**ORAL ADDRESS ON BEHALF OF THE HELEN SUZMAN FOUNDATION**

**11 April 2023**

## INTRODUCTION

1 The Helen Suzman Foundation (HSF) has filed full heads of argument. The main HSF heads appear at 020-3. The HSF heads in the counter-application appear at 058-5.

2 The HSF persists with all of those contentions. But in the course of this oral address, the HSF will focus on four main issues:

2.1 First, the relevant factual context.

2.2 Second, the legal basis of this application.

2.3 Third, HSF's primary grounds of review:

2.3.1 Procedural unfairness and irrationality;

2.3.2 The failure to consider the impact on ZEP-holders and their children;

2.3.3 The unjustified breach of constitutional rights.

2.4 Fourth, the just and equitable remedy.

3 Before dealing with each of these issues, we emphasise certain critical issues.

4 First, there is no dispute that the Minister decided the fate of the ZEP-programme without any prior notice to or consultation with ZEP-holders and the public. A call for representations from ZEP-holders was only issued in January 2022, after the Minister's decision was announced.

**AA p 010-54 - 55 para 160**

5 Second, the Minister has repeatedly told ZEP-holders and the public that he will not reconsider the decision to terminate the ZEP-programme. All that has changed is the “grace period”, which will not be extended further.

**Press Statement, Annexure SRA 1 p 022-13**

6 Third, there can be no genuine dispute that this decision has profound consequences for the lives of ZEP-holders, their children, and the broader society. The Minister has himself acknowledged that this decision will have an impact on national security, international relations, political, economic and financial matters.

**Annexure "FA28 " p 001-182 para 13.**

7 Fourth, it is important to be clear on the limits of the HSF’s case.

7.1 The HSF does not suggest or ask this Court to find that the Minister may never terminate the ZEP programme.

7.2 But because any such termination has such profound consequences, in order to be valid it must, at minimum:

7.2.1 follow a fair and procedurally rational consultation process; and

7.2.2 be consistent with fundamental constitutional rights; and

7.2.3 be based on lawful, rational and reasonable grounds.

7.3 The Minister’s decision falls short of these fundamental constitutional requirements.

## THE RELEVANT FACTS

### *The ZEP programme*

8 Since 2009, the Minister has granted eligible Zimbabweans exemption permits under section 31(2)(b) of the Immigration Act, affording them the rights to live and work in South Africa.

8.1 In 2009, the Minister introduced the Dispensation of Zimbabweans Project (DZP) to give legal status to over 250,000 eligible Zimbabweans who had fled the economic and political turmoil in their country.

8.2 In 2014, the DZP was extended and renamed the Zimbabwean Special Permit (ZSP).

8.3 In December 2017, the ZSP was replaced with the Zimbabwean Exemption Permit (ZEP).

**FA p 001-24 para 5; Noted AA 010-91 para 273**

9 These exemption programmes provided Zimbabwean nationals with a streamlined application process to obtain permits, if they satisfied the requirements and paid the necessary fees.

10 ZEPs were only made available to those who held the original DZP in 2009.

**AA p 010-49 para 141**

11 This means that all 178,412 ZEP-holders have been lawfully resident in South Africa for more than 14 years. They have followed the rules, submitted their applications timeously, and paid substantial fees. On the basis of these exemptions, they have built families, lives and businesses in South Africa.

12 The 2017 White Paper on International Migration Policy (White Paper), which remains official government policy, recognises the importance of these exemption programmes: they advance national security, prevent corruption, and protect vulnerable migrants from exploitation and harassment.

**Annexure FA6 p 001-94**

***The Minister's decision to terminate the ZEP programme***

13 The Minister's decision has two essential components:

**HSF HOA 020-21 paras 49 - 60**

13.1 The termination of the exemption programme: The Minister has decided to terminate the ZEP programme and refuses to use his powers under section 31(2)(b) to establish any exemption regime to replace it.

13.2 The refusal to extend the grace period: The Minister has extended the validity of existing permits until 30 June 2022, but has refused any further extensions.

14 In their heads of argument, the respondents attempt to recast the Minister's decision, denying that there is any final decision to terminate the ZEP programme:

14.1 They claim that the only decision that the Minister has taken is to extend permits until 30 June 2023.

**Minister's HOA p 028-12 paras 23 – 24**

14.2 The Director General has previously claimed that there was "*no decision taken to terminate all ZEPs*" and that "*no decision has been taken not to grant further exemptions to ZEP-holders*".

**AA p 010-14 para 16; p 010-14 para 18; p 010-91 para 274.**

15 This is inconsistent with the Minister's actual decision, as communicated to ZEP-holders and the public.

**Reply p 018-9 - 14 para 16 - 22**

**HSF HOA p 020-21 para 49ff ("the true nature of the Minister's decision")**

15.1 On 21 September 2021, the Minister approved the Director General's recommendation "*to exercise his powers in terms of section 31 (2) (d) of the Immigration Act to withdraw and/or not extend the exemptions granted to the Zimbabwean nationals.*"

**Annexure FA 8 p 001-96.**

15.2 That language was repeated in the January 2022 letters and notices issued to ZEP-holders, prominently headed "*non-extension of exemptions*", informing them that "*the Minister of Home Affairs has exercised his powers in terms of section 31(2)(d) of the Immigration Act 13 of 2002 not to extend the exemptions granted in terms of section 31(2)(b) of the Immigration Act*".

**5 January 2022 notice, Annexure FA 13 p 001-122.**

**Letters to ZEP-holders, Annexure AA 4 p 010-145 – 147.**

15.3 In a letter to the Scalabrini Centre, the Minister confirmed that he would not grant any further exemptions to ZEP-holders under section 31(2)(b): "*I do not intend to grant exemptions in terms of section 31(2)(b) anymore*".

**Annexure SCCT 2 p 018-326 paras 36 – 38.**

**Annexure SCCT 3 p 018-337 para 47.**

15.4 The press statement accompanying the Minister's latest directive, issued on 2 September 2022, is clear that "*[t]here will be no further extension granted by the Minister*", confirming the finality of his decision.

**Press statement, Annexure SRA 2 p 022-12**

16 In the face of these public statements, the respondents suggest that the Minister's decision is not reviewable because he has the power under section 31(2)(b) to reverse it.

**Respondents' HOA p 028-25 para 66.**

> *"It is not disputed that the Minister is presently of the view that the ZEP will come to an end in due course and that this decision is supported by Cabinet. What is disputed, however, is the implication that the Minister is prevented for some or other reason from considering the granting of further extensions of the validity of the current ZEPs should the need arise."*

17 This reasoning is mistaken. The Minister has not reversed his decision and unless and until he does so, it is subject to review.

18 Our courts are frequently called upon to review reversible decisions, such as an administrator's refusal to take a decision or unreasonable delays in taking decisions.

> See, for example, **Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others (39724/2019) [2022] ZAGPPHC 208 (18 March 2022) at para 239 (Collis J)** reviewing and setting aside the Minister's refusal to create enforcement regulations to address air pollution in the Highveld.

***The impact of the Minister's decision***

19 The inevitable effect of the Minister's decision is that, on 30 June 2023, tens of thousands of ZEP-holders will be left undocumented. This is due to the legal and practical barriers to securing alternative visas and permits.

**HSF HOA p 020-25 para 61 - 86**

20 Even where ZEP-holders are eligible for alternatives visas and permits, they are unlikely to receive them in less than three months, due to the undisputed backlogs and delays in the processing of applications. That is demonstrated by:

20.1 The SCA's judgment in *De Saude*, reflecting "*prolonged and enduring departmental dysfunction*" and "*sloth on a grand scale*".

> **Department of Home Affairs and Others v De Saude Attorneys and Another [2019] ZASCA 46; [2019] 2 All SA**

20.2 Circulars issued by the Department, reflecting ongoing backlogs and delays.

> **FA p 011-50 para 76. Annexure FA 25 p 001-178.**

20.3 The respondents' admission that, by September 2022, the Minister had not yet decided <u>any</u> of the approximately 4000 waiver applications submitted by ZEP-holders.

> **Response to Rule 35(12) request p 015-3 para 6.2**

20.4 The Departmental Advisory Committee's (DAC) memorandum on 2 September 2022, acknowledging the "mammoth task" of issuing visas and permits to ZEP-holders before the deadline.

**Letter to the Minister on 2 September 2022, Annexure SA 4 p 010-361**

21 Despite filing a 76-page supplementary affidavit, the respondents do not provide any information on the status of the backlogs, the precise steps they intend to take to address these delays, or the timelines for doing so.

22 This is despite the fact that the respondents are subject to heightened duties of candour in constitutional litigation, which require that they be fully transparent and disclose all necessary information to the Court.

**HSF HOA p 020-34 para 78**

**Public Protector v South African Reserve Bank [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at para 152**

23 Bald denials and evasions, in circumstances where the relevant facts are uniquely in the respondents' knowledge, do not establish a genuine dispute of fact.

**Wightman v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) paras 12-13**

**THE LEGAL BASIS OF THIS APPLICATION**
**(*See Heads at 020-37 to 020-38)***

**The Minister's case until yesterday**

24 On the basis of the papers and heads filed, there is no dispute that the Minister's decision was subject to challenge on three legal bases:

24.1 First, it is administrative action which is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

24.2 Second, even if PAJA does not apply, it is an exercise of public power that is reviewable under the section 1(c) constitutional principle of legality, which includes the requirements of substantive and procedural rationality.

24.3 Third, to the extent that it limits constitutional rights, any limitation must be reasonable and justifiable under section 36 of the Constitution.

**The Minister's new case**

25 Until yesterday, there was no suggestion by the Minister that PAJA was inapplicable.

26 In a note uploaded yesterday, however, the Minister's counsel suggested that his powers under section 31(2)(b) are executive action, not administrative action – seemingly suggesting that PAJA does not apply.

**Respondents' "Short Note", 60-6, para 2**

27 This belated attempt to avoid the effect of PAJA is plainly unsustainable.

27.1 It directly contradicts the Minister's heads in response to the Truckers, which rely on PAJA in arguing that the Truckers' challenge is out of time.

**See Respondents' HOA (Truckers) p 2 paras 9 – 15**

27.2 It is also inconsistent with cases from this Court and other courts, which have accepted that PAJA applies to the Minister's decisions under section 31(2)(b):

**HSF HOA p 020-38 para 88.4, footnotes 94 – 95**

27.2.1 The refusal of section 31(2)(b) exemptions has been held to be reviewable under PAJA:

**Tima and Others v Minister of Home Affairs (34392/2014) [2015] ZAGPPHC 763 (9 July 2015);**

**Kuhudzai and Another v Minister of Home Affairs [2018] ZAWCHC 103 (24 August 2018)**

27.2.2 The SCA further accepted that unreasonable delays in processing exemption applications are subject to PAJA:

***De Saude* para 12.**

27.3 If further justification is needed, the Minister's decisions on exemptions are plainly administrative in nature:

27.3.1 This involves the implementation of legislation, not abstract policy formulation.

**Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) *(Section 21) Inc* [2000] ZACC 23; 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) at para 18.**

27.3.2 The Minister's powers are not unfettered, but are subject to the jurisdictional requirement that there be "special circumstances".

**Respondents' HOA (Response to Truckers) p 11 para 36** *"The … jurisdictional fact necessary for the Minister to exercise his powers in terms of section 31(2)(b) is the existence of special circumstances that justify the granting of an exemption"*

27.3.3 The Minister's powers under section 31(2)(b) serve to give effect to existing national policy on exemption regimes – the White Paper - rather than creating new policy.

27.4 The respondents faintly suggest that there is a difference when the Minister uses section 31(2)(b) to create a blanket exemption programme, without an application. But that reasoning is unsound:

27.4.1 An administrative act does not lose its administrative character merely because it affects many people, rather than a few.

27.4.2 And the creation of broad exemption regimes, like the ZEP, is essentially a bureaucratic function, involving the setting of timeframes for applications, the eligibility criteria, the applicable fees, the conditions to be attached to permits, and issuing of permits to successful applicants. This is not high policy.

28 But in any event, and critically, even if PAJA somehow does not apply, the Minister is still bound by the requirements of legality and the Bill of Rights. As we argue in our heads and in what follows, procedural rationality under the principle of legality required that ZEP-holders and the public be afforded a hearing.

**FIRST REVIEW GROUND: PROCEDURAL UNFAIRNESS AND IRRATIONALITY (*See Heads at 020-39 to 020-55)***

29 If PAJA applies – as it plainly did – the Minister was required to comply with the basic requirements of procedural fairness under PAJA.

30 Even if PAJA did not apply, the Minister was wtill obliged to take a decision that was procedurally rational.

> ***Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC) at para 64**
>
> ***Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) at para 37**

31 Our courts have held that it would be irrational to take a decision without affording affected parties provide their views on the matter where –

31.1 the decision being contemplated has a drastic effect on their rights, lives and livelihoods;

> ***e.tv (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa and Another v e.tv (Pty) Limited* [2022] ZACC 22 (28 June 2022) at para 52**
>
> ***Esau v Minister of Co-Operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA) at para 103**

31.2 there are persons or organisations with special expertise that would have a bearing on the decision under consideration.

> ***Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) at paras 70 - 72**

***Procedural unfairness and irrationality in relation to ZEP-holders***

32 The Minister's treatment of ZEP-holders was procedurally unfair and irrational for two reasons:

32.1 First, a call for representations was only made after the Minister communicated his decision to terminate the ZEP programme.

32.2 Second, the call for representations was also meaningless in the circumstances because it did not indicate the nature and purpose of the representations.

The invitation for representations came after the fact

33 A meaningful opportunity to be heard requires that the opportunity arises *before the decision is taken.*

**Attorney-General Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 668D-E**

34 The grounds on which an after-the-fact hearing can be afforded are narrow, requiring a demonstration of exceptional circumstances.

**Baxter *Administrative Law* (1984) at 587.**

**Nortjè en 'n Ander v Minister van Korrektiewe Dienste 2001 (3) SA 472 (SCA) at para 19**

35 The respondents contend that consultation after-the-fact was justified because the Minister "*was, and is open to persuasion*", that he has retained an "*open mind*", and that representations may still influence the outcome.

**Minister's HOA p 028-47 para 150, p 028-45 para 142 and p 028-47 para 152**

36 This assertion has no basis in the evidence. The Minister has not deposed to any affidavit, let alone a confirmatory affidavit, in the three separate applications.

37 Instead, the Minister's public statements over the last 18 months have been clear that his decision to terminate the ZEP programme is final and will not be reconsidered. We have assembled these statements in our heads of argument. Two statements bear emphasis.

**HSF HOA p 020-21 paras 49 – 60**

37.1 First, in the Minister's letter on 19 February 2022, the Minister told the Scalabrini Centre, in no uncertain terms, that "*there was no scope for reconsideration*" of his decision.

> "*[T]he attorneys for the Minister and DHA received representations for reconsideration of the decision that I have made from affected Zimbabwean nationals. They were informed that there is no scope for reconsideration as the decision was taken after careful consideration and supported by the National Executive (Cabinet). It has become practically impossible to continue with the exemption regime.*"

**Minister's letter of 19 February 2022 018-303**

37.2 Second, in responding to ZEP-holders' representations, the Minister's attorneys blankly asserted that "*due to the circumstances and reasons advanced in the letter [sent to ZEP-holders in January 2022], the Minister is unable to reverse the decision*.

**Email on 30 January 2022, Annexure RA 7 p 018-153**

38 The respondents accept that the right to a fair hearing is breached "*when an administrator has already made a decision and then contends that any participation process would have made no difference to the ultimate outcome.*" That is precisely what the Minister has done here.

**Respondents' HOA p 028-54 para 172**

39 The respondents argue that the September 2022 decision to extend the grace period by 6 months is evidence that the Minister retains an open mind. However, this is inconsistent with the facts:

39.1 There was no change to the decision to terminate the ZEP-programme. All that changed is the grace period afforded to ZEP-holders until expiry takes effect.

39.2 That decision was again taken behind closed doors, without prior notification or consultation.

39.3 Moreover, the accompanying press statement made it clear that "*[t]here will be no further extension granted by the Minister*".

**Press Statement, Annexure SRA 1 p 022-13**

39.4 The internal report and recommendations to the Minister in September 2022, which formed the basis of the Minister's decision, made no

reference to any representations from ZEP-holders and the decision to terminate the ZEP programme was taken as final. The sole reason provided for the extension of the grace period was the internal backlog.

**Submissions to Minister on 2 September 2022, Annexure SA 4 p 010-354 – 372**

40 Hoexter and Penfold explain, after carefully considering the cases that: "*an after-the-fact hearing will be procedurally unfair in the absence of compelling reasons why an opportunity to make representations cannot be granted before the decision is taken*".

**Hoexter and Penfold, Administrative Law in South Africa, 3rd edition (2021) at page 531**

41 What are the "compelling reasons" justifying after-the-fact consultation which appear from the affidavits in this case? There are none. The respondents' suggestion that prior consultation would have been impractical is advanced for the first time in their heads, with no basis in the evidence.

**Respondents' HOA p 028-47 para 152**

The invitation for representations was meaningless in the circumstances

42 A call for representations is not meaningful unless it is clearly demarcated as an opportunity to make representations on the specific decision under consideration.

**Pridwin at paras 192 and 206 and Sokhela v MEG for Agriculture and Environmental Affairs, KwaZulu-Natal 2010 (5) SA 574 (KZP) at para 58**

43 The respondents give an inconsistent account of what, exactly, their call for representations was attempting to elicit from ZEP holders. In one breath, it is suggested that ZEP-holders were asked to address the termination of the ZEP programme. In another, it is claimed that ZEP-holders were invited to apply for individual exemptions under section 31(2)(b).

**AA p 010-56 paras 162 – 163;**

**AA p 010-22 para 54**

44 The vagueness of the Minister's call for representations, and the confusion this caused, is demonstrated by the sample of representations that HSF has received from the Department, in which ZEP-holders pleaded for advice and assistance. All received an automated response, offering no assistance.

**HSF's HOA p 020-50 para 122**

**Supplementary Reply p 022-7 para 23 – 26 ; Annexure SRA 3 p 022-15 – 27**

***No public consultations or engagement with civil society***

45 The Minister did not engage in any public consultations, let alone meaningful consultations with civil society organisations representing ZEP-holders interests.

46 The respondents now deny that there was any obligation to engage in public consultations under section 4 of PAJA, as they allege that the Minister's decision does not have the capacity to affect the rights of the broader public.

47 However, the Minister has himself admitted that his decision has an impact "*on national security, international relations, political, economic and financial matters*" and was so important that it required Cabinet consideration and approval.

**Annexure "FA28 " p 001-182 para 13; See also 2017 White Paper Annexure "FA6" p 001-94**

48 The respondents further contend that compliance with section 4 of PAJA is "*entirely voluntary".* That is incorrect. Our courts have repeatedly confirmed that compliance with section 4 is enforceable.

***Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) at para 99**;

***Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* [2019] 1 All SA 491 (GP) at paras 11.1.1 and 11.1.2**

49 Apart from sending letters to two civil society organisations representing Zimbabwean nationals, and meeting with Scalabrini, after the Minister had already taken a decision, the respondents cannot point to any engagement with civil society or the public at large. Contrary to what the respondents suggest, the call for representations from individual ZEP-holders, did not amount to a call for representations from the public or civil society organisations.

50 The respondents suggest that neither the public nor civil society have anything to add to the debate and that their views would have made no difference to the outcome. This line of argument is ill-founded:

50.1 This is a "*no difference*" argument, which is impermissible.

**Pridwin at para 193**

50.2 Moreover, our courts have accepted that where a specific group is impacted, civil society organisations focused on representing their interests ought to be consulted.

**Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA) at para 72**

**South African Veterinary Association v Speaker of the National Assembly and Others 2019 (3) SA 62 (CC) at paras 42 – 44**

***The new argument about effluxion of time***

51 In a new argument, filed yesterday, the Minister seeks to suggest that there is no right to a hearing because the ZEPs are due to expire by effluxion of time.

**Respondents' "Short Note", 60-5**

52 This is wrong for a series of reasons.

53 First, it mischaracterises the true nature of the Minister's decision and hides his agency.

53.1 The Minister has not simply allowed ZEPs to lapse. Instead, he has taken a positive decision, that has two key components:

53.1.1 He has decided to terminate the ZEP programme and has expressly refused to use his powers under section 31(2)(b) to create a further exemption programme in its place.

53.1.2 He has granted a limited extension of ZEPs to 30 June 2023, while refusing to grant further extensions.

53.2 The attempt to equate the Minister's decision with the automatic expiry of a fixed-term licence or tender is therefore entirely inapposite. There is nothing automatic or inevitable about it.

53.3 The decision therefore cannot be equated with the circumstances in ***Phenithi***, ***Louw***, and ***Grootboom***, which concerned statutory automatic dismissal clauses.

53.4 Under those clauses, the legislation prescribes that dismissal is automatic as soon as an employee is absent from the workplace for a fixed number of days, involving no discretion at all. Here, the fate of ZEPs and the future of the ZEP programme is decided by the Minister.

54 Second, and in any event, even where termination occurs by effluxion of time, a decision-maker's refusal to act to reverse that automatic consequence has, in certain circumstances, been held to be an administrative act, attracting the right to a fair hearing. For example:

54.1 In ***Minister of Defence and Military Veterans and Another v Mamasedi 2018 (2) SA 305 (SCA) para 15***, the SCA held that the Chief of the SANDF's refusal to reinstate a soldier who had been automatically dismissed by operation of law was administrative action and that the soldier was entitled to a fair hearing before the decision on reinstatement was taken.

54.2 Similarly, in ***Minister of Defence and Another v Xulu 2018 (6) SA 460 (SCA)*** **at para 51** the SCA held that the decision not to renew the fixed-

term contract of a soldier, whose contract was set to expire by effluxion of time, was also an administrative act that attracted the right to a fair hearing.

55 Third, it is no answer for the respondents to say that the denial of a fair hearing is justified because ZEP-holders were denied a hearing when the DZP, ZSP and ZEP were created.

55.1 The denial of the right to a fair hearing is not justified by past denials.

55.2 In any event, the fairness of the decisions taken by the Minister's predecessors is not challenged before this Court. The only issue that this Court needs to decide is whether the decision taken by the current Minister is fair.

***Conclusion on the first ground***

56 In all the circumstances, there can in truth be no serious debate that the procedural unfairness/procedural irrationality ground of review falls to be upheld.

57 This ground of review – by itself – justifies the relief sought by the HSF.

**SECOND REVIEW GROUND: FAILURE TO CONSIDER THE IMPACT ON ZEP-HOLDERS AND THEIR CHILDREN**
**(*See Heads at 020-75 to 020-80)***

58 A decision of this importance required the Minister to apply his mind to its impact on the more than 178,000 ZEP-holders and their children. That required, at minimum, that the Minister should have had proper information before him on who would be affected, to what degree, and what measures were in place to ameliorate the harm.

59 The respondents have provided no evidence at all that this impact was considered.

60 For a start, there is no affidavit – confirmatory or otherwise – by the Minister.

60.1 The decision-maker in this case is the Minister. Not the Director-General, not any other official.

60.2 This means that only the Minister can testify to what materials and considerations he took into account.

60.3 Yet there is no affidavit by the Minister. The Director-General cannot depose to an affidavit on behalf of the Minister on this score. This is made clear by the series of cases cited in the CORMSA heads.

**CORMSA HOA, 024-10 to 024-11, para 17 footnote 10**

***Gerhart v State President* 1989 (2) SA 499 (T) at 504G:**

> **"***Clearly one person cannot make an affidavit on behalf of another and Mr. Hattingh, who appears on behalf of the three respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his own knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible*."

***Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at para 70:**

> *"It was intimated in argument that the denials of the second respondent might be extended to the fifth respondent. That cannot be so. One person cannot make an affidavit on behalf of*

*another. The second respondent can only depose to matters in his own knowledge".*

61 The Court has simply no admissible evidence from the Minister on whether he took these considerations into account and how.

62 On that basis alone, this ground of review must succeed.

63 But even if one were (somehow) to look past this and rely on the evidence from the Director-General, there is still no answer to this ground of review.

63.1 The Director-General's submissions to the Minister on 20 September 2021, which formed the basis of his decision, were entirely silent on the impact.

**HSF HOA p 020-75 para 196.1**
**Annexure FA 8 p 001-96.**

63.2 On the Director-General's own version, the Minister simply approved the Director-General's submissions on the same day they were handed to him, without any further interrogation.

**African Amity AA p 018-132 para 90.3 (African Amity Caselines p 004-47)**

63.3 The Minister's 7 January 2022 press statement, which sought to explain his decision, was entirely silent on this question of impact.

63.4 In its founding affidavit, the HSF expressly invited the respondents to attach to their answering affidavit all relevant documents and records which were relevant to the Minister's decision, in lieu of a Rule 53 record.

**FA p 001-28 para 20**

63.5 No documents or information were forthcoming.

63.6 In the answering affidavit, the Director-General was content to make the bald allegation that *"the question of the impact on children and families weighed heavily in the deliberations of the Department and the*

*Minister*", without any substantiation. No details were provided as to what information was considered, by whom, and when.

**AA p 010-86, para 255**

63.7 The HSF then afforded the respondents yet another opportunity to disclose records of these alleged deliberations in its Rule 35(12) notice, which called for any documents, including minutes, of the alleged deliberations on the question of the impact on children and their families. This was met with a blanket refusal from the respondents.

**RA 1 p 018-85 para 4.**

**RA 2 p 018-89 para 8.**

63.8 Finally, the September 2022 DAC report to the Minister again made no reference to the impact of the decision on ZEP-holders and their children.

**Submissions to Minister on 2 September 2022, Annexure SA 4 p 010-354 – 372**

63.9 The respondents' heads of argument (1) do not dispute that the impact of the decision on the lives of the ZEP holders is a relevant consideration and (2) implicitly concede that there are no documents reflecting any consideration of this impact.

63.10 Instead, the respondents' heads assert that the Minister "*could do no more than state that he considered such effect*".

**Respondents' HOA p 028-62 para 205**

63.11 But we repeat that the Minister has not deposed to any affidavit in these proceedings. And even if the Minister somehow considered the matter, there were no documents or information before him on which he could have formed a reasonable and rational assessment of the impact of his decision.

64 The respondents contend that the Minister has now had the benefit of representations from affected ZEP-holders, after-the-fact.

**Minister's HOA p 028-62 para 206**

64.1 But that does not assist, as the Minister's decision must be assessed based on the information actually before him at the time of making his decision.

64.2 In any event, the Minister flatly refused to engage with these representations with an open mind. As he told the Scalabrini Centre in February 2022, *"there is no scope for reconsideration".*

**Minister's letter to Scalabrini p 018-303**

65 It follows that the Minister's decision must be reviewed and set aside, at the very least on the grounds that he failed to take into account relevant information under section 6(2)(e)(iii) of PAJA.

66 This also renders the decision unreasonable under section 6(2)(h) of PAJA. The guiding principles on reasonableness, as summarised in *Bato Star*, specifically require an assessment of the "*the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected*." (Emphasis added)

**Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others 2004 (4) SA 490 (CC) at para 45.**

67 Even under the less searching standard of rationality, the Minister's failure to obtain and consider information on the likely impact of his decision would render his decision procedurally irrational.

**HSF HOA 020-78 para 200 - 202**

**e.tv (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa and Another e.tv (Pty) Limited [2022] ZACC 22 (28 June 2022) at para 52.**

**Democratic Alliance v President of South Africa [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (Simelane) at para 39.**

67.1 First, the impact of the decision on ZEP-holders' lives and wellbeing is a relevant consideration.

67.2 Second, the Minister's failure to consider or call for relevant information on this impact was not rationally connected to the purpose of the decision. At least one of the intended purposes of the "grace period" must have been to mitigate the disruptive consequences of the decision, but that required the Minister to be apprised of information on the likely impact.

67.3 Third, the irrationality colours the whole decision, as the Minister could only form a rational assessment with proper information.

68 The second ground of review must therefore also plainly be upheld.

69 And this second ground of review – by itself – suffices to grant the relief sought in the Notice of Motion.

**THIRD REVIEW GROUND: UNJUSTIFIED LIMITATION OF RIGHTS**
**(*See Heads at 020-56 to 020-74)***

70 The Minister's decision is subject to the two-stage limitations analysis, considering: first, whether the decision limits fundamental rights; and, second, whether the respondents have demonstrated that the limitation is reasonable and justifiable under section 36 of the Constitution.

***Limitation***

71 The Minister's decision limits two sets of rights.

72 First, the right to dignity:

**HSF HOA p 020-56 para 141**

72.1 For ZEP-holders, documentation is essential to a life of dignity, which the Constitutional Court has defined as including "*the enjoyment of employment opportunities; access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference.*"

**Saidi v Minister of Home Affairs [2018] ZACC 9; 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC) at para 18**

72.2 ZEP-holders have enjoyed a life of dignity for more than 13 years. The Minister's decision threatens to deprive them of such a life.

73 Second, children's rights, including the section 28(2) right and principle that the best interests of children must be afforded paramount importance:

73.1 The Minister's decision exposes children to the risk of family separation;

73.2 It will render many children of ZEP-holders undocumented, which would threaten their access to basic services, including education and healthcare;

73.3 This decision was taken without proper consideration of the impact on children.

**HSF HOA p 020-60 para 149ff**

74 The respondents deny that any rights are limited, but their responses are unavailing:

74.1 First, they contend that that the exemption permits had an expiration date and that the "*coming to an end of an exemption which was always temporary does not implicate the right to dignity of the beneficiaries of that temporary exemption simply because it has come to an end.*"

**Respondents' HOA p 028-57 para 186**

74.1.1 The fact that exemptions have been repeatedly extended by successive Ministers, over a period of more than 14 years, demonstrates that these exemptions were anything but temporary in effect.

74.1.2 This characterisation also masks the true nature of the Minister's decision. He has taken the active decision to terminate the ZEP-programme and he has expressly refused to establish any exemption programme in its place under section 31(2)(b).

74.2 Second, the respondents argue that if ZEP-holders rights are limited, then this would mean that ZEPs could never be withdrawn and would become permanent. That reasoning ignores the two-stage limitations analysis. A finding of limitation is not a finding of unconstitutionality. The respondents must demonstrate that the limitation is reasonable and justifiable, which calls for a context-sensitive assessment.

74.3 Third, the respondents claim that if this Court finds that dignity is limited then this would have implications for all other vias and would "*undermine the very purpose of the immigration regime*". Far from it. All parties accept that ZEP-holders are in a unique position. This court is asked to do no more than to assess their unique circumstances and the justification provided for the limitation of their rights.

**Respondents' HOA p 028-59 para 190**

74.4 Fourth, the suggestion that alternative visas and permits adequately protect the rights of children and ZEP-holders is unavailing, given the barriers and the Department's admitted backlogs and delays.

74.5 Finally, the suggestion that ZEP-holders have been afforded the opportunity to make representations on their children's interests is equally untenable. We have addressed the insufficiency of the after-the-fact process in detail above.

***No justification***

**HSF HOA p 020-64 para 161**

75 The onus is on the respondents to demonstrate that the limitation of rights is reasonable and justifiable. That requires cogent factual evidence to support the respondents' factual claims.

**Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) 2005 (3) SA 280 (CC) at para 34.**

**Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2014 (2) SA 168 (CC) at para 84**

76 The reasons provided by the Minister are insufficient to justify the rights limitations:

76.1 Alleged budgetary constraints: No evidence is provided to support the allegations of budgetary constraints. There is also no answer to the HSF's demonstration that, on the respondents' own evidence, the ZEP-programme has more than paid for itself and that the termination of the ZEP only adds to the burden on the Department.

**HSF HOA 020-71 para 186 - 190**

76.2 Alleged improvements in conditions in Zimbabwe: The alleged significant improvements in political and economic conditions in Zimbabwe are unsubstantiated. On the contrary, there is no dispute that:

76.2.1 Rates of extreme poverty in Zimbabwe have increased since 2009, rising from 22.8% of the population to 49% in 2020;

76.2.2 Inflation rates continue to spiral;

76.2.3 Political instability and violence remain endemic;

76.2.4 The human rights situation in Zimbabwe continues to deteriorate.

**HSF HOA p 020-68 para 176 , fn 172 - 175**

76.3 Alleged backlogs in the asylum system: The respondents' reliance on backlogs in the asylum system are difficult to comprehend, as the termination of ZEPs is likely to result in an increase in the number of asylum applications.

**HSF HOA 020-70 paras 181 - 185**

77 There is a deeper flaw underlying these attempts at justification. None of the respondents' justifications attempt to address the severe impact of the Minister's decision on the rights of ZEP-holders, nor do they explain why the Minister did not explore less restrictive means to address the alleged challenges within his Department.

**JUST AND EQUITABLE REMEDY**
**(*See Heads at 020-86 to 020-90)***

78 The applicants seek three forms of relief:

78.1 A declaration of invalidity;

78.2 An order reviewing and setting aside the Minister's decision and remitting it back for a fresh decision, following a procedurally fair and rational process.

78.3 A temporary order directing that, pending the conclusion of a fair process:

78.3.1 Existing ZEPs shall be deemed to be valid; and

78.3.2 ZEP-holders will continue to enjoy the protections afforded by Immigration Directive 1 of 2021 and Directive 2 of 2022.

**HSF's Amended NoM p 001-228 prayers 1 – 4**

79 The respondents <u>do not</u> dispute that the first and second categories of relief are competent. They only take issue with the temporary order.

80 The respondents contend that this order is, in effect, a substitution order to the extent that it orders the Minister "*to issue some 178,000 ZEPs*" and thus "*orders the continued existence of the ZEP programme post 30 June 2023*".

**Respondents' HOA p 028-22 para 56; p 028-79 para 273; p 028-80 para 277**

81 This characterisation is incorrect:

81.1 <u>First</u>, the respondents ignore the fact that section 8 of PAJA draws a clear distinction between substitution orders in section 8(1)(e)(ii) and "temporary relief" in section 8(1)(e). A substitution order finally and conclusively replaces an administrator's decision with the court's decision. A temporary order, by comparison, grants temporary relief pending a future event.

81.2 Second, the effect of the order sought is simply to preserve the *status quo*, on a temporary basis, pending the outcome of a fair process and the Minister's further decision. It does not require the issuing of any new permits or the reopening of any application process.

81.3 Third, the temporary order simply retains the protections that the Minister has already granted to ZEP-holders and thus does not impose a novel solution on the executive. It retains the Minister's existing directives in place until such time as the Minister has made a fresh decision.

81.4 Fourth, the power to make a decision on the future of the ZEP-programme remains in the Minister's hands. The duration of the temporary relief is also entirely within the Minister's control.

81.5 Fifth, the Minister's attempt to distinguish *All Pay II* and *Black Sash* is unsustainable.

81.5.1 As in those cases, we are concerned with fashioning temporary relief to protect important interests that would be imperilled if the *status quo* were not preserved pending a decision by the designated decision-maker. In this case, we are dealing with a permit that underpins the lives and livelihoods of thousands of people, many of whom are children.

81.5.2 In *All Pay II*, the invalid contract entered into with Cash Paymaster Services was effectively imposed on the South African Social Security Agency pending its decision, in terms of a valid tender process, to enter into a new contract. In this case, HSF asks this Court to preserve the Minister's extension of the ZEP pending the Minister's decision as to whether and to what extent the ZEP should be extended further.

82 This temporary relief is therefore a "*just and equitable*" remedy in terms of section 172(1)(b) of the Constitution for the following reasons:

82.1 Unless temporary relief is granted, thousands of ZEP-holders will be rendered undocumented in just under three months. Given the brevity of this window, and the undisputed backlogs, they will be left without sufficient time to obtain alternative permits or visas. Thousands of lives, including the lives of children, will be uprooted. As indicated, the termination of the current ZEP extension will have a disruptive and destabilising effect on thousands of children.

82.2 The Minister has not identified any negative consequences of granting the temporary relief. Indeed, this is not surprising, given that the Department itself motivated for an extension in September 2022 due to the "mammoth task" confronting it.

83 The respondents' bald appeals to the separation of powers, without more, carry no weight.

83.1 Where invalid and unconstitutional action has been identified, "*the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility*" to grant just and equitable remedies.

**Mwelase and Others v Director-General, Department Of Rural Development And Land Reform And Another 2019 (6) SA 597 (CC) at para 51**

83.2 Moreover, the Court is not asked to fashion a novel regime for ZEP-holders. It is simply asked to temporarily extend the existing protections afforded by the Minister's directives.

**STEVEN BUDLENDER SC**
**CHRIS MCCONNACHIE**
**ZIPHOZIHLE RAQOWA**
**MICHAELA KRITZINGER**
**11 April 2023**