

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2023-044685

DATE: 4 November 2025

In the matter between:

KOPANANG AFRICA AGAINST XENOPHOBIA

First Applicant

SOUTH AFRICAN INFORMAL TRADERS FORUM

Second Applicant

INNER CITY FEDERATION

Third Applicant

AB AHLALI BASEMJONDOLO MOVEMENT SA

Fourth Applicant

and

OPERATION DUDULA

First Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

Second Respondent

MINISTER OF POLICE

Third Respondent

**NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Fourth Respondent

MINISTER OF HOME AFFAIRS

Fifth Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Sixth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL:
GAUTENG DEPARTMENT OF HEALTH**

Seventh Respondent

MINISTER OF HEALTH

Eighth Respondent

MINISTER OF BASIC EDUCATION

Ninth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL:
GAUTENG DEPARTMENT OF EDUCATION**

Tenth Respondent

ZANDILE DABULA

Eleventh Respondent

DAN RADEBE

Twelfth Respondent

**THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION
SECTION 27**

Thirteenth Respondent

**THE INTERNATIONAL COMMISSION OF JURISTS
MEDIA MONITORING AFRICA ('MMA')**

First *Amicus Curiae*

Second *Amicus Curiae*

Third *Amicus Curiae*

**THE UNITED NATIONS SPECIAL RAPPORTEUR
ON HUMAN RIGHTS DEFENDERS**

Fourth *Amicus Curiae*

Neutral Citation: *Kopanong Africa against Xenophobia and others v Operation Dudula and Others* (2023-044685) [2025] ZAGPJHC ---
(4 November 2025)

Coram: Adams J

Heard: 10 and 11 June 2025

Delivered: 4 November 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 4 November 2025.

Summary: Application for interdictory and declaratory relief against Operation Dudula and against the Government of South Africa – section 41 of the Immigration Act 13 of 2002 – application for declarator that only Immigration Officials and Police Officers have the power to demand identification from persons – Operation Dudula interdicted from demanding that any private person produce identification – application for declarator that SAPS breached its constitutional duties to combat and investigate crime and to uphold and enforce the law refused – Operation Dudula also interdicted from unlawful conduct and conduct which amounts to them taking the law into their own hands and hate speech –

The National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and related intolerance – the Government is directed to implement the said plan –

Applicants' claim that the SAPS and the DHA support or collude with Operation Dudula not accepted – interdictory and declaratory relief sought in that regard not granted by the court – held that the applicants have failed to present credible evidence in support of the claim –

Section 41 of the Immigration Act 13 of 2002 – to be interpreted such that it authorises warrantless searches only in public spaces and not in private places that include the home and places of study, work or business – also to be interpreted in a way which requires the immigration officer or police officer to hold a 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 – lastly, the court held that the said section is to be interpreted in such a manner that the interest of minor children is safeguarded –

Application succeeds – applicants granted some relief sought in their application, others refused.

ORDER

- (1) It be and is hereby declared that only an immigration officer or a police officer has the power in terms of section 41 of the Immigration Act 13 of 2002 to demand that another private person produce her / his passport or other identity documents to demonstrate her / his right to be in the Republic of South Africa and that no private person has the power to do so unless expressly so authorised by law.
- (2) The first respondent, the eleventh and twelfth respondents be and are hereby interdicted and restrained from demanding that any private person produce her / his passport or other identity documents to demonstrate her / his right to be in the Republic.
- (3) The first respondent, the eleventh and the twelfth respondents be and are hereby interdicted and restrained from: -
 - (a) Intimidating, harassing and/or assaulting any individuals that they identify as being foreign nationals;
 - (b) Making public statements that constitute hate speech on the grounds of nationality, social origin or ethnicity at public gatherings, on social media platforms or in any other way;
 - (c) Interfering with the access of foreign nationals to health care services and/or their right to such access;
 - (d) Interfering with access to, or the operations of, schools and intimidating or harassing learners, teachers or parents at schools;
 - (e) Unlawfully evicting foreign nationals from their homes;
 - (f) Unlawfully removing foreign nationals from their trading stalls or interfering with the employment of foreign nationals in shops and businesses;

- (g) Instigating, encouraging or inciting any other person to perform any of the acts prohibited by this order, on social media, at gatherings in terms of the Regulation of Gatherings Act 205 of 1993, or in any other way;
- (4) The first respondent be and is hereby ordered and directed to communicate this order to any and/or all of its office-bearers and members.
- (5) The second respondent be and is hereby directed and ordered to take reasonable steps to implement the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, including by: -
 - (a) taking steps to establish an early warning and rapid response mechanism regarding threats of xenophobic hate speech and hate crimes;
 - (b) collating and publishing disaggregated data in respect of xenophobic hate speech and hate crimes, including the prosecution and conviction of persons who commit such offences.
- (6) It be and is hereby declared that on a proper interpretation of section 41 of Immigration Act 13 of 2002, the powers conferred on an immigration officer or police officer:
 - (a) are confined to public places and do not authorise warrantless searches in private places that include the home and places of study, work or business;
 - (b) require that an immigration officer or police officer hold a 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; and
 - (c) do not permit the interrogation, arrest and detention of children under the age of 18, except as a measure of last resort and in a manner that is consistent with section 28(1)(g) of the Constitution.

- (7) The first, second, third, fourth, sixth, eleventh and twelfth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants costs of their opposed Special Motion, such cost to include the costs of three Counsel, where so employed, and in regard to Counsel's costs incurred after 12 April 2024, same shall be on scale 'C' of the tariff applicable in terms of Uniform Rule of Court 67A.

JUDGMENT

Adams J:

[1]. As was held by the Constitutional Court in *Residents of Industry House*¹, the rights to privacy and dignity in the Constitution attach to 'everyone' and not just to citizens. Human dignity has no nationality. The fact that an individual is a non-citizen or undocumented does not mean that her / his basic human rights can be violated without consequences. That flies in the face of the founding provisions and values of our constitution. This matter implicates the foregoing principles.

[2]. The applicants are all voluntary public benefit associations. They promote and fight for human rights in general and for the individual rights of their members. So, for example, the first applicant ('Kopanang Africa') is a voluntary association established to fight against xenophobia in South Africa. The second applicant ('SAITF') is an association of informal traders, which promotes and fights for the rights of its members, who consist, as the name suggests, of informal traders. The third applicant ('ICF') is a voluntary association, which has as its objectives the improvement of the lives and living conditions of the residents of the Johannesburg inner city. It also defends unlawful evictions on behalf of its members. The fourth applicant ('Abahlali') is a national association of shack dwellers, based in Durban, with branches in

¹ Footnote 13.

Johannesburg and Cape Town. It works to improve the living conditions of people living in informal settlements by protecting informal settlement residents from unlawful eviction. They also advocate and fight for the provision of basic services for shack dwellers and has, as one of their objectives, the facilitation of transparent, fair and participatory informal settlement upgrading processes.

[3]. The first respondent (Operation Dudula) is a voluntary association that is registered as a non-profit company, with the stated objective of expelling foreign nationals from South Africa. The eleventh and twelfth respondents are executive members of Operation Dudula. I shall refer to these two respondents and the first respondent collectively as the 'Operation Dudula respondents'. The second to the tenth respondents are the Government of the Republic of South Africa and various national and provincial departments of the government. Only the third and fourth respondents (collectively referred to as 'the South African Police Service' or 'the SAPS') and the fifth respondent ('Department of Home Affairs' or 'DHA') are opposing some of the relief sought on behalf of the applicants. The other government respondents have indicated their intention to abide the decision of this court.

[4]. In total four *amici curiae* have been admitted and have participated fully in these proceedings. In the main, the *amici curiae* have made submissions with a view to assisting the court in the adjudication of this matter, which submissions align with the case on behalf of the applicants. The South African Human Rights Commission ('the SAHRC'), although cited by the applicants in their application as the thirteenth respondent, has adopted the same approach and presented evidence and made submissions in support of and which aligns with the applicants' case.

[5]. The application was duly served on the first respondent and the twelfth respondent on 18 May 2023. Subsequently, Operation Dudula in social media and on other platforms confirmed that it had received service of the application but indicated that they would not be opposing the application. It is mainly for this reason that I refused an application for a postponement of the matter by

Operation Dudula at the commencement of the hearing before me on 10 June 2025. The matter accordingly proceeded on an unopposed basis as against the Operation Dudula respondents.

[6]. In this opposed application, which came before me as a Special Motion on 10 and 11 June 2025, the applicants apply for wide ranging relief against the Operation Dudula respondents, as well as against the Government respondents. The relief sought is in the form of interdictory relief, as well as for declaratory orders directed mainly at the conduct of Operation Dudula. There are also ancillary relief prayed for by the applicants, and it may be apposite, in the interest of crystallizing the issues in the matter, to cite from the amended notice of motion, which reads, in the relevant part, that the applicants apply for an order in the following terms: -

- '1. Declaring that only an immigration officer or police officer has the power in terms of section 41 of the Immigration Act 13 of 2002 to demand that another private person produce their passport or other identity documents to demonstrate their right to be in the Republic and that no private person has the power to do so unless expressly so authorised by law;
2. Interdicting and restraining the first respondent, the eleventh and twelfth respondents from demanding that any private person produce their passport or other identity documents to demonstrate their right to be in the Republic;
3. Declaring that members of the first respondent who publicly wore clothing resembling the uniform of the South African Defence Force without authorisation in terms of the Defence Act 42 of 2002 have contravened section 8(8) of the Regulation of Gatherings Act 205 of 1993 and section 104(5) of the Defence Act 42 of 2002.
4. Declaring that the South African Police Service breached its constitutional duties to combat and investigate crime and to uphold and enforce the law by failing to reasonably investigate and/or charge members of the first respondent, who publicly, and in some instances in the presence of members of the South African Police Service, wore clothing resembling the uniform of the South African Defence Force in contravention of the section 8(8) of the Regulation of Gatherings Act 205 of 1993 and section 104(5) of the Defence Act 42 of 2002.

5. Interdicting and restraining the first respondent and the eleventh and twelfth respondents from:
 - 5.1. Intimidating, harassing or assaulting any and/or all individuals that they identify as being foreign nationals;
 - 5.2. Making public statements that constitute hate speech on the grounds of nationality, social origin or ethnicity at public gatherings, on social media platforms or in any other way;
 - 5.3. Wearing or authorising office-bearers or members of the first respondent to wear apparel that resembles the uniforms worn by members of the security forces, including the South Police Service and the South African National Defence Force, in public;
 - 5.4. Interfering with the access of foreign nationals to health care services;
 - 5.5. Interfering with access to, or the operations of, schools and intimidating or harassing learners, teachers or parents at schools;
 - 5.6. Unlawfully evicting foreign nationals from their homes;
 - 5.7. Unlawfully removing foreign nationals from their trading stalls or interfering with the employment of foreign nationals in shops and businesses;
 - 5.8. Instigating, encouraging or inciting any other person to perform any of the acts prohibited by this order, on social media, at gatherings in terms of the Regulation of Gatherings Act 205 of 1993, or in any other way;
6. Directing the first respondent to communicate this order to all of its office-bearers and members;
7. Directing the second respondent to take reasonable steps to implement the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and related intolerance, including by:
 - 7.1. taking steps to establish an early warning and rapid response mechanism regarding threats of xenophobic hate speech and hate crimes;
 - 7.2. collating and publishing disaggregated data in respect of xenophobic hate speech and hate crimes, including the prosecution and conviction of persons who commit such offences.
8. Declaring that the South African Police Service, by failing to reasonably investigate complaints against members of the first respondent arising from allegations of criminal conduct aimed at foreign nationals, has breached its constitutional duties to combat and investigate crime, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

9. Interdicting and restraining the South African Police Service from supporting or colluding with Operation Dudula, its office-bearers and members, including in particular (but without limiting the generality of this order) conducting police raids targeting whole communities at the instigation of the first respondent or any of its office-bearers or members in the absence of a warrant or a reasonable suspicion that identified individuals have committed a criminal offence;
10. Interdicting and restraining the Minister of Home Affairs and the Department of Home Affairs from supporting or colluding with the first respondent, its office-bearers and members, including in particular (but without limiting the generality of this order) conducting raids, with or without the police, targeting whole communities at the instigation of the first respondent or any of its office-bearers or members in the absence of a warrant or a reasonable suspicion that identified individuals have committed a criminal offence;
11. Declaring section 41 of the Immigration Act 13 of 2002 inconsistent with the Constitution and invalid to the extent that:
 - 11.1. It is not confined to public places, but authorises warrantless searches in private places that include the home and places of study, work or business; and,
 - 11.2. that the provision does not require that an immigration officer or police officer hold a 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.
 - 11.3. It authorises the interrogation, arrest and detention of children under the age of 18, without adequate safeguards consistent with section 28(1)(g) and 28(2) of the Constitution.
12. Suspending the order of invalidity in paragraph 11 for a period of twenty-four (24) months to enable Parliament to remedy the unconstitutionality;
13. Directing that, during the period of suspension referred to in paragraph 12, the words 'on reasonable suspicion' and 'in a public place' be read into section 41 of the Immigration Act, so that it shall provide:

'When so requested on reasonable suspicion by an immigration officer or a police officer in a public place, any person over the age of 18 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.'

14. Referring the order in paragraphs 11 to 13 to the Constitutional Court for confirmation.
- 14A. In the alternative to paragraphs 11 to 14 above, it is declared that on a proper interpretation of section 41 of Immigration Act 13 of 2002, the powers conferred on an immigration officer or police officer:
 - 14A.1. are confined to public places and do not authorise warrantless searches in private places that include the home and places of study, work or business; and
 - 14A.2. require that an immigration officer or police officer hold a 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.
 - 14A.3. do not permit the interrogation, arrest and detention of children under the age of 18, except as a measure of last resort and in a manner that is consistent with section 28(1)(g) of the Constitution.
- 14B. The National Commissioner of the South African Police Service is directed to effect appropriate amendments to or supplementation of the National Instruction 12 of 2019, titled 'Arrest and Treatment of illegal foreigner', to ensure that the guidance provided to members of the SAPS on the application of section 41 of the Immigration Act is aligned with this Court's order within 60 days of the date of this order.'
15. Directing the first to thirteenth respondents and any of the other respondents that oppose the application, jointly and severally, to pay the applicants' costs.
16. Granting such further and/or alternative relief that the court may deem appropriate.'

[6]. The case on behalf of the applicants in a nutshell is that Operation Dudula and its members have, on a constant and continuous basis, made themselves guilty of unlawful conduct, which falls foul of the Constitution. Such conduct is alleged to include: intimidation, harassment and assault of certain individuals, notably foreigners; the making of public statements that constitute

hate speech; wearing apparel that closely resembles the official uniforms of the security forces; interfering with public access to and the public's right to access health care services; interfering with access to, or the operations of, schools or harassing learners, teachers or parents; unlawfully evicting people from their homes; and unlawfully removing informal traders from their stalls or interfering with the employment of persons in shops and businesses.

[7]. The applicants therefore seek interdictory relief against Operation Dudula and its named office-bearers, coupled with declaratory orders, to address its pattern of unlawful conduct.

[8]. The applicants also contend that the South African Government is complicit in such unlawful conduct. At the very least, so the case on behalf of the applicants goes, the Government has woefully failed in its constitutional and legal obligations to take reasonable and effective steps to address Operation Dudula's unlawful conduct and the broader threat of xenophobia in our society. The applicants therefore apply for an order *inter alia* compelling the government to take reasonable and effective steps to implement its National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance ('the National Action Plan'). As against the SAPS, the applicants seek relief requiring it to fulfil its constitutional obligations to prevent, combat and investigate criminal conduct, as well as interdictory relief against both the SAPS and the DHA to prevent these two government departments colluding with or supporting Operation Dudula.

[9]. As already indicated, the Operation Dudula respondents have failed to deliver notice of intention to oppose and the application for interdictory and declaratory relief sought against them is unopposed.

[10]. The SAPS denies that it breached its constitutional or legislative obligations and accordingly contends that the applicants are not entitled to the relief sought against the SAPS. It does, however, agree and accept that only an immigration or police officer has the power in terms of section 41 of the

Immigration Act 13 of 2002 to demand that another person produce her / his passport or any other identity documents to demonstrate her / his right to be in the Republic and that no private person has the power to do so unless expressly authorised by law. The relief sought in prayer 1 of the notice of motion is therefore not disputed by the SAPS and can and should be granted.

[11]. The DHA denies the serious allegations of possible breaches on its part of its constitutional and legislative duties and obligations and of the applicable law. The applicants have not, so the contention on behalf of the DHA goes, produced any evidence in support of their allegations against the DHA, who submits that a factual basis has not been established in these proceedings for the relief sought against it. As regards the relief sought by the applicants relating to the implementation of the National Action Plan ('NAP'), the DHA's case is that, on a proper interpretation of the NAP, it has to be accepted that the Government is not solely responsible for the implementation of the said plan and it, therefore, cannot be compelled to unilaterally implement same. The DHA also contends that there is no justifiable need to either amend s 41 or a declaring it inconsistent with the Constitution. Section 41, so the contention goes, operates within the compendium of laws including, among others, other provisions of the Immigration Act, the Criminal Procedure Act and the Identification Act. Concerning any arrest of a minor for a criminal offence, the relevant provisions of the Children's Act also come into play. From the outset, so the argument is concluded, when dealing with issues relating to immigration, it should be borne in mind that any person who is not authorised to be within the Republic breaks the law and commits a criminal offence.

[12]. Therefore, in issue in this application is whether the applicants have made out a case for the wide-ranging relief sought by them. In that regard, the applicants seek five categories of relief, as reflected in the amended notice of motion. I intend dealing with those five categories separately and in turn, whilst at the same time dealing with the facts relevant to the adjudication of these issues.

[13]. As already indicated, the Operation Dudula respondents have elected not to oppose the application. In public statements following the issue and service of the application, they confirmed that they were aware of it and had decided to ignore the court proceedings. As a result, the core of the interdictory relief against the Operation Dudula respondents, as reflected in prayers 2, 5 (excepting the prayer relating to wearing by its members of apparel that resembles the uniforms worn by members of the security forces – dealt with later on in this judgment) and 6 of the amended notice of motion, is unopposed.

[14]. Xenophobia, according to the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance ('NAP')², 'is an unreasonable fear, distrust or hatred of strangers, foreigners or anything perceived as foreign or different and is often based on unfounded reasons and stereotypes. It can manifest itself in several ways in a country. For example, it can be through victimisation on the basis of one's nationality or appearance, brutal assaults, murders, ethnic cleansing in an area and mass expulsion from the country'.

[15]. This is a complex form of unfair discrimination that targets individuals based on intersecting protected characteristics, including actual or perceived citizenship, race, colour, language and ethnic or social origin, among other grounds. Xenophobia is linked to racism. International instruments and government's own 2019 NAP deal with xenophobia as a form of discrimination associated with racism. The form of xenophobia experienced in South Africa, and with which this application is concerned, is best understood as xenoracism, as it is directed predominantly at black African foreign nationals.

[16]. The government's NAP acknowledges the scourge of xenophobia in South African society in the following terms: -

² National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, 13 March 2019.

‘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.’

[17]. The NAP 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.’

[18]. The country has experienced successive waves of xenophobic violence in the last two decades. 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. 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’. These figures are likely a significant underestimation due, in large part, to reluctance on the part of victims to report criminal conduct, out of fear of further victimisation and a lack of confidence in the state authorities.

[19]. Xenophobia presents a serious threat to human rights, as acknowledged in the government's NAP. The state is subject to both constitutional and international law obligations to address this threat. The rights afforded by the Bill of Rights apply to all persons within South Africa's borders, regardless of their nationality or immigration status. 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. 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.

[20]. These constitutional duties are reinforced by South Africa's international law commitments. Sections 39(1)³ and 233⁴ 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 instruments⁵.

[21]. South Africa is party to, and is bound by, a range of international treaties that impose relevant obligations, including: (a) the International Covenant on Elimination of All Forms of Racial Discrimination; (b) the International Covenant on Economic, Social and Cultural Rights; (c) the International Covenant on Civil and Political Rights; and (d) the African Charter on Human and Peoples' Rights.

[22]. While xenophobia is not mentioned by name in these instruments, the rights and protections they contain all impose obligations to combat and address xenophobia⁶. 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 Intolerance⁷. That declaration recognises that 'xenophobia against non-nationals, particularly migrants, refugees and asylum seekers, constitutes

³ Section 39(1)(b) provides that when interpreting the Bill of Rights, a court 'must consider international law'.

⁴ 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 is to prefer an interpretation that aligns with international law standards, rather than that which is inconsistent with such standards.

⁵ *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (Makwanyane) at para 35.

⁶ 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.

⁷ 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).

one of the main sources of contemporary racism' and commits states to concrete action to combat xenophobia and related discrimination.

[23]. In bringing this application, the applicants sought to give effect to these constitutional and international commitments.

[24]. With that legal and legislative framework in mind, I now proceed to deal with the case of the applicants against the Operation Dudula respondents,

[25]. The undisputed evidence before me indicates that 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. In isiZulu 'Dudula' means 'to force out'. The name therefore refers to Operation Dudula's stated objective of expelling foreign nationals from South Africa, regardless of their immigration status.

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

[27]. Operation Dudula and its members have engaged in violent and unlawful activities across the Gauteng Province. The undisputed and uncontested evidence of these activities is extensively documented in the applicants' founding papers, with over thirty supporting and confirmatory affidavits from victims and witnesses. Some of the undisputed incidents are set out in the paragraphs which follow.

[28]. 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.

[29]. Operation Dudula has conducted unlawful raids on buildings in Johannesburg, involving threats, intimidation, assaults and the eviction or attempted eviction of residents. For example, on 6 February 2022, members of Operation Dudula, led by Mr Dlamini, 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. During 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 and whips. They assaulted the residents and evicted them from the building. And on 30 November 2023, Operation Dudula arrived at Eastleigh Court in Hillbrow and demanded, by way of a loudhailer 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.

[30]. Operation Dudula has repeatedly threatened and attacked informal traders and businesses that are perceived to be owned and run by non-South Africans. 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. 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. Throughout 2022, Operation Dudula targeted traders in Orange Grove, and during 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. During 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. And 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 market. The traders resisted and refused to leave. The arson attack followed shortly after this march.

[31]. Operation Dudula has also targeted public healthcare facilities, using threats and violence to prevent foreign nationals from accessing healthcare. In August and September 2022, Operation Dudula picketed outside the Kalafong Hospital and the Hillbrow clinic, refusing access to those they deemed to be foreign nationals. During January 2023, Operation Dudula picketed at 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.

[32]. 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.

[33]. The foregoing incidents follow a common pattern, revealing a *modus operandi*. 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.

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.

[34]. The interdictory relief sought against the Operation Dudula respondents is unopposed, with the only exception being the relief relating to the wearing of military uniforms. I am satisfied that a case is made out on behalf of the applicants for the relief sought against Operation Dudula. The simple point about this portion of the application is that it can safely be said the applicants have satisfied the trite requirements for a final interdict, that being that (a) a clear right must be demonstrated; (b) there must be an injury actually committed or reasonably apprehended; and (c) the absence of suitable alternative remedies.

[35]. In *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another (Oak Valley)*⁸, the Constitutional Court explained the importance of interdicts in the constitutional dispensation as follows.

'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.'

[36]. 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, human dignity, life, freedom and security of the person, education, housing and healthcare. Importantly, Operation Dudula's vigilante conduct also constitutes a clear violation of the rule of law.

⁸ *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 19.

[37]. In *Chief Lesapo v North West Agricultural Bank and Another*⁹, 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”.’

[38]. Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law.

[39]. As regards actual harm, the undisputed evidence reveals a clear pattern of unlawful acts perpetrated by Operation Dudula, its public representatives, and its members, including incitement of violence and hate speech. It 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). Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) further prohibits speech that incites harm on grounds that include nationality, social origin, race and ethnicity.

[40]. 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 of the right to 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. Moreover, 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)

⁹ *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.

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

[41]. Operation Dudula has interfered with access to health care at public health facilities, including threatening and forcibly removing foreign nationals from facilities. 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. Similarly, 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. 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 right. The right to a basic education is afforded to all children, regardless of their immigration status. 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 '... , without just cause, [from] prevent[ing] a learner who is subject to compulsory attendance from attending a school'. This conduct is an offence, which is subject to a fine or imprisonment for a period not exceeding six months.

[42]. Importantly, Operation Dudula has routinely demanded that private persons produce their personal identity documents establishing legal status in South Africa and inciting other private persons to so demand personal identity documents.

[43]. As for the requirement of reasonable apprehension of ongoing and future harm, there is no doubt in my mind that the applicants have established a reasonable apprehension of future injuries if interdictory relief is not granted.

The requirement of a 'reasonable apprehension' was explained by the Appellate Division in *Minister of Law and Order v Nordien*¹⁰ as follows.

'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 undisputed facts. 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. Second, the evidence presented in the supplementary founding affidavit demonstrates that, since launching these proceedings, Operation Dudula and its members have continued to act unlawfully and have engaged in the very conduct impugned in these proceedings. The supplementary founding affidavit details further and persisting incidents of incitement and hate speech, unlawful demands for personal identity documents, directing traders to cease to operate, unlawful evictions and acts of vigilantism. 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.

[45]. Lastly, it is so, as contended on behalf of the applicants, that 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. Alternative relief

¹⁰ *Minister of Law and Order v Nordien* 1987 (2) SA 894 (A) at 896G-I, restated with approval in *Oak Valley* id at para 19.

refers to suitable alternative judicial remedies. Criminal procedures are not, in general, an effective alternative to the grant of an interdict restraining unlawful conduct. In any event, 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.

[46]. All of the foregoing translate into a proper case having been made out on behalf of the applicants for the declaratory and interdictory relief against the Operation Dudula respondents. I therefore intend granting the applicants that relief.

[47]. That brings me to the applicants' case relating to the wearing by Operation Dudula members of clothing resembling South African National Defence Force ('SANDF') uniforms.

Clothing Resembling Military Uniforms

[48]. The only portion of the interdictory relief against Operation Dudula that is opposed concerns Operation Dudula members wearing clothing resembling military uniforms. The SAPS and the DHA contest this relief.

[49]. The applicants submit that the wearing of the military style attire by members of Operation Dudula contravenes the provisions of s 8(6) and (8) of the Regulation of Gatherings Act 205 of 1993 ('Gatherings Act') and s 104(5) of the Defence Act 42 of 2002 ('Defence Act'), which, according to the applicants, contain separate prohibitions on such activities.

[50]. 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 s 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. 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, distinctive marks or crests'. Contravening that provision is an offence carrying a fine or imprisonment for a period not exceeding five years.

[51]. Whilst the facts in relation to the wearing of military style attire by Operation Dudula members are not in dispute, the SAPS and the DHA contend that there is no legal basis to take steps to prevent or arrest Operation Dudula members wearing the said clothing at gatherings. The applicants claim that the SAPS failed to investigate and charge member of operation Dudula who wore clothing resembling the uniform of the SANDF in contravention of the section 8 (6) of the Regulation of Gatherings Act 205 of 1993 and section 104(5) of the Defence Act 42 of 2002.

[52]. Section 104 (5) of the Defence Act 42 of 2002 provides as follows: -

'(5) Any person who, without the written authority of the Chief of the Defence Force, possesses or wears any uniform or part thereof, distinctive mark or crest that has been determined by the Chief of the Defence Force as official attire in the Defence Force, or performs any prohibited act while wearing such uniform or with such uniform, distinctive mark or crest, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.'

[53]. It was submitted on behalf of the SAPS that a plain reading of this section clearly speaks to the possession and wearing of an actual SANDF uniform with its distinctive mark or crest. This section does not make mention of 'resemblance' or 'likeness' to an SANDF uniform. It is therefore contended by the SAPS that this section is not applicable to the complaint by the applicants.

[54]. I agree with this submission. In my view, the section, interpreted textually, contextually and purposively, only prohibits the wearing of actual SANDF uniforms with the distinctive mark or crest. The provision says so in as many words. Moreover, the purpose of the provision is clearly aimed at a prohibition against holding oneself out as a member of the SANDF.

[55]. Section 8 (8) of the Regulation of Gatherings Act provides as follows: -

‘(8) No person shall at any gathering or demonstration wear any form of apparel that resembles any of the uniforms worn by members of the security forces, including the Police and the South African Defence Force.’

[56]. In my view, the evidence before me does not support a conclusion, as contended for by the applicants, that the military style attire worn by members of Operation Dudula at their gatherings ‘resemble any of the uniforms worn by members of the security forces’. Importantly, the clothing worn by Operation Dudula members do not bear the distinctive mark or crest which distinguishes a SANDF uniform, for example, from those worn at gatherings by the said members. Therefore, at a factual level, I am of the view that the applicants have not demonstrated that the provisions of s 8(8) have been contravened by the Operation Dudula respondents.

[57]. I therefore do not accept the contention on behalf of the applicants that the members of Operation Dudula contravenes s 8(8) of the Gatherings Act in that they wear ‘any form of apparel’ that ‘resembles’ the uniform *inter alia* worn by members of the SANDF. It is not, in my view, sufficient that the attire ‘resembles’ the SANDF uniform as per the Oxford English Dictionary, namely ‘to be like, to have a likeness or similarity to, to have some feature or property in common with’ with it. The important point for me is that the clothes worn by the Operation Dudula members do not bear the distinguishing mark or crest of the SANDF uniform. To hold otherwise would be stretching the definition in the context of this matter and, in particular, having regard to the related legislation referenced *supra*, that being s 104(5) of the Defence Act.

[58]. For these reasons, the applicants are not entitled to the relief sought by them in relation to wearing uniforms by the members of Operation Dudula. That relates to both the declaratory and the interdictory relief sought against Operation Dudula and the SAPS.

The Alleged Failure by the Government to Fully Implement the National Action Plan

[59]. 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. That commitment is reflected in the NAP, referenced *supra* and which was adopted and approved by Cabinet on 28 February 2019 and formally launched on 25 March 2019. This Plan expressly seeks to give effect to South Africa's commitments under the 2002 Durban Declaration and Programme of Action. 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.

[60]. The UN Guidelines on the Development of National Action Plans Against Racial Discrimination (UN Guidelines), which are referenced throughout the NAP, 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'. These Guidelines emphasise that 'State bodies, including the national institution for racial equality, ministries or departments of justice, foreign affairs, defence, education, health and so on, are responsible for implementing the plan'.

[61]. It is the case on behalf of the applicants that more than five years after its adoption, critical aspects of the NAP and its Implementation Plan have not been implemented. They therefore contend that the government has failed in three critical respects: (a) It has not operationalised an early warning system and rapid response mechanism in respect of racist and xenophobic violence and hate crimes; (b) It has not established or operationalised a system to collect disaggregated data on racist and xenophobic offences and hate crimes; and (c) It has not taken proper steps to roll out social mobilisation campaigns to combat racism, xenophobia and related forms of intolerance.

[62]. The Plan specifically emphasised the need for proper monitoring, data collection and an effective response to acts of xenophobic violence, in the following terms:

‘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.’

[63]. The Implementation Plan of the NAP further set dates and targets for the rollout of these mechanisms, recording that:

- (a) 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;
- (b) 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;
- (c) The DOJ was to secure funding for the implementation of the National Action Plan by 31 March 2020;
- (d) 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;

[64]. The NAP 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.

[65]. The applicants submit that the government has failed to do any of the foregoing and to fully implement its own NAP. Such failure, so the case on behalf of the applicants goes, constitutes a breach of its section 7(2) constitutional obligations to respect, protect and promote rights, which requires the state to take 'reasonable and effective' steps. That, in turn, requires more than the mere adoption of a plan, but it also requires action to implement those plans.

[66]. For these reasons, the applicants apply for the relief sought in paragraph 7 of the amended notice of motion, referred to above.

[67]. The government and, in particular, the DHA offer very little by way of resistance to this relief sought by the applicants.

[68]. The high watermark of the DHA's grounds of opposition to this relief is to the effect that the government bears no responsibility for the implementation of that Plan. As contended by the applicants, this is an astounding approach to adopt. Moreover, it demonstrates a misunderstand of the contents and purpose of the NAP, which explicitly places the burden of implementation on the shoulders of government. 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'.

[69]. Whilst the NAP 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 the primary bearer of constitutional obligations under section 7(2) of the Constitution.

[70]. In these circumstances, I find myself in agreement with the applicants contention that the government's unexplained failures to give proper effect to critical components of the NAP are an unconstitutional violation of its duties. 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. Such an order is consistent with this Court's just and equitable remedial powers under section 172(1)(b) of the Constitution.

The Alleged Failures by the SAPS to Combat, Prevent and Investigate Criminal Conduct

[71]. 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'.

[72]. 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.'

[73]. 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.

[74]. The case on behalf of the applicants is that there are numerous instances, as detailed in their founding papers, where the SAPS failed in its duties to adequately protect the public from Operation Dudula's unlawful conduct. These failures, so the case for the applicants goes, fall into the following three broad categories: (a) The failure to act when crimes were committed in the presence of the police; (b) The refusal to assist or accept complaints when foreign nationals went to police stations to lay charges; and (c) The failure to take reasonable and effective steps to investigate crimes reported to the police.

[75]. The allegation is made that there are multiple instances on the papers where the police stood passively by while Operation Dudula members engaged in unlawful conduct. So, for example, it is alleged that 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 applicants submit that 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 their property.

[76]. SAPS officers are also alleged to have been 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. Mr Elvis Nyathi was murdered by a mob in Diepsloot later that evening after the mob went door to door demanding passports from people. In the gathering earlier in the day, Operation Dudula's leader 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.'

[77]. The response of the National Commissioner of the SAPS, who deposed to the answering affidavit, is to deny knowledge of these events, which, according to the applicants, does not suffice to establish a genuine dispute of fact. The applicants give further examples of instances where members of the SAPS allegedly stood by and watched whilst Operation Dudula made itself guilty of unlawful attacks on other individuals.

[78]. In their founding papers, the applicants also detail evidence of the police refusing to assist foreign nationals in laying charges against Operation Dudula members. So, for example, it is alleged that 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 allegedly made xenophobic remarks that 'foreign nationals are tiring'.

[79]. What is more, so the contention on behalf of the applicants goes, the relevant evidence of these failures is not genuinely in dispute by the SAPS.

[80]. The applicants make the point quite poignantly that 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. In the aftermath of Mr Nyathi's murder, so it is alleged by the applicants, the SAPS proceeded to conduct a 'joint operation', instead of investigating the murder and the vigilante violence, and in the process targeted foreign nationals. The SAPS further admits that while arrests were subsequently made, the murderers remain at large and there have been no successful prosecutions. No details are provided about the status of the investigations and what steps, if any, the SAPS is taking to continue these investigations.

[81]. This indicates, so the applicants contend, that the manner in which the SAPS investigated the murder of Mr Nyathi falls far below the standard set by the Constitutional Court.

[82]. For all of these reasons, the applicants apply, on the basis that the SAPS has failed in its constitutional duties and on the basis that rights in the Bill of Rights have been infringed by the SAPS, for 'appropriate' and 'just and equitable' relief under sections 38 and 172(1)(b) of the Constitution. That relief, so the contention is concluded, should take the form of an order that SAPS should be required to fulfil its constitutional obligations to prevent, combat and investigate crimes committed by Operation Dudula and/or its members.

[83]. The SAPS denies that it breached its constitutional or legislative obligations and therefore contends that the applicants are not entitled to the relief sought by them against the SAPS. It denies that it has failed to protect victims of attacks by Operation Dudula or that they have failed to take steps to prevent Operation Dudula from committing crimes.

[84]. As regards, for example, the 6 February 2022 incident referred to by the applicants, the SAPS expressly denies that its members accompanied Operation Dudula, who, according to the SAPS, were in fact accompanied by church leaders. Moreover, the conduct complained about was not in the presence of the SAPS.

[85]. As for the incident in Diepsloot on 6 April 2022, during which Mr Nyathi was killed, the applicants allege that police officers were present when the leader of Operation Dudula addressed a crowd and incited violence. And the third incident relates to the SAPS's failure to intervene when Operation Dudula attacked waiters in the Maboneng precinct.

[86]. In respect of these incidents, the case on behalf of the SAPS is that they did respond to the precinct when they were called. They continued to monitor the situation and remained at the scene in order to maintain law and order and to protect the patrons and the employees. A number of the employees, so the SAPS avers, laid complaints, as a result of which dockets were opened for further investigation and/or arrests.

[87]. As for the applicants' claims that the SAPS refused to assist complainants or to receive complaints arising from xenophobic attacks, two particular incidents are referenced by the applicants.

[88]. The Applicants allege that on 13 June 2022, the Norwood Police Station SAPS members refused to open cases against Operation Dudula members who had threatened informal traders. In response to these assertions by the applicants, the SAPS provided references to dockets opened on 13 June 2022 for intimidation and malicious damage to property under case number 251/03/2022. In addition, the SAPS indicates that the complainants were provided with the contact details of the investigating officer for progress updates.

[89]. The SAPS accordingly submits that the foregoing demonstrates that they not only received complaints but they also investigated the claims made by foreign nationals. I agree with this submission. Whilst it is so that the applicants maintain that there is a pattern of reluctance or refusal by the SAPS to act against Operation Dudula, the SAPS has, in my view, demonstrated that they have indeed acted where they were called upon to do so.

[90]. The same applies to the claims by the applicants that the SAPS failed to properly investigate complaints expeditiously. In its answering affidavit, the SAPS provides clear accounts where complaints were laid and dockets were opened. By way of example, the SAPS points out that in the murder case of Mr Nyathi, suspects were arrested. However, subsequently the case was struck from the roll due to witnesses failing to co-operate. The SAPS handed over its suspects, the witness and the docket to the National Prosecuting authority to secure the convictions of the suspects.

[91]. The point about the SAPS's case on this aspect of the matter is that they have always acted reasonably and that it cannot be said with conviction that they have thus far failed in their statutory and legislative duties. To further demonstrate the foregoing, the SAPS provided the applicants with the full fire

inquiry documents, including statements from shop owners, vendors and foreigners, in relation to the inquiry into the Yeoville marketplace fire, which includes statements of a witness indicating that the fire started in shop 20, where a stove was left on, which seemingly caused the fire to start. The SAPS, during its aforesaid investigations, indiscriminately interviewed and obtained statements from all the shop owners and vendor whether foreign or not.

[92]. In *AK v Minister of Police*¹¹, the Constitutional Court at para 17 held as follows: -

‘[71] It follows from the above that the enquiry must be centred on whether the SAPS acted reasonably in the circumstances, considering the resources which were available to them at the time. Whether the SAPS acted reasonably is based on, amongst others, the positive obligation imposed on organs of state to respect, protect, promote and fulfil the rights in the Bill of Rights. I therefore agree with the applicant that the SAPS must establish that they took reasonable and appropriate measures available to them in the circumstances. Furthermore, in my view, the enquiry must centre on whether the SAPS took reasonable measures to protect and fulfil the rights of women, such as the applicant, to dignity, equality and freedom and security of the person, including the right to be free from violence from both public and private sources.’

[93]. Also at para 86, the Constitutional Court held as follows: -

‘[86] For these reasons, the police investigation was negligent. The police failed to take reasonable measures which were available to them in the circumstances. They furthermore failed to act promptly and expeditiously so as to follow up on any available leads. The investigation was not deficient because it failed to result in a successful prosecution of the applicant's perpetrators, but because the methodology was flawed; the police failed to act diligently and with the skill required of them by the Constitution.’

[94]. On the basis of this authority and having regard to the evidence before me, I conclude that the SAPS has within its framework acted reasonably in its investigations of reported matters relating to foreigners. The applicants have therefore, in my view, failed to demonstrate why the court should exercise its

¹¹ *AK v Minister of Police* 2023 (2) SA 321 (CC).

discretion in favour of the applicants for the declaratory relief sought against the SAPS.

SAPS and the DHA alleged Communications and Collusion with Operation Dudula

[95]. The applicants contend that the answering affidavits of the SAPS and the DHA 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. The SAPS admits that it has previously 'escorted' Operation Dudula members on some of their 'missions'. In that regard, the National Commissioner of the SAPS states in its answering affidavit that 'where the SAPS is requested to escort a march or protest, it has an obligation to do so to ensure it remains peaceful'. And the DHA admits that it has had communications and meetings with Operation Dudula, but, according to the applicants, also elects not to disclose any details, disturbingly suggesting that it has no records of these engagements.

[96]. The Director-General of the DHA, who deposed to its answering affidavit, states that 'the DHA does admit communicating from time to time, and when necessary, with civic organisations, including Operation Dudula'. He furthermore confirms that the DHA admits 'having communicated with Operation Dudula in the past, however there is no record of any correspondence AND/OR letters between the DHA and Operation Dudula'.

[97]. The applicants furthermore note that the SAPS and DHA admit conducting joint operations in areas that had been specifically targeted by Operation Dudula. For example, the National Commissioner of the SAPS 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'. The applicants make the point, in that regard, that 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, so the submission on behalf of the applicants goes, in the aftermath of a murder allegedly instigated by Operation Dudula, the response of the SAPS was to conduct an operation in the area to 'verify the status' of non-national residents.

[98]. The foregoing, so the case on behalf of the applicants is concluded on this aspect of the matter, coupled with the deliberate refusal to disclose relevant engagement with Operation Dudula by both the SAPS and the DHA, ground sufficiently a basis 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. Such an order, according to the applicants, 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 absence of a warrant or a reasonable suspicion that identified individuals have committed a criminal offence'.

[99]. The DHA has in its answering papers denied allegations concerning any collusion with Operation Dudula. What is denied, in particular, by the DHA is that it or its officers collude and join forces with Operation Dudula when conducting searches against illegal foreigners. The DHA submits that the applicants have not, in their founding papers, produced any evidence which prove any of the allegations of collusion and therefore contends that the sought relief should be refused on the basis that it is without any factual grounds.

[100]. The DHA explains that when raids and searches are done, it is governed by sections 33(5) and (6) of the Immigration Act. It denies being involved in any of the alleged raids and searches alleged in the founding papers. Moreover, so the DHA contends, the applicants have failed to prove and establish, as they are required to do in order to establish a clear right if they were to obtain interdictory relief, that the DHA has factually colluded with Dudula. This is a factual enquiry. There are no clear facts in the founding papers to sustain the

allegations of support and collusion other than speculations and suspicions. The SAPS adopts a similar approach to that of the DHA, namely that a factual basis has not been established to support the relief sought in relation to collusion.

[101]. I agree with these contentions on behalf of DHA and the SAPS. And the interdictory relief sought in that regard by the applicants should not be granted.

Section 41 of the Immigration Act

[102]. Section 41 of the Immigration Act is frequently used by the SAPS and the DHA to conduct dragnet, warrantless raids and operations in public streets, as well as in private homes and businesses. The applicants, with a view to ensuring the effective protection of rights, seek declaratory and interdictory relief, confirming that the s 41 powers may not be exercised by private individuals, other than police officers and immigration officials. I have already indicated *supra* that the applicants are entitled to such a declaratory order for the reasons alluded to above.

[103]. Secondly, the applicants have mounted a constitutional challenge to s 41, alternatively, ask for 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. This addresses the question of how these powers may be lawfully exercised.

[104]. 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.'

[105]. As submitted on behalf of the applicants, the powers envisaged by s 41 has five components: (a) 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; (b) 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; (c) 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; (d) 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; and (e) Section 34 detention: The person may, 'if necessary', be further detained in terms of s 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.

[106]. Regulation 37, titled '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.'

[107]. In *Lawyers for Human Rights v Minister of Home Affairs and Others*¹², the Constitutional Court declared s 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 legislation¹³.

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

[109]. As I have already indicated, the applicants have mounted a constitutional challenge to s 41. They, in particular, take issue with the manner in which the powers conferred on immigration officials and police officers ought to be lawfully exercised in a manner that is consistent with the constitution and the individual rights enshrined in the Bill of Rights.

[110]. The applicants impugn s 41 on the ground that it is not consistent with the rights guaranteed by the Bill of Rights and they have identified three constitutional defects in the said section and its application, namely: (a) 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; (b) The section does not impose any guidance, internal safeguards or constraints for when or how these s 41 powers may be used. For instance, it does not require that an immigration officer or police officer act reasonably or hold a 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; and (c) Section 41 authorises the arrest and detention of

¹² *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] UCC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC).

¹³ 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).

children, without adequate safeguards that are consistent with the children's constitutional rights.

[111]. The applicants contend that s 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.

[112]. This constitutional challenge, so the applicants' case goes, has its genesis in the fact that s 41 has been repeatedly used by the DHA and the SAPS to conduct so-called 'joint operations', in which communities that had previously been targeted by Operation Dudula are subjected to raids. The Minister of Home Affairs have confirmed that these raids had involved warrantless searches and invoked s 41 as the legal basis for this conduct. In correspondence between the Minister and the legal representatives of the applicants, the Minister stated that 'section 41 permits an immigration officer or a police officer to exercise the powers bestowed upon him or her without a warrant'. The DHA has also officially adopted the approach that '[t]he 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'.

[113]. The applicants contend that the indiscriminate nature of these s 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.

[114]. The first challenge relates to the exercise of the s 41 powers in private spaces during warrantless raids. The Constitutional Court has repeatedly confirmed that warrantless searches and raids are a severe violation of

constitutional rights, including the rights to privacy and dignity¹⁴. 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 searched¹⁵. 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'¹⁶.

[115]. In *Residents of Industry House*¹⁷, in a constitutional challenge to a provision of the South African Police Service Act 68 of 1995 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.'

[116]. On the basis of these authorities, the applicants contend that, to the extent that s 41 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. This therefore stands to be declared invalid.

[117]. In response to the applicants' claim for the foregoing relief, the DHA and the SAPS adopt an interpretation of s 41 that directly contradicts their conduct and position before the litigation. The DHA in its answering affidavit

¹⁴ 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.

¹⁵ 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.'

¹⁶ *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27.

¹⁷ Footnote 13.

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'. The Director-General further states that '[i]mplicit to the provisions of s 41 are the guidelines and guiding principles set out in s 33 of the Act for searches and arrest'. The deponent for the SAPS, the National Commissioner, states that "[o]n [a] reasonable reading and interpretation of the section it does not permit warrantless raids of any kind'.

[118]. This, in my view, amounts to a concession on the part of the DHA and the SAPS that s 41 does not permit of warrantless stops, raids and searches. The said section must accordingly either be declared invalid to the extent that it permits warrantless searches, alternatively, it must be read down to preserve its constitutional validity.

[119]. Section 41 is, in my judgment, indeed capable of a constitutionally compatible reading, that does not permit warrantless searches. I agree with the applicants that it is in the interests of justice to grant the declaratory relief sought by the applicants in prayer 14A.1 of the amended notice of motion, which would confirm that the powers conferred on DHA officials and SAPS officers by s 41 'do not authorise warrantless searches in private places that include the home and places of study, work or business'.

[120]. 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 s 41 powers. Declaratory relief in such circumstances plays an important role, in providing guidance on the future use of s 41 powers. As the Constitutional Court observed in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*¹⁸ '[a] declaratory order is a flexible remedy which can assist in clarifying legal and constitutional

¹⁸ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) 107.

obligations in a manner which promotes the protection and enforcement of our Constitution and its values’.

[121]. I am of the view that the same argument applies to the second ground on which the constitutional challenge is directed at s 41, namely the said section confers 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.

[122]. The applicants contend that it appears from the pre-litigation conduct and the positions of the SAPS and the DHA that they both consider s 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 correspondence from the Minister of Home Affairs, confirming the use of s 41 in joint SAPS / DHA operations throughout Johannesburg targeting whole parts of the City through warrantless raids of homes and businesses, as well as from their conduct.

[123]. 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).

[124]. As submitted on behalf of the applicants, 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. 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 s 41 and face the risk of further detention under s 34 if the officials are not satisfied with the outcome of those investigations.

[125]. 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.

[126]. 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. It also implicates the section 12(1) 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. These freedom rights are implicated whenever a person is accosted by a police officer or immigration official, using their s 41 powers, and is prevented from walking away or remaining silent, on pain of criminal sanctions for non-cooperation. However, these s 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.

[127]. 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.

[128]. In *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*¹⁹, 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:

'[54] 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

¹⁹ *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) 54 – 55.

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.

[55] 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.'

[129]. I conclude that s 41 is capable of a constitutionally compatible interpretation. It can and 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

[130]. The SAHRC presented uncontested evidence 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. 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.

[131]. 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.

[132]. This means, as contended on behalf of the applicants, that s 41 has the potential to be interpreted with unconstitutional and 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.

[133]. It is not in the best interests of children to subject them to such questioning under s 41, which carries criminal sanctions for any failure or refusal to cooperate. It is also unconstitutional to subject children to warrantless arrest and detention under s 41, except as a matter of last resort and subject to safeguards.

[134]. I am therefore of the view that s 41 should be read down to avoid these unconstitutional consequences, with an appropriate declaratory order, as reflected in prayer 14A.3.

Conclusion and Costs

[135]. In this application, the applicants seek to prohibit conduct by Operation Dudula that is unlawful. They also apply for orders requiring the SAPS and the DHA to discharge their obligations in their dealing with Operation Dudula and victims of its conduct. Moreover, the applicants seek an order requiring the government to implement its own policy — the 2019 National Action Plan — to combat racism and xenophobia. And lastly the applicants apply to have s 41 of the Immigration Act subjected to appropriate constitutional scrutiny. As I have

already indicated *supra*, the applicants are entitled to some of the relief sought by them in their amended notice of motion and they are not entitled to other relief.

[136]. As for costs, the applicants have been substantially successful against Operation Dudula and those government respondents, who opposed the application. This means that, applying the general rule that a successful party should be awarded the costs of his suit, the applicants should be awarded the costs of the opposed application as against the foregoing respondents.

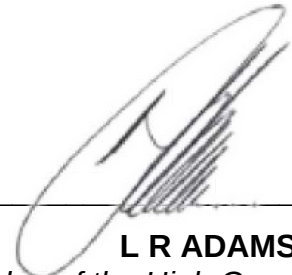
Order

[137]. In the result, I make the following order:

- (1) It be and is hereby declared that only an immigration officer or a police officer has the power in terms of section 41 of the Immigration Act 13 of 2002 to demand that another private person produce her / his passport or other identity documents to demonstrate her / his right to be in the Republic of South Africa and that no private person has the power to do so unless expressly so authorised by law.
- (2) The first respondent, the eleventh and twelfth respondents be and are hereby interdicted and restrained from demanding that any private person produce her / his passport or other identity documents to demonstrate her / his right to be in the Republic.
- (3) The first respondent, the eleventh and the twelfth respondents be and are hereby interdicted and restrained from: -
 - (a) Intimidating, harassing and/or assaulting any individuals that they identify as being foreign nationals;
 - (b) Making public statements that constitute hate speech on the grounds of nationality, social origin or ethnicity at public gatherings, on social media platforms or in any other way;
 - (c) Interfering with the access of foreign nationals to health care services and/or their right to such access;

- (d) Interfering with access to, or the operations of, schools and intimidating or harassing learners, teachers or parents at schools;
 - (e) Unlawfully evicting foreign nationals from their homes;
 - (f) Unlawfully removing foreign nationals from their trading stalls or interfering with the employment of foreign nationals in shops and businesses;
 - (g) Instigating, encouraging or inciting any other person to perform any of the acts prohibited by this order, on social media, at gatherings in terms of the Regulation of Gatherings Act 205 of 1993, or in any other way;
- (4) The first respondent be and is hereby ordered and directed to communicate this order to any and/or all of its office-bearers and members.
- (5) The second respondent be and is hereby directed and ordered to take reasonable steps to implement the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, including by: -
- (a) taking steps to establish an early warning and rapid response mechanism regarding threats of xenophobic hate speech and hate crimes;
 - (b) collating and publishing disaggregated data in respect of xenophobic hate speech and hate crimes, including the prosecution and conviction of persons who commit such offences.
- (6) It be and is hereby declared that on a proper interpretation of section 41 of Immigration Act 13 of 2002, the powers conferred on an immigration officer or police officer:
- (a) are confined to public places and do not authorise warrantless searches in private places that include the home and places of study, work or business;

- (b) require that an immigration officer or police officer hold a 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; and
 - (c) do not permit the interrogation, arrest and detention of children under the age of 18, except as a measure of last resort and in a manner that is consistent with section 28(1)(g) of the Constitution.
- (7) The first, second, third, fourth, sixth, eleventh and twelfth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants costs of their opposed Special Motion, such cost to include the costs of three Counsel, where so employed, and in regard to Counsel's costs incurred after 12 April 2024, same shall be on scale 'C' of the tariff applicable in terms of Uniform Rule of Court 67A.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	10 and 11 June 2025
JUDGMENT DATE:	4 November 2025
FOR THE APPLICANTS:	J Brickhill, with C McConnachie and Z Raqowa
INSTRUCTED BY:	SERI Law Clinic, Braamfontein, Johannesburg
FOR THE FIRST, ELEVENTH AND TWELFTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance
FOR THE SECOND RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance
FOR THE THIRD AND FOURTH RESPONDENTS (THE SAPS):	W Isaaks
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE FIFTH RESPONDENT (THE DHA):	W Mokhare SC, with K Mnyandu
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE SIXTH, SEVENTH, EIGHTH AND NINTH RESPONDENTS:	No appearance – all of these respondents delivered notice of intention to abide the Court's decision
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE TENTH RESPONDENT (MEC for EDUCATION, GAUTENG):	No appearance
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE THIRTEENTH RESPONDENT (THE HRC of SA):	I De Vis
INSTRUCTED BY:	The Human Rights Commission of South Africa, Johannesburg

FOR THE FIRST *AMICUS CURIAE*
(SECTION 27):

N Nyembe

INSTRUCTED BY:

Section 27, Braamfontein

FOR THE SECOND *AMICUS CURIAE*
(THE INTERNATIONAL COMMISSION
OF JURISTS or ICJ):

T Pooe

INSTRUCTED BY:

Webber Wentzel, Cape Town

FOR THE THIRD *AMICUS CURIAE*
(MEDIA MONITORING AFRICA
TRUST or MMA):

Deborah Mutemwa, with
Akhona Mehlo

INSTRUCTED BY:

Power & Associates Incorporated,
Rosebank, Johannesburg

FOR THE FOURTH *AMICUS CURIAE*
(UNITED NATIONS SPECIAL
RAPPORTEUR ON HUMAN RIGHTS
DEFENDERS):

Jatheen Bhima

INSTRUCTED BY:

Lawyers for Human Rights,
Braamfontein, Johannesburg