

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION- PRETORIA

Case no: 32323/2022

In the application of:

HELLEN SUZMAN FOUNDATION

1st APPLICANT

CONSORTIUM REFUGEES AND MIGRANTS
IN SOUTH AFRICA

INTERVENING APPLICANT

-and-

THE MINISTER OF HOME AFFAIRS

1ST RESPONDENT

THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS

2ND RESPONDENT

ALL TRUCK DRIVERS FORUM AND ALLIED
OF SOUTH AFRICA

INTERVENING RESPONDENT

INTERVENING RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

I, the undersigned;

MARIO KHUMALO

do hereby declare under oath and state that:

1.

- 1.1. I am an adult male and the spokesperson of the All-Truck Drivers and Allied South Africa ("ATDFASA").
- 1.2. The ATDFASA and the Intervening Respondent has appointed the offices of Messrs M J Mashao Attorneys No 230 Orange Street in Arcadia, Pretoria, as the Address at which they will accept service of all notice and process relating to these proceedings.
- 1.3. I confirm, that the averments deposed to in this affidavit fall within my personal knowledge and are to the best of my belief both true and correct, except where the context indicates the contrary.
- 1.4. To the extent that I make submissions of legal nature, I do so on the advice of the intervening Respondent's legal representatives, which I received during the preparation of this affidavit, and I accept as correct and in accordance with the prevailing legal position.
- 1.5. I have already deposed to the founding affidavit, to which this affidavit is supplementary by virtue thereof, I submit that I still have the

necessary authority to depose to this affidavit to supplement on behalf of ATDFASA. I therefore beg leave that this affidavit be read as part and /or together with the founding affidavit, I have already deposed to.

A. THE OVERVIEW AND THE PURPOSE OF THIS AFFIDAVIT

2.

2.1. On the 14th June 2022 the Hellen Suzman Foundation (*HSF*) brought an application seeking orders aimed at:

2.1.1. reviewing and setting aside the Minister's decision to terminate the Zimbabwean exemption permit scheme and to grant extension thereof for a period of 12 months and to refuse extensions beyond 1st December 2022.

2.1.2. remitting the matter to the minister for reconsideration with directions that he follows a fair process in compliance with the requirement of section 3 and 4 of PAJA.

2.1.3. maintaining the status *quo ante*, pending the consideration of the matter by the Minister, in that:

- 2.1.3.1. The existing ZEP's are deemed to remain valid.
- 2.1.3.2. ZEP holders continue to enjoy the protection afforded thereby, including:
 - 2.1.3.2.1. a right not to be arrested and/or ordered to depart or to be detained for the purposes of deportation or be deported in terms of section 3 of the Immigration Act and account of not having any valid exemption certificate.
 - 2.1.3.2.2. not to be denied entry or departure from the Republic, on account of not having a permit and not to be required to produce a valid exemption certificate and/or authority to remain in South Africa pursuant to section 32(2) of the Immigration Act and applying for any visas, including temporary resident Visas.

- 2.2. The HSF contends the Minister's decisions falls to be declared, invalid and unconstitutional and consequently reviewed, on FIVE primary grounds. these are:
- 2.2.1. That the decision was procedurally unfair and irrational on account of absence of meaningful public consultation process.
 - 2.2.2. Constitutes unjustified limitations on the constitutional right of the ZEP holders and their children.
 - 2.2.3. Was taken without giving regard to the impact on the ZEP holders.
 - 2.2.4. Reflects a material error of fact in the present conditions in Zimbabwe.
 - 2.2.5. Is unreasonable and irrational.
- 2.3. The review application is resisted by the minister and the Director general who have filed an affidavit in response thereto. The Minister opposes the application on the grounds:

- 2.3.1. First, no decision, to terminate the ZEP was taken, in that the ZEPs are expired by fraction of time.
 - 2.3.2. Second, the relief sought by HSF, strikes at the heart of the doctrine of separation powers, in that, it seeks of this Court to grant permanent blanket extensions to all the ZEPs including of those who have failed to apply for their renewal.
 - 2.3.3. That there is no merit in any of the grounds review raised against the so-called decision by HSF.
- 2.4. On the 27th July 2022, Cormsa brought an application for leave to intervene. The intervention is aimed at supporting the relief sought by HSF. Cormsa was granted leave to intervene on the 16th September 2022.
- 2.5. On the 27th September 2022, ATDFASA, brought an application for leave to intervene as the Third Respondent. The purpose of the intervention, was:
- 2.5.1. First, to oppose the relief sought by both HSF and Cormsa;
and

2.5.2. Second, to launch an attack on the legality of the entire Zimbabwean Permit scheme.

2.6. In doing so, it pointed out, certain deficiencies in the entire exemption scheme invalid. These are:

2.6.1. First, that the entire exemption scheme created and designed for illegal Zimbabweans in the county is and was unlawful from the onset, because:

2.6.1.1. That the exemptions in terms of section 31(2)(b), can only be applied for by foreigners who are lawful in the country and not illegal foreigners.

2.6.1.2. Second, the exemptions, cannot be granted based on status, i.e being a foreigner and can only on the basis or nationality i.e Zimbabweans.

2.6.1.3. Third, the purpose for which the scheme was designed for, was unlawful.

2.6.1.4. Fourth, that no special circumstances existed as to why the exemptions ought to be granted to

Zimbabweans.

- 2.7. ATDFASA's intervention was opposed by both HSF and Cormsa. Although the Minister filed an affidavit seeking to denounce merits of ATDFASA's challenge to the legality of the ZEP scheme, he elected to abide by the Court's decision.
- 2.8. The intervention was heard by this Court on the 6th February 2023 and leave to intervene was granted to ATDFASA with proviso that should ATDFASA wish to file any supplementary affidavit, it must do so within 10 days. A copy of the Court order, in this regard is attached hereto marked **ATDFSA 1**.
- 2.9. Thus, this affidavit is filed pursuant to the Court's invitation to ATDFASA to file any supplementary affidavit, should it so wish.
- 2.10. Thus the purpose of this affidavit, is to:
- 2.10.1. expatiate on ATDFASA scope of challenge to the scheme and to supplement the grounds on which such further challenge is premise.

B. FURTHER GROUNDS OF CHALLENGE TO THE SCHEME

The Zimbabwean exemption permit scheme and its extensions are unlawful.

3.

- 3.1. As indicated in the founding affidavit that ATDFASA takes issue with the legality of the entire Zimbabwean exemption permit scheme.
- 3.2. In addition, thereto ATDFASA, further contends that the extensions to the DZP, ZSP and the ZEPs were and are unlawful.
- 3.3. In order to put ATDFASA contentions within their proper context, I am advised that it will be prudent for me, to reiterate the provisions of section 31(2)(b), because it is the statutory foundation on which the Minister relies and/or relied for the dispensation. Section 31(2)(b), provides that:

"31. Exemptions

- (2). *upon application, the Minister may under terms and conditions determined by him or her.*

- (a)...
- (b). *grant a foreigner or a category of foreigners the rights of permanent resident as specified or unspecified period when special circumstances exist which will justify such decision, provided that the Minister may:*
- (i). *exclude one or more identified foreigners from such categories; and*
- (ii) *for a good cause, without such rights from a foreigner and/or category of foreigners.*
- (c). *for good cause, waive any prescribed requirements or form; and*
- (d). *for good cause, withdraw an exemption granted by him or her in terms of this section."*

3.4. I am advised, that in terms of the principle of legality, the Minister may only exercise those powers as conferred by him in law.

3.5. In the present case, it is common cause, that during:

3.5.1. December 2009, the Minister announced and granted Zimbabweans who were in the country legally, permits for a period of 5 years expiring in December 2014.

3.5.2. During 2014, the Minister, extended DZP scheme and renamed it, Zimbabwean Special Permit scheme. The scheme was meant for had unsuccessfully applied for the DZP permit to re-apply and allowed the holders thereof, to apply for extensions. The extended scheme was for a period of five years, expiring in December 2017.

3.5.3. In December 2017, the Minister extended the ZSP scheme and renamed it, Zimbabwean Exemption Permit. The ZEP scheme was only meant for those individuals, who were the holders of the ZSP's to apply for extensions.. the scheme was extended until December 2021; and

3.5.4. In December 2021, extended the ZEPs until December 2022; and in December 2022, extended them for a further 6 months until 21st June 2023.

- 3.6. I am advised, that in granting the extensions to the scheme under the regime of ZSP's and the ZEP's the Minister acted unlawfully. I say this because, in section 31(2)(b) or the regulations issued in terms of the Immigration Act, confers upon him in terms of the Immigration Act, does not confer upon his, the power to extend the permit once it has lapsed by effluxion of time.
- 3.7. The effect of this, is that, upon expiry, the holder must apply for a new permit and the Minister must consider the application on basis of the existence of the special circumstances. This was not the case. The minister granted blanket exemptions, for the same reasons and without considering whether any special circumstances existed.
- 3.8. In doing so, I am advised that the minister acted unlawfully and which in turn, taints all the extensions in respect of the ZSP's and ZEP's with illegality and thus render them unlawful and invalid.
- 3.9. In the PREMISES, I am advised that it will be argued on behalf of ATDFSA, that the extensions granted to the DZPs, ZSPs and the ZEPs falls to be declared unlawful and invalid. Further submissions in this regard will be made at the hearing of this matter.

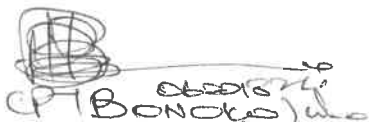
CONCLUSION AND APPROPRIATE RELIEF

4.

- 4.1. for the reasons set out herein and, in the founding, affidavit already filed, it is submitted that the entire Zimbabwean Exemption Permit scheme is unlawful, and falls to be declared as such.
- 4.2. Accordingly, it is submitted that considering the declaration sought, this Court ought to find that even if the Minister's decision is reviewable, the review application falls to fail, in that the scheme is unlawful and the Court cannot remit an unlawful decision to the Minister for reconsideration.
- 4.3. In the premises, the review application by HSF and Cormsa falls to fail, with costs.

**DEPONENT**

Signed and sworn before me at PRETORIA on this the 28 day of FEB 2023 the deponent having acknowledged that he knows and understands the contents of this declaration and that he has no objection to the taking of the prescribed oath and that he considers it binding on his conscience. I certify further that the provisions of Regulation R.1258 of 21 July 1972 have been complied with.


CPTB BONDO

COMMISSIONER OF OATHS

FULL NAMES:

OFFICIAL CAPACITY:

AREA APPOINTED:

FULL STREET ADDRESS:

