DHA (in the letter in response to SERI)[220] and the SAPS (in its letter to the SAHRC arising from the SAHRC complaint)[221] took the position that section 41 *does* permit warrantless stops, raids, and searches and confirmed that they were conducting such raids.

[218] Home Affairs AA p 06-262 para 68.
[219] SAPS AA p 06-25 para 146.
[220] Annexure KX 69 p 04-303.
[221] Annexure TM4 p 06-226.

161 In these circumstances, section 41 of the Immigration Act must either be declared invalid to the extent that it permits warrantless searches, alternatively it must be read down to preserve its constitutional validity.

162 In the event that section 41 is capable of a constitutionally compatible reading, that does not permit warrantless searches, the applicants submit that it is in the interests of justice to grant the alternative declaratory relief sought by the applicants in prayer 14A.1 of the amended notice of motion. This declaratory order would confirm that the powers conferred on officials and SAPS officers by section 41 "*do not authorise warrantless searches in private places that include the home and places of study, work or business*".

163 Such a declaratory order would be a just and equitable remedy in the circumstances, particularly given the apparent confusion and disagreement within the DHA and SAPS over the scope of their section 41 powers. Declaratory relief in such circumstances plays an important role, in providing guidance on the future use of section 41 powers. As the Constitutional Court observed in *Rail Commuters*,[222] "*[a] declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values*".

[222] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 107.

Absence of reasonable suspicion

164 The section 41 powers to request identification confer an unguided discretion on immigration officials and police officers to stop and question any person, which is not qualified by any requirement of reasonable suspicion or any other restrictions on how these powers should be exercised.

165 As appears from the pre-litigation conduct and positions of the SAPS and the DHA, they both consider section 41 to confer an unconstrained power to request any person, anywhere and at any time, to produce their documents, without the need for a warrant even if the request is made in a private place. This appears from the letter by the former Minister of Home Affairs confirming the use of section 41 in joint SAPS/DHA operations throughout Johannesburg targeting whole parts of the City through warrantless raids of homes and businesses;[223] and from the response of the SAPS to the SAHRC confirming that SAPS members use section 41 without a warrant to stop and search people, including minors, at random on public streets and to detain those without documents.[224]

166 On this interpretation adopted by the SAPS and the DHA, any immigration official or SAPS officer may stop any person and request that they identify themselves, at any time and any place, in any manner, and for any reason (or without any particular reason).

[223] Annexure KX 69 p 04-306 paras 14-17.
[224] Annexure TM4 to SAHRC AA p 06-226 to 06-227 at p 06-226.

167 This is a coercive power that is coupled with a duty to cooperate on pain of criminal sanction. Any person who fails or refuses to cooperate or respond to this request to identify themselves is guilty of a criminal offence, punishable by up to five years' imprisonment.[225]

168 Any person – whether citizen or visitor – who is not carrying identification documents is faced with a severe threat to their freedom:

168.1 If they refuse to answer and identify themselves, they face criminal prosecution and harsh sanctions.

168.2 If they do answer, and their answer is disbelieved for any reason, they face the risk of being arrested and detained without a warrant while officials conduct further inquiries under section 41 and face the risk of further detention under section 34 if the officials are not satisfied with the outcome of those investigations.

169 These risks are not confined to non-citizens. Any citizen who is undocumented or has lost or misplaced their identity documents would face the same risks, as confirmed by the experience of the minor child, Ms SN, a South African national whose complaint was investigated by the SAHRC.

170 This directly limits the rights to privacy and dignity, which together confer a general *"right to be left alone by the state"*, unless specific conditions are satisfied.[226]

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[225] Home Affairs AA p 06-258 para 54.
[226] *Hyundai* above n 214 at para 16.

171 It also implicates the section 12(1)(a) right not to be "*deprived of freedom*" arbitrarily or without just cause, a right which is expressly not confined to circumstances of arrest and detention.[227] While the precise meaning of a "deprivation of freedom" has not yet been determined by our courts, this rights must be afforded a "*wide meaning so as to afford individuals maximum protection.*"[228]

172 These freedom rights are implicated whenever a person is accosted by a police officer or immigration official, using their section 41 powers, and is prevented from walking away or remaining silent, on pain of criminal sanctions for non-cooperation.[229] Such powers, which may be exercised at any time and anywhere, have painful echoes of the apartheid-era *dompas* system, requiring close constitutional scrutiny and safeguards.

173 However, these section 41 powers are not qualified by any requirement that police officers or immigration officers must have reasonable cause for stopping and questioning a person, or any other guidance on when or how these powers may be lawfully exercised.

174 The Constitutional Court has repeatedly held that it is unconstitutional to afford broad, discretionary powers that threaten constitutional rights without appropriate guidance on their use.

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[227] See *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at para 28, where Ackermann J noted that the word "*detention*" under section 11 of the interim Constitution "*can relate to a variety of physical restraints*".
[228] *Lawyers for Human Rights* above n 195 at para 31.
[229]See the US Supreme Court's Fourth Amendment jurisprudence, which confirms that freedom rights apply "whenever a police officer accosts an individual and restrains his freedom to walk away." See *Terry v Ohio* 392 U.S. 1 (1968) at 16.

175 In *Dawood*,[230] the Constitutional Court struck down a statutory provision that conferred unguided discretionary powers on immigration officers to grant or refuse foreign spouses temporary residence permits. There the Court held that:

> *"We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.*
>
> *Such guidance is demonstrably absent in this case. It is important that discretion be conferred upon immigration officials to make decisions concerning temporary permits. Discretion of this kind, though subject to review, is an important part of the statutory framework under consideration. However, no attempt has been made by the Legislature to give guidance to decision-makers in relation to their power to refuse to extend or grant temporary permits in a manner that would protect the constitutional rights of spouses and family members."*

176 In *Lawyers for Human Rights*,[231] the Constitutional Court applied these principles in declaring section 34 of the Immigration Act to be invalid to the extent that it affords immigration officials an open-ended discretion to arrest and detain illegal foreigners without a warrant.

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[230] *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 54 – 55.
[231] Above n 195.

176.1 The Court emphasised that the section 12(1)(a) right confers substantive protections, requiring that deprivations of freedom may only occur for "*constitutionally acceptable reasons*".[232]

176.2 The Court proceeded to hold that the absence of guidance on the proper exercise of these powers offends the section 12(1)(a) right and the rule of law:

> *"The exercise of this power is not subject to any objectively determinable conditions. Nor does the section lay down any guidance for its exercise. There can be no doubt that in present form section 34(1) offends against the rule of law by failing to guide immigration officers as to when they may arrest and detain illegal foreigners before deporting them. More so because this power may be exercised without the need for a warrant of a court. The detention is quintessentially administrative in nature."*

177 Having established a limitation of rights, the burden shifts to the respondents to show that these limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom under section 36 of the Constitution.[233]

178 However, the respondents have offered no meaningful attempt to justify the limitations of rights identified above. The applicants maintain that the limitations are not justified, particularly as there are less restrictive means available to achieve the apparent objectives of section 41, through proper guidance and requirements for the use of section 41 powers.

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[232] Id at para 33.
[233] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 34.

179 Section 41 therefore falls to be declared inconsistent with the Constitution and invalid on the ground that it lacks guidance and safeguards, notably any requirement of reasonable suspicion or cause to exercise the power to request a person to establish their legal status on pain on criminal sanction.

180 In the alternative, to the extent that section 41 is capable of a constitutionally compatible interpretation, it should be interpreted as requiring a police officer or immigration official to hold a reasonable suspicion that a person is unlawfully in South Africa before they may request a person to identify themselves as a citizen, permanent resident or foreigner. That is reflected in the declaratory relief sought in prayer 14A.2 of the amended notice of motion.

Children's rights

181 The evidence presented by the SAHRC starkly illustrates the implications of 41 for children's rights.

182 The SAHRC's uncontested evidence is that, as a consequence of section 41, a 15-year-old child, Ms SN, was detained after she could not provide documentation to prove her citizenship or immigration status. Ms SN was subjected to this treatment even though she is a citizen.[234]

[234] SAHRC AA pp 06-87 to 06-91 paras 30 – 37.

183 In its answering affidavit to the SAHRC, the SAPS's deponent, Brigadier Nevhuhulwi, does not deny that SN was interrogated and then arrested under section 41. The SAPS also does not deny that section 41 has been and will continue to be applied to children in this way.

184 While the SAPS acknowledges that it applies section 41 to children, it suggests that if a member of SAPS "*ascertains that the individual being arrested is a minor child, that child will be immediately released*". However, no formal guidance to that effect is to be found in section 41 itself, the Children's Act 38 of 2005, the Child Justice Act 75 of 2008, or in the National Instruction referenced in the SAPS' answering affidavit.[235]

185 The applicants maintain that section 41 has unconstitutional, rights-limiting consequences for all whom it impacts, including adults and children. However, the impact on children is a matter for particular concern, as courts are required by section 28(2) of the Constitution and the Children's Act to ensure that the best interests of children are considered paramount in all matters concerning the child.[236]

186 The applicants agree with the SAHRC that section 41 is unconstitutional and invalid to the extent that it permits children to be interrogated, arrested and detained, without any adequate safeguards:

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[235] SAPS AA to SAHRC Annexure 1 p 06-53.
[236] See *Centre for Child Law v Media 24 Ltd* [2019] ZACC 46; 2020 (1) SACR 469 (CC); 2020 (3) BCLR 245 (CC) at para 64.

186.1 It is not in the best interests of children to subject them to such questioning under section 41, which carries criminal sanctions for any failure or refusal to cooperate.[237]

186.2 It is also unconstitutional to subject children to warrantless arrest and detention under section 41, except as a matter of last resort and subject to the safeguards in

187 Accordingly, we submit that section 41 should either be declared unconstitutional and invalid, to the extent that it applies to children, alternatively it should be read down to avoid these unconstitutional consequences, with an appropriate declaratory order, as reflected in prayer 14A.3.

The SAPS National Instructions

188 The SAPS's answering affidavits make frequent reference to National Instruction 12 of 2019, titled "Arrest and Treatment of Illegal Foreigners", which purports to give effect to section 41 and directs police officers on how they exercise these powers.

189 SAPS had not previously relied on this National Instruction 12 and the applicants have only had an opportunity to consider its contents after a copy was disclosed in the SAPS' answer to the SAHRC.

[237] Section 28(2) provides that "*a child's best interests are of paramount importance in every matter concerning the child*".

190 Such National Instructions are issued by the National Commissioner under section 25 of the SAPS Act to guide SAPS members on the conduct and execution of their duties.

191 The National Instruction offers scant guidance, beyond largely replicating the contents of section 41. The National Instruction cannot, in any event, remedy the constitutional defects in section 41 identified above. It is a subsidiary instrument issued under the SAPS Act, not the Immigration Act; and in any event legislation cannot be interpreted by having regard to regulations or other subsidiary authorities.

192 We submit that it is just and equitable to direct the National Commissioner to consider amending or supplementing this National Instruction to ensure that it is aligned with any orders granted by this Court on the constitutional invalidity of section 41 and / or any declaratory orders issued by this Court on the proper interpretation of this provision.

193 This consequential relief is necessary to ensure an effective remedy that is properly implemented by members of the SAPS. It falls squarely within this Court's just and equitable remedial discretion under section 172(1)(b) of the Constitution.

194 In *Hoërskool Ermelo*,[238] the Constitutional Court explained that "[*a] just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduc*t." The Court added that "[*t]his ample and flexible remedial jurisdiction in constitutional disputes permits a*

[238] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 97.

court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements." (Emphasis added)

195 In *Economic Freedom Fighters*,[239] the Court added that this remedial discretion "*is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading*", enabling the courts "*to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution*."

196 It is therefore appropriate, in the event that any relief is granted regarding the interpretation or constitutionality of section 41, to direct the National Commissioner to amend National Instruction 12 in light of the court's order.

[239] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) at para 211.

CONCLUSION

197 Operation Dudula's campaign of xenophobic violence and vigilantism is a severe threat to fundamental rights and the rule of law, requiring a swift and effective response by the state.

198 The application seeks to do no more than to prohibit conduct by Operation Dudula that is blatantly unlawful; to require the SAPS and the DHA to discharge their obligations in their dealing with Operation Dudula and victims of its conduct; to require the government to implement its own policy – the 2019 National Action Plan – to combat racism and xenophobia; and to subject section 41 of the Immigration Act to appropriate constitutional scrutiny.

199 For the reasons set out above, we submit that the applicants are entitled to the relief sought in the amended notice of motion, including the costs of three counsel where employed, which costs should be paid, jointly and severally, by Operation Dudula together with the respondents who have opposed this application.

200 In the event that this court grants costs on a party and party scale, Rule 67A would apply to work done on the matter after 12 April 2024.[240] In respect of work conducted after that date, the applicants respectfully seek costs of three counsel on Scale C on the basis of the importance of the matter; its complexity and the breadth of issues engaged.

[240] *Mashavha v Enaex Africa (Pty) Ltd* [2024] ZAGPJHC 387 at para 12.

201 If the applicants are unsuccessful in any respect, there should be no order of costs against them in light of the *Biowatch* principle.[241]

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20 January 2024

[241] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21 – 25.