IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32323/22

In the matter between:

HELEN SUZMAN FOUNDATION	**Applicant**
and	
MINISTER OF HOME AFFAIRS	**First Respondent**
DIRECTOR GENERAL OF HOME AFFAIRS	**Second Respondent**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**Third Respondent**
and	
CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	**Applicant as Intervening Party**

THE HELEN SUZMAN FOUNDATION'S HEADS OF ARGUMENT

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INTRODUCTION

1 This application concerns the rights of over 178,000 holders of Zimbabwean Exemption Permits (ZEPs), which were recently due to expire on 31 December 2022 and are now due to expire on 30 June 2023.

2 For more than thirteen years, qualifying Zimbabwe nationals have been granted permission by the Minister of Home Affairs to live, work and study in South Africa.

3 In reliance on these permits, ZEP-holders have established lives, families, and careers. All of these have now been placed in jeopardy.

4 The Minister has decided to terminate the ZEP programme and to refuse any further exemptions. While the Minister has recently extended the "grace period" by a further six months, until 30 June 2023,[1] his decision to end the ZEP programme remains unchanged.

5 The applicant, the Helen Suzman Foundation (HSF), challenges the Minister's decision on five grounds:

5.1 First, the decision was procedurally unfair and procedurally irrational, in the absence of any prior consultation process with affected ZEP-holders, civil society and the public at large.

5.1 Second, it is a breach of the constitutional rights of ZEP-holders and their children.

5.2 Third, it was taken without any regard to the impact on ZEP-holders.

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[1] Directive 2 of 2022, published on 2 September 2022. See Supplementary Replying Affidavit, Annexure SRA 1.

5.3 Fourth, it reflects a material error of fact as to the present conditions in Zimbabwe, that bears no reasonable or rational connection to the information before the Minister.

5.4 Fifth, the decision is otherwise unreasonable and irrational.

6 We reiterate that the HSF does not contend that the Minister is obliged to extend exemptions in perpetuity.

6.1 Instead, this application concerns the lawfulness of the present decision – regarding both the manner in which it was taken and the substance of the decision.

6.2 It is clear from the papers that tens of thousands of people have built their lives in reliance on the ZEPs, over many years.

6.3 In those circumstances, a decision to terminate the ZEP programme and to refuse further exemptions had to be taken following a fair and procedurally rational consultation process, in a manner that was consistent with fundamental rights, and on lawful, rational and reasonable grounds.

6.4 The Minister's decision fell short of these fundamental constitutional requirements.

7 We further stress that this case is not about undocumented, "*illegal foreigners*", as defined in the Immigration Act.

7.1 ZEP-holders are lawful residents who have made significant contributions to South Africa.

7.2 They have followed the rules for more than 13 years by applying for exemption permits, paying the required fees, and providing proof of employment, studies, or legitimate businesses.

7.3 Yet they are now at risk of being left undocumented, with all the vulnerability this entails.

8 In what follows, we address the following topics in turn:

8.1 First, we begin by outlining the material facts and legal principles which are common cause;

8.2 Second, we outline the relevant factual and legal background to the Minister's decision, charting the history of the ZEP programme and the contradictory stance now adopted by the Minister and the Department of Home Affairs (Department);

8.3 Third, we explain the legal basis of this application, which is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the constitutional principle of legality, and the Bill of Rights.

8.4 Fourth, we address the five grounds of review.

8.5 Fifth, we conclude by addressing the just and equitable remedy.

WHAT IS NOT IN DISPUTE

9 At the outset, we emphasise that the essential legal principles and material facts that underlie the applicant's case are not disputed at all or certainly not meaningfully disputed.

10 First, the respondents correctly do not appear to deny that the Minister's decision is reviewable under PAJA.[2] Of course, even if PAJA does not apply, there is no debate that the Minister's decision had to comply with the principle of legality and the Bill of Rights.

11 Second, the respondents accept that the Minister's decision could only be lawful if, at minimum, there was:[3]

11.1 A fair and rational process, affording a meaningful opportunity to make representations;

11.2 Sound justification for the termination; and

11.3 A meaningful opportunity for ZEP-holders to regularise their status before the termination takes effect.

12 Third, there is no dispute that the Minister failed to consult with affected ZEP-holders, civil society and the public at large before taking the decision to terminate the ZEP and to refuse further extensions.[4] Instead, the Director-

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[2] FA p 001-58 para 112. Not denied AA p 010-107 paras 380-1.

[3] AA p 010-85 paras 250 – 251.

[4] AA p 010-54 - 55 para 160. Each of the alleged invitations for representations relied upon by the Director General and Minister were issued in January 2022.

General relies on a call for representations made after the Minister communicated his firm decision.[5]

13 Fourth, there is no dispute that the majority of ZEP-holders are unable to obtain mainstream permanent residence permits and visas within the "grace period", due to the legal and practical barriers standing in their way.[6]

14 Fifth, there is no dispute that the Department is plagued by systemic backlogs and delays that prevent the speedy determination of applications for visas, permits and waivers.[7] The Director-General simply notes the extensive evidence of these backlogs, without offering any meaningful explanation as to how they could possibly be addressed in the months remaining.[8]

15 Sixth, there is no dispute that Zimbabwe remains politically unstable, political opposition is suppressed, and rates of extreme poverty have increased since 2009.[9] The Director-General merely points to evidence of a minor increase in GDP between 2021 and 2022,[10] while conceding all evidence showing that conditions have otherwise deteriorated or not improved.[11]

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[5] AA p 010-58 para 173.

[6] FA p 001-43 para 59. Bald denial AA p 010-100 para 337. The respondents note the applicant's contention that permanent residence, general work visas, critical skills visas, relative visas, and study visas are extremely difficult for ZEP holders to obtain. AA p 010-101 paras 338-9.

[7] FA p 001-49 - 50 paras 74 – 77. Noted AA p 010-102 - 3 paras 350-2.

[8] See AA paras 351-2.

[9] The high water mark of the Director General's case in this regard is that "the economic situation in Zimbabwe is not the same as that which prevailed when the ZEP (or its previous iterations) was first introduced". See AA p 010-100 para 333.

[10] AA p 010-77 para 224.

[11] AA p 010-100 para 331.

16 It is submitted that, on these common cause principles and facts alone, there is more than sufficient basis to declare the Minister's decision to be unlawful and invalid.

BACKGROUND

The Minister's powers to grant exemptions

17 Section 31(2)(b) of the Immigration Act 13 of 2002 gives the Minister the power to grant individuals or categories of non-citizens the rights of permanent residence. Section 31 provides, in relevant part, as follows:

> "*31. Exemptions*
>
> *…*
>
> *(2) Upon application, the Minister may under terms and conditions determined by him or her -*
>
> *…*
>
> *(b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may -*
>
> *(i) exclude one or more identified foreigners from such categories; and*
>
> *(ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;*
>
> *(c) for good cause, waive any prescribed requirement or form; and*
>
> *(d) for good cause, withdraw an exemption granted by him or her in terms of this section."*

18 For more than a decade, successive Ministers determined that "special circumstances" existed which justified the creation of exemption programmes for Zimbabwean nationals under section 31(2)(b).

19 These programmes established streamlined procedures for Zimbabwean nationals to apply for exemption permits under section 31(2)(b), if they satisfied the eligibility criteria, and followed the steps prescribed by the Minister.

The History of the ZEP Permit

The 2009 DZP

20 In April 2009, the Minister of Home Affairs created the Dispensation of Zimbabwean Project (DZP), in response to the political and economic instability in Zimbabwe which had caused an exodus to South Africa.[12]

21 This programme allowed undocumented Zimbabweans in South Africa to apply for exemptions, provided that they possessed a valid Zimbabwean passport and had proof of employment, registration at an educational institution, or proof of running a business, among other requirements.[13]

22 The programme had a four-fold purpose: regularising the legal status of Zimbabweans residing in South Africa illegally; curbing the deportation of Zimbabweans who were in SA illegally; reducing pressure on the asylum seeker and refugee regime, which was overwhelmed with Zimbabwean asylum seekers;

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[12] FA 2 p 001-87 (Remarks by the Minister on 12 August 2014).

[13] AA p 010-43 para 108.

and providing amnesty to Zimbabweans who obtained SA documents fraudulently.[14]

23 The Department approved 242,731 applications, granting qualifying Zimbabweans the rights to work, conduct a business, or study.[15] The process of issuing formal documentation under the DZP began in September 2010, with permits set to expire at the end of December 2014.[16]

24 The Minister's predecessors have praised the DZP as "*a significant gesture of support and solidarity with our neighbouring country of Zimbabwe in response*"[17] that had also "*enhanced national security and the management of migration and helped to mitigate the widespread abuse of Zimbabweans illegally in the country*." [18]

The 2014 ZSP

25 In August 2014, the then Minister, Mr Gigaba, announced that the DZP would be replaced by the Zimbabwean Special Permit (ZSP).

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[14] AA p 010-42 para 105

[15] AA p 010-43 para 110.

[16] FA p 001-30 para 28.

[17] FA p 001-31 para 30. Annexure FA 2 p 001-87.

[18] FA p 001-32 para 30.3. Annexure FA 3 p 001-89.

26 Applications were only opened to DZP-holders[19] and had to be submitted via Visa Facilitation Services Global (VFS), for a substantial fee (between R800 to R1350),[20] together with the required documentation.[21]

27 Some 197,790 ZSP permits were issued to successful applicants,[22] which were valid until 31 December 2017. [23]

28 Minister Gigaba made a public statement at the time in which he set out in detail the rationale behind his decision not to abruptly terminate the DZP.[24]

28.1 He noted that "*the approaching expiry date [of the DZP] has caused anxiety for many permit holders, particularly those whose are not ready to return to Zimbabwe, as they contemplate their next steps.*"

28.2 Minister Gigaba made a common-sense assessment that Zimbabwe's recovery would be fraught. "*We are aware*", he stated *"that it will take time for her to fully stabilise*." The ZSP was therefore part of South Africa's commitment to Pan-Africanism and its role in supporting "*Africa's stability, security, unity and prosperity*."

28.3 Minister Gigaba noted the positive contribution that Zimbabweans had made to South Africa's economic and social life. In particular, he

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[19] AA p 010-46 para 127.

[20] AA p 010-47 para 132.

[21] AA p 010-47 – 48 paras 131 – 134.

[22] AA p 010-48 para 136.

[23] FA p 001-32 para 31.

[24] FA p 001-32 – 33 para 32.

observed that "*Zimbabweans have made notable contributions in our education and health sectors . . . and in many other sectors*".

28.4 He concluded by underlining the need to "*continue the productive engagement [with] stakeholder formations during the DZP process four years ago*" and expressed a willingness to "*work with new stakeholders that have emerged since*".

The 2017 ZEP

29 In September 2017, the then Minister of Home Affairs, Mr Mkhize, announced that the ZSP would be replaced by the ZEP programme.[25]

30 The ZEP programme was confined to holders of the ZSP,[26] who were again required to apply for exemptions through VFS, for a fee of R1090, together with the necessary proof of employment, study, or business.[27]

31 These permits were granted for a further four years and were initially due to expire on 31 December 2021.[28]

32 Minister Mkhize made a public statement at the time in which he too set out in detail the rationale behind his decision not to terminate the exemption programme, but to create the ZEP instead.[29]

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[25] Annexure FA 5 p 001-92.

[26] AA p 010-49 para 141.

[27] AA p 010-49 para 142.

[28] FA p 001-34 para 33.

[29] FA p 001-34 para 34. Annexure FA 5 p 001-92.

32.1 He framed his reasons for replacing the ZSP with the ZEP with reference to Oliver Tambo concerns for "*international solidarity, conscious of the political imperative to build peace and friendship in the continent and in the world as a whole.*"

32.2 Minister Mkhize, like Minister Gigaba before him, maintained "*that migrants play an important role in respect of economic development and enriching [South African] social and cultural life*".

32.3 Moreover he emphasised the importance of special dispensations as part of a well-functioning immigration system that serves South Africa's national security. He noted that "*these dispensations have assisted in enhancing national security and the orderly management of migration*".

The 2017 White Paper

33 The most recent extension of the ZEP in 2017 was a manifestation of national policy. The 2017 White Paper on International Migration Policy (White Paper) addressed the value of exemption programmes in the following terms:[30]

> *"National security and public safety depend on knowing the identity and civil status of every person within a country. In addition, the presence of communities and individuals who are not known to the state but for whom the state has to provide, puts pressure on resources and increases the risk of social conflicts. Vulnerable migrants pay bribes and are victims of extortion and human trafficking. This increases levels of corruption and organised crime. Regularising relationships between states, however,*

[30] FA p 001-34 para 34.4.(See annexure FA6).

> *improves stability, reduces crime and improves conditions for economic growth for both countries."*[31]

34 The White Paper remains government policy and has not been withdrawn. Its justification for exemption programmes such as the ZEP – including reasons of national security, resource constraints, the protection of vulnerable groups, and economic growth – remain unchanged. Yet, the Minister has now turned his face against this policy in deciding to terminate ZEPs.

The Minister's decision to terminate the ZEP programme

35 The Department made its first public statement on the fate of the 2017 ZEP on 19 November 2021 – just over a month before ZEPs were due to expire. The statement was prominently headed "*No decision has been made on the Zimbabwean Exemption Permit*" and suggested that "*the matter of the Zimbabwean Exemption Permit [was] still to be considered by Cabinet*".[32]

36 This statement was misleading, at best.

37 It subsequently emerged that the Minister had already taken a decision to terminate the ZEP programme in September 2021, behind closed doors and without any public consultation.[33] That decision and the Minister's reasons were only revealed to the public months later.

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[31] Annexure FA6 p 001-94.

[32] FA p 001-35 para 35. Annexure FA 7 p 001-95. The next Cabinet sitting was scheduled for the following week from the date of the statement (19 Nov 2021).

[33] FA p 001-36 para 36. AA (African Amity) p 018-132 para 90.3.

37.1 The Minister's decision was prompted by submissions from the Director-General, dated 20 September 2021 and prominently headed "WITHDRAWAL AND/ OR NON-EXTENSION" of ZEPs.[34]

37.2 The Director-General recommended that the Minister "*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.*"[35]

37.3 While the Director-General recommended the eventual termination of the ZEP programme, he left it to the Minister to determine the duration of any further extension. The Director-General recommended that the Minister "*should consider imposing a condition extending the validity of the exemptions for a period of three years, alternatively a period of 12 months and any other period which the Minister deems appropriate*".[36]

37.4 The Minister approved these submissions, with the handwritten addition that he chose an extension period of only 12 months, without providing reasons for doing so. [37]

38 On 24 November 2021, Cabinet released a statement reflecting its decision "*to no longer issue extensions to the Zimbabwean special dispensations*". This was accompanied by the rider that Cabinet had "*decided on a 12 months grace period*

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[34] Annexure FA 8 p 001-96.

[35] Id p 001-100 para 5.

[36] Id p 001-100 para 6.

[37] Id p 001-102.

at the expiry of the current ZEP."[38] The respondents remain adamant that this decision was the Minister's alone and that Cabinet merely gave its approval.[39]

39 Several days later, on 29 November 2021, the Department issued Immigration Directive 10 of 2021,[40] directing that ZEP-holders were to be granted a 12-month "grace period" following the expiry of their ZEPs. The Directive further suggested that banks and other service providers should discontinue provision of services to ZEP-holders as from 1 January 2022 unless ZEP-holders could produce receipts of their applications for mainstream visas.

40 In the face of urgent litigation in the *African Amity* matter, the Department hastily withdrew Directive 10, on 13 December 2021, leaving nothing in its place.[41]

41 The next public statement made by the Department came on 29 December 2021,[42] just days before the expiry of ZEPs, which simply announced that DHA had been successful in the litigation.[43]

42 At no stage in the forgoing flurry of announcements and directives were any formal attempts made by the DHA to call for representations from affected ZEP-holders or to conduct a public participation process.[44]

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[38] Annexure FA 9 p 001-108 para 6.3.

[39] AA (African Amity) p 018-114 para 58.2.

[40] FA p 001-37para 38. (See annexure FA10).

[41] Annexure FA 11 p 001-118.

[42] Annexure FA13 p 001-122.

[43] FA p 001-37 para 40.

[44] FA p 001-38 para 41.

43 On 5 January 2022, the Department published a notice in several newspapers, headed "*non-extension of exemptions*", which informed all ZEP-holders 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*" (emphasis added).[45] This notice repeated that ZEP-holders were afforded a 12-month grace period, solely for purposes of obtaining alternative visas. Identical language was used in the letters that were emailed to ZEP-holders at the time.[46]

44 Two days later, on 7 January 2022, the Minister published Immigration Directive 1 in the *Government Gazette* (Directive 1 of 2021).[47] The directive stated that the Minister had decided to extend ZEPs for a period of 12 months "*to allow the holders thereof to apply for one or other visas provided for in the Immigration Act that they may qualify for*". The Minister further directed that no action may be taken against ZEP-holders during the 12-month period.

45 This directive was accompanied by a press statement from the Minister to "*set the record straight*" and elaborate on the Minister's reasons for his decision.[48] In that statement, the Minister confirmed that he had "*decided to approve the recommendation made by the Director-General not to extend the exemptions to Zimbabwean nationals.*"[49]

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[45] Annexure FA 13 p 001-122.

[46] Annexure AA 4 p 010-145 – 147.

[47] Annexure FA14 p 001-123.

[48] FA p 001-3 para 44.

[49] Id p 001-131 para 11.

46 Both the notice in newspapers and the letters to ZEP-holders concluded by stating that: "*Should any exemption holder have any representations to make regarding the non-extension of the exemptions and the 12 months period, you may forward such representations to Mr Jackson McKay: Deputy Director-General: Immigration Services, E-mail ZEPenquiries@dha.gov.za*".

47 This invitation for comment was made as an afterthought, after the Minister had already communicated his decision. It was not a genuine attempt at consultation, as illustrated in an exchange between a ZEP-holder, Ms Maliwa, and the Minister's attorneys in January 2022:

47.1 Ms Maliwa sent an email to the designated address, imploring the Minister to "*Please consider giving us another 4 years. We have nowhere to stay in Zim and no work*".[50]

47.2 The Minister's attorneys responded, in no uncertain terms, stating: "*due to the circumstances and reasons advanced in the letter that you have received, the Minister is unable to reverse the decision*."[51]

48 Almost nine months later, there has been a further development, which is dealt with in the HSF supplementary affidavit.

48.1 On 2 September 2022, the Minister issued a fresh directive, Directive 2 of 2022, together with an accompanying press statement, extending the grace period for a further six months, until 30 June 2023.

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[50] Annexure RA 7 p 018-152.

[51] Id p 018-153.

48.2 The press statement concludes that "*[t]here will be no further extension granted by the Minister*".

48.3 Yet again, this announcement was made without any prior consultation with ZEP-holders and with no attempt at public participation.

The true nature of the Minister's decision and the contradictory versions now advanced

49 These public statements and directives leave little doubt as to the true nature of the Minister's decision. He has made up his mind to terminate the ZEP-programme and to refuse further exemptions to ZEP-holders. All that has now changed is the termination date, or "grace period". The underlying decision remains the same.

50 Yet, in his answering affidavit, the Director-General has sought to deny that the Minister has made any such decision. He claims that there was "*no decision taken to terminate all ZEPs*"[52] and that "*no decision has been taken not to grant further exemptions to ZEP-holders*".[53] He has further suggested that the Minister may grant individual extensions to ZEP holders under section 31(2)(b), stating that "*further extensions [are] available based on the individual circumstances of ZEP holders.*"[54]

51 The Director-General's attempt to reinterpret the Minister's decision, after the fact, is unsustainable. Not only has the Minister failed to depose to a

[52] AA p 010-14 para 16; p 010-91 para 274.

[53] AA p 010-14 para 18.

[54] AA p 010-75 para 220.

confirmatory affidavit, but the Director-General's version contradicts all that has come before.

52 First, this new version is inconsistent with the public statements, submissions and directives, addressed above, which all unequivocally state that the Minister has decided to end the exemption programme and will entertain no further exemptions.

53 Second, it is inconsistent with the Director-General's answering affidavit filed in the *African Amity* matter, which confirmed that "*the Minister decided in September 2021 not to extend the exemptions granted to Zimbabwean nationals*".[55] At no point did the Director-General quibble with the *African Amity* applicants' characterisation of the Minister's decision as a decision to "terminate" or "end" the ZEP programme.

54 Third, in his letter to the Minister of Foreign Affairs, dated 4 January 2022, requesting that his decision be communicated to the Zimbabwean government, the Minister referred to the "*decision I have taken not to extend the exemptions granted to approximately 178 412 Zimbabwean nationals*."[56]

55 Fourth, in his engagements with the Scalabrini Centre of Cape Town, the Minister was clear that he had decided to terminate ZEPs and that he will not entertain any further exemption applications from ZEP-holders, on either a blanket or individual basis.[57]

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[55] African Amity AA p 018-117 para 61.2 (African Amity p 004-32).

[56] Annexure RA5 p 044-131.

[57] Supporting Affidavit from Scalabrini p 018-290.

55.1 Prior to a meeting with the Minister on 18 February 2022, Scalabrini circulated a proposed agenda. On the proposed item "*Scope for discussion and reconsideration*", the Minister responded that "*the attorneys for the Minister and DHA received representations for reconsideration of the decision that I have made from affected Zimbabweans. 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*" (Emphasis added).[58]

55.2 In a letter to the Minister after the meeting, Scalabrini specifically asked whether he would consider individual exemption applications from ZEP-holders under section 31(2)(b).[59]

55.3 The Minister replied "*I do not intend to grant exemptions in terms of section 31(2)(b) anymore.*"[60]

56 Fifth, the Minister has also made numerous statements in the media, in which he confirmed that he has decided to terminate ZEPs, his decision is final, and will not be reversed.[61]

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[58] Supporting Affidavit from Scalabrini p 018-294 para 10; Annexure SCCT 1 p 018-303 para 8. (see also answers to the proposed agenda at p018-301).

[59] Annexure SCCT 2 p 018-326 paras 36 – 38.

[60] Annexure SCCT 3 p 018-337 para 47.

[61] RA p 018-13 para 21.

57 Sixth, the Director-General's new version also contradicts what individual ZEP holders have been told when they have attempted to make representations to the Minister. In response to one such ZEP-holder, the Minister's attorneys blankly asserted that "*due to the circumstances and reasons advanced in the letter that you have received, the Minister is unable to reverse the decision*."[62]

58 Finally, 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.

59 As a result, the Director-General's belated attempt to reinterpret the Minister's decision is not genuine.

60 The decision that falls to be reviewed and set aside is the decision as communicated to ZEP-holders and the public by the Minister:

60.1 The Minister has decided to terminate the ZEP programme and refuses to exercise his powers under section 31(2)(b) of the Immigration Act to establish any exemption regime in its place.

60.2 He has decided to grant a limited extension of ZEPs until 30 June 2022, solely for the purpose of allowing ZEP-holders to apply for other permits or visas, but refuses to grant any further extensions; and

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[62] Annexure RA 7 p 018-153.

The Minister has refused to grant further section 31(2)(b) exemptions to ZEP-holders, on either a blanket or individual basis. The impact of the Minister's decision on ZEP-holders

61 The Minister's decision means that thousands of ZEP-holders are at risk of:[63]

61.1 Being left undocumented which, in turn, exposes them to the dangers of xenophobic attacks, human trafficking, extortion, and the threat of arrest, detention and deportation;

61.2 Losing their employment, businesses, and homes;

61.3 Losing access to banking services, pension funds, and other financial services;

61.4 Being separated from their families and children;

61.5 Disrupting the lives of their children, who face the risk of being denied access to schooling, medical care, and social services; and

61.6 Being forced to return to Zimbabwe, where the political and economic conditions there have not materially improved.

62 This impact is illustrated by the experiences of four ZEP-holders, who have deposed to affidavits in support of this application:

62.1 GN is a 50-year-old teacher living in Johannesburg. She was first issued with the DZP in 2012 and is currently a ZEP-holder. Fearing for

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[63] FA p 001-53 para 89.

her safety and livelihood if she were forced to return to Zimbabwe, GN intends to exhaust all available options, including applying for asylum again. Due to the backlogs, she fears that she will "*become a part of a very dysfunctional system*".[64]

62.2 EWS is a 52-year-old ZEP-holder, residing in Johannesburg. He graduated in industrial engineering from the National University of Science and Technology in Bulawayo. He is married with five children, who remain in Zimbabwe. His wife and children are dependent on him for financial support and day-to-day essentials. EWS reasonably fears that he will not be able to secure an alternative visa in time He is considering applying for a critical skills visa or a business visa, but he fears that he will be unable to meet the stringent requirements for these visas in time and he cannot afford the lawyers' fees required to pursue these applications. EWS adds that "*even if I could somehow afford to work my way through the visa application system, I am very concerned that the system is so dysfunctional that I could be left in the lurch for many years.*"[65]

62.3 DJN arrived in South Africa in 2010, at a time when the Zimbabwean economy was in free-fall. Shortly after arriving, DJN applied for, and obtained, a DZP and, subsequently, a ZSP. DJN faces dim prospects back in Zimbabwe. The economy he left behind in 2010 remains in tatters. Jobs are scarce and DJN sees little prospect in starting his own

[64] FA p 001-54 para 92. GN's affidavit p 001-194.

[65] FA p 001-55 para 98. EWS's affidavit p 001-201.

timber business back home. Without either employment or entrepreneurial prospects, he will be unable to provide for his family.[66]

62.4 LM arrived in Cape Town in 2005, he worked as a waiter at a Spur - he lacks the critical skills and capital to obtain alternative immigration status under the Immigration Act. To remain in South Africa, LM's only option would be to revert back to asylum-seeker status, knowing full well the logistical and socio-political challenges asylum seekers face in this country. A withdrawal of the ZEP will abruptly terminate the life LM and his wife have known in South Africa and uproot the lives of their children.[67]

The barriers to obtaining alternative visas and permits

63 The Minister suggests that none of these harms will come about because ZEP-holders can apply for other visas. But this ignores the practical and legal barriers that stand in the way of ZEP-holders obtaining documentation by the 30 June 2023 deadline.

Legal barriers

64 The successive exemption programmes for Zimbabwean nationals were created in recognition of the fact that most exemption-holders would have great difficulty qualifying for "mainstream" permanent residence permits and temporary visas

[66] FA p 001-56 para 102. DJN's affidavit p 001-212.

[67] FA p 001-57 para 106. LM's affidavit p 001-218.

under the Immigration Act. The legal barriers to obtaining these visas have not been eased.[68]

65 In respect of permanent residence:

65.1 Under section 26 of the Immigration Act, permanent residence may be granted to a person who has spent five years on a work visa (section 26(a)) or as the spouse of a citizen or permanent resident (section 26(b)). However, the conditions attached to ZEPs state that they "*[do] not entitle the holder the right to apply for permanent residence irrespective of the period of stay in the RSA.*" In their answering papers, the respondents' position on ZEP-holders' eligibility remains entirely contradictory and haphazard.[69]

65.2 Under section 27 of the Immigration Act, an application for permanent residence can be made immediately, without a qualifying period of residence, in a very narrow set of circumstances, including significant wealth – requiring capital investment of over R5 million, net worth of over R12 million, retirement earnings of over R37,000 a month – or if a person satisfies the onerous critical skills requirements. Most ZEP-holders would be unable to satisfy these requirements.

66 In respect of temporary residence, sections 11 to 23 of the Immigration Act provide for a range of visas, subject to different qualifying criteria and conditions.

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[68] FA p 001-43 from para 59.

[69] See RA p 018-21 para 41.

Only a few of these visas afford rights to work in the country, which are more difficult to obtain.

66.1 General work visas, provided for in section 19 of the Immigration Act read with Regulation 18 of the Immigration Regulations, are subject to stringent requirements. These include the Regulation 18(3) requirement that the Department of Labour must issue a prospective employer with a certificate confirming, *inter alia*, that despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with equivalent qualifications or skills and experience.

66.2 Critical skills visas, regulated under section 19(4) of the Immigration Act read with Regulation 18(5), are even more difficult to obtain, especially since recent amendments to the list have cut the number of qualifying skills significantly.[70]

66.3 Business visas, provided for in section 15 of the Immigration Act and Regulation 14, require a minimum capital investment of R5 million from funds sourced from outside the country. This steep capital requirement excludes all but a tiny minority of ZEP-holders, not to mention the other stringent procedural requirements.

66.4 Relatives visas, provided for in section 18 of the Immigration Act and Regulation 17, may be issued to members of the immediate family of a

[70] Annexure FA23 p 001-154.

citizen or permanent resident, subject to stringent requirements of proof and financial assurances. However, these visas do not confer any work rights, putting ZEP-holders to an impossible choice: stay on a relatives' visa and face unemployment and destitution or leave the country and break up the family unit.

66.5 Study visas, regulated by section 13 of the Immigration Act and Regulation 12, would only offer limited protection, where available, and do not confer any work rights.

67 In respect of waivers under section 31(2)(c) of the Immigration Act, these are highly complex and technical applications, requiring specialised legal assistance. Such an individualised process is not suited to processing thousands of applications from ZEP-holders in a short period. The respondents suggest that, in more than nine months, the Minister has not made any decisions on the approximately 4000 waiver applications allegedly submitted to the Department, nor do they offer any indication of when such decisions will be made.[71]

68 Finally, in respect of further exemptions, the respondents have adopted an entirely contradictory stance on whether ZEP-holders may submit individual applications under section 31(2)(b) of the Immigration Act, if they do not qualify for other visas.

68.1 In the answering affidavit, the Director General claims that the Minister will somehow decide to grant individual exemptions, on a case-by-case

[71] RA p 018-22 para 42, Annexure RA 2 p 018-89 para 6.2.

basis, based on the representations submitted by ZEP-holders to the ZEPenquiries@dha.gov.za address. [72]

68.2 But this is patently misleading.

68.3 The Minister has been adamant that he will refuse to consider any individual exemption applications from ZEP-holders, stating in his letter to Scalabrini that: "*I do not intend to grant exemptions in terms of section 31(2)(b) anymore*."[73]

68.4 Moreover, none of the communications to ZEP-holders have offered the opportunity to apply for individual exemptions, nor have they specified the information and documents that are required.

68.5 In their supporting affidavits, GN, EWS, DJN and LM, have all expressed surprise and disbelief at the Director-General's statements. As they point out, all previous exemption regimes have been preceded by a clearly announced application procedure that specifies the criteria for eligibility, the information and documents required, the applicable fees, and the steps required, including submission via VFS. None of the communications to ZEP-holders since the announcement of the Minister's decision have provided any such instructions. Moreover, no permits or visas have ever been granted on the basis of a mere email to a departmental email address.[74]

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[72] AA p 010-22 para 52.

[73] FA p 001-48 para 69.

[74] RA p 018-20 para 37.6.

69 The Director-General's contradictory position on individual exemptions demonstrates that there is no genuine intention to afford this remedy to ZEP-holders. This is merely a ploy to downplay the impact of the Minister's decision.

70 If, however, the Minister and the Director-General have truly changed their stance, that must be publicly communicated to all ZEP-holders, with clear and explicit instructions on the procedure to be followed in submitting applications, the criteria to be applied, the information and documents required, and the timeframes for follow-ups and decisions.

Practical barriers

71 Even where ZEP-holders may be eligible to obtain other visas or permits, they face substantial practical obstacles, which would make it unlikely that they could obtain documentation in time.[75]

72 The complexity of these applications, the lack of information, the costly (and often non-refundable) application fees, and the barriers to accessing legal advice all explain why many ZEP-holder may be discouraged from applying.[76]

73 Most significantly, systemic backlogs and incapacity within the Department stand in the way of the speedy determination of applications. There is no genuine dispute on the existence of these backlogs, nor do the respondents offer any details of how they intend to address them. The Director-General simply notes

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[75] FA p 001-48 para 69.

[76] FA p 001-69 – 71; Bald and evasive denials AA p 010-101 – 102 paras 341 – 347.

the evidence of backlogs presented in the founding affidavit without meaningful reply.[77]

74 These backlogs have previously attracted judicial attention. In *Department of Home Affairs and Others v De Saude Attorneys and Another[78],* decided in 2019, the Supreme Court of Appeal addressed the DHA's unreasonable delays in processing hundreds of applications for temporary residence visas, permanent residence, exemptions, waivers, and internal appeals. The SCA described conditions of "*prolonged and enduring departmental dysfunction*" which had resulted in delays of years rather than months. While the Immigration Act requires expedition in issuing visas and permanent residence permits, the reality, as described by the SCA, was one of "*sloth on a grand scale*".

75 These pre-existing backlogs have now been aggravated by the Covid-19 pandemic and two years of lockdowns, which saw the DHA suspending many immigration services for extended periods. [79]

75.1 The ongoing effect of these backlogs is reflected in the frequent extensions that have been granted to current visa-holders whose documents have expired, due to the failure to process their applications for new visas timeously. Rolling extensions have been granted since 2020 due to the increasing delays.

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[77] See FA p 001-49 – 50 paras 74 – 77; Noted and not disputed AA p 010-102 paras 350 - 352.

[78] *Department of Home Affairs and Others v De Saude Attorneys and Another* [2019] ZASCA 46; [2019] 2 All SA 665 (SCA).

[79] See FA p 001-49 – 50 paras 74 – 77; Noted and not disputed AA p 010-102 paras 350 - 352.

75.2 Most recently, on 1 April 2022, the Minister published a circular titled "*Temporary Measures in Respect of Foreign Nationals in Light of a Backlog Being Experienced in Processing Outcomes on Waiver Applications and Visa Applications*". This circular granted a further blanket extension until 30 June 2022, due to the admitted "*backlog in processing outcomes on waiver- and visa applications.*"[80]

76 Given these backlogs, it is exceedingly unlikely that the Department could process ZEP-holders' applications for alternative visas and waivers in time, even with the brief extension of only six months.

77 In response, the Director-General has merely repeated the bald statement that a "*special task team has been set up to deal with the applications*", the same claim made by the Minister in his press statement in January.[81] However, more than nine months later, no further information is provided regarding this special task team or other measures in place to assist and process ZEP-holders' applications.

78 The measures put in place by the DHA to deal with the backlogs and delays standing in the way of the ZEP-holders are only known to the respondents. As a result, there is a duty on the respondents to set out the details of such measures, if any, including a detailed account of the supposed special task team.[82] This is even more so given the respondents' special duties as state litigants, who have

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[80] FA p 011-50 para 76. Annexure FA 25 p 001-178.

[81] AA p 010-85 para 251.3.

[82] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para 13.

a higher duty to be fair, honest and forthright with the Court. As the Constitutional Court has explained:

> *"The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court."*[83]

79 The respondents' lack of candour falls far short of these duties.

80 The Minister's latest extension of the grace period, until 30 June 2022, was ostensibly motived by a "progress report" from his own Department. The HSF has called on the respondents to disclose this progress report.[84] However, at the time of filing, the respondents have failed to deliver this report, compounding the lack of transparency.

The asylum system

81 In the absence of meaningful alternatives, it is likely that many ZEP-holders may again turn to the asylum system for protection, in terms of the Refugees Act.[85]

82 The DZP was initially created for the express purpose of relieving pressure on this system. Thirteen years later, systemic backlogs in the asylum system remain.

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[83] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at para 152; citing *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) 2006 (5) SA 47 (CC) at para 107.

[84] See HSF's SRA Annexure 2.

[85] Admitted AA p 010-100 para 335.

83 The uncontested evidence shows that these backlogs are at the level of decision-making on asylum applications, as decision-makers lack the capacity and resources to decide asylum applications swiftly. It is not uncommon for asylum seekers to wait a decade or more for a final decision.[86]

84 It is also not disputed that these backlogs have been compounded by the Covid-19 lockdowns, as no new asylum applications were processed for more than two years, from March 2020 to May 2022.[87]

85 In these circumstances, the termination of ZEPs will not only further burden this system, but it will also subject ZEP-holders to a long and uncertain process, plagued by interminable delays. The certainty of ZEPs would be swapped for the precarity of the asylum system.

86 This precarity is heightened by the divergence between the Director General and the Minister. While the Director-General acknowledges that ZEP-holders are entitled to apply for asylum,[88] the Minister holds the opposite view. The Minister has stated publicly: "*I have never . . . said that the exemption holders may apply for asylum . . . I do not believe that they satisfy the qualification criteria for refugee status . . .*"[89] This divergence offers little comfort to affected ZEP-holders.

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[86] FA p 001-52 paras 82 – 88; The evidence of these backlogs, reflected in Annexures FA 26 – FA 27, are not denied AA p 010-103 para 358.

[87] FA 001-52 para 85; No specific denial AA p 010-103 paras 358 – 360.

[88] AA p 010-100 para 335

[89] Annexure SCCT p 018-329 para 6.

THE LEGAL BASIS OF THIS APPLICATION

87 The Minister's decision to terminate the ZEP programme and to refuse any further exemptions is subject to scrutiny on three legal bases:

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

87.2 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.

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

88 The respondents do not appear to deny that the Minister's decision is an administrative act that is subject to review under PAJA.[90] This is for good reason.

88.1 Administrative action is framed in encompassing terms, including "*any decision taken or any failure to take a decision*",[91] including the refusal to give any "*approval, consent or permission*".[92]

88.2 This captures the hybrid nature of the Minister's decision in this case, which includes a decision to terminate the ZEP programme, a refusal to exercise his powers under section 31(2)(b) to grant further

[90] FA p 001-58 para 112. Not denied AA p 010-107 paras 380-1.

[91] Section 1(i).

[92] PAJA s 1(v)(b).

exemptions to ZEP-holders, coupled with a decision to extend existing permits for a limited period.

88.3 The Minister's decision under section 31(2)(b) involves the implementation of legislation, which is administrative in nature.[93]

88.4 Courts have previously accepted that the Minister's decisions on exemptions under section 31(2)(b) of PAJA, including the refusal to grant exemptions[94] and unreasonable delays in taking decisions,[95] are reviewable under PAJA.

88.5 The decision adversely affects the rights of ZEP-holders and plainly has a direct, external, legal effect.

89 Even if it were held that the Minister's decision does not amount to administrative action, it is an exercise of public power that is subject to the principle of legality and the Bill of Rights.

90 The grounds of review that follow are all applicable, regardless of the standard of review that is applied.

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[93] *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.

[94] See, for example, *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), which reviewed and set aside refusals of s 31(2)(b) exemptions in terms of PAJA.

[95] *De Saude* (n 78) para 12.

FIRST GROUND: PROCEDURAL UNFAIRNESS AND PROCEDURAL IRRATIONALITY

91 The common cause facts reveal that:

91.1 ZEP holders, civil society, and the general public were not notified of the Minister's intended decision nor were they afforded a meaningful opportunity to make representations before the Minister took his decision.[96]

91.2 The Minister's press statement of 7 January 2022 refers to internal discussions between the Minister and "*affected units within the DHA*"[97] but is silent on the participation of ZEP holders and the public in the decision-making process.

91.3 Indeed, the Minister himself admits that the only "*inputs*" into his decision regarding the extension of ZEPs in September 2021 were provided by DHA officials and a September 2021 submission from the Director General of the DHA.[98]

91.4 Apart from sending letters to two civil society organisations representing Zimbabwean nationals, after the Minister had already taken a decision, the respondents cannot point to any engagement with civil society or the public at large.

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[96] The Minister and Director General admit that the invitation for representations on which they rely was communicated in notices that communicated the decision not to extend in January 2022. AA pp 010-54-57 paras 159 - 169.

[97] Annexure "FA28" para 9.

[98] Id.

92 Yet the Minister and Director-General now insist that there was an "*extensive public process implemented to seek comment from every affected ZEP holder and from civil society organisations representing the interests of ZEP holders*".[99] The Minister and Director-General even go so far as to suggest that they provided an opportunity for ZEP holders to apply for individual exemptions, something the Minister has expressly stated he would not do.[100]

93 The flaws in this response are clear:

93.1 First, a call for representations was made after-the-fact, once the Minister's decision was a *fait accompli*.

93.2 Second, the invitation for representations was vague and not designed to elicit meaningful representations from either ZEP holders or the public.

93.3 Third, throughout the Minister and Deputy-General's answering affidavit, there is a notable disdain for the value of public participation.[101] Indeed, it is presumed that ZEP holders are capable only of making representations on why the Minister's decision should not apply to them personally, and not on the merits of the decision itself, while the views of civil society and the public are deemed unnecessary altogether.[102]

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[99] AA p 010-62 - 63 para 180.

[100] See RA pp 018-9 - 11 paras 16 - 22

[101] See for example AA p 010-61 para 176.5; AA p 010-60 para 176.3; and AA p 010-62 para 176.7.

[102] See for example AA pp 010-61-2 paras 176.5 and 176.6.

The requirements of procedural fairness and procedural rationality

94 As already noted, the Minister and Director-General do not deny that the decision to terminate the ZEP programme on 12 months' notice was an administrative act that is subject to review under PAJA.[103]

95 In terms of section 3 of PAJA, administrative action which materially and adversely affects an individual's rights or legitimate expectations must be procedurally fair, requiring, at minimum:

95.1 a clear statement of the administrative action;

95.2 adequate notice of any right of review or internal appeal; and

95.3 a reasonable opportunity to make representations

96 Section 4(1) of PAJA stipulates that where administrative action "*materially and adversely affects the rights of the public*" an administrator owes a duty of procedural fairness to the public at large.

97 In those circumstances, the administrator has five options: either hold a public inquiry (which includes a public hearing on the proposed administrative action, and public notification of the inquiry); follow a notice and comment procedure (which involves publishing the proposed action for public comment and written representations on the proposal); follow both the public inquiry and notice and comment procedures; follow a fair but different procedure in terms of an empowering provision; or follow another appropriate procedure which gives

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[103] FA p 001-58 para 112. Not denied AA p 010-107 paras 380-1.

effect to the right to procedural fairness in section 3 of PAJA (for example, granting hearings to the entire group affected by the proposed action).

98 Apart from observing the dictates of procedural fairness under PAJA, the Minister was also obliged to take a decision that was rational.

99 Rationality demands that the decision itself and the process by which it was taken must be rational.[104] In *Simelane*, the Constitutional Court emphasised:

> *"[W]e must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality."*[105]

100 In *Albutt*,[106] the Constitutional Court confirmed that there are circumstances in which rational decision-making outside the ambit of PAJA requires specific interested parties to be invited to make representations. Whether this is so depends on the nature and effect of the decision at issue and the expertise or experience of those contending that they had a right to be heard.[107]

101 In this regard, the Constitutional Court recently held in *e.tv (Pty) Limited v Minister of Communications and Digital Technologies* that where a decision is *"not a mechanical determination"* and "*important interests are at stake*", it is not procedurally rational to take a decision without notice to affected parties to obtain

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[104] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) at para 64.

[105] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (*Simelane*) at para 37.

[106] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC).

[107] *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) paras 68 – 69, citing *Albutt* id.

their views on the matter.[108] The facts of that case and the Constitutional Court's conclusions provide important guidance for this case:

101.1 There the applicants challenged two decisions taken by the Minister of Communications in October 2021: a decision to switch off analogue television signals on 30 March 2022 and a further decision to fix the deadline for households to register to receive "set-top boxes", the boxes needed to allow old televisions to receive digital signals. The result was that several million South Africans were in danger of losing their television signals.

101.2 The Minister of Communications had not engaged in prior consultation with affected members of the public and civil society before announcing the switch-off date. Instead, the Minister denied any obligation to conduct consultations, but contended further that consultations were ongoing with affected parties regarding "*aspects that need[ed] to be considered for the completion of the digital migration process*".[109]

101.3 While the Court concluded that the Minister's decision was executive and not administrative in nature, it held that this decision was nevertheless bound by the requirements of legality and procedural rationality.[110]

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[108] *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.

[109] Id at para 46.

[110] Id at paras 36 – 38.

101.4 It concluded that the Minister's failure to conduct any prior consultations, before announcing the switch-off date, rendered the decision procedurally irrational, given the far-reaching implications of the decision and that "*important interest are at stake*".[111]

101.5 The fact that the switch-off date had not yet arrived, and that it was notionally possible for affected organisations and individuals to make representations before that date, were not considered to be relevant factors. The absence of any prior consultation, before the Minister announced the decision, was decisive.

102 *In Esau,* the Supreme Court of Appeal further recognised that where a decision's "*effect, potential or real, on the rights, lives and livelihood of every person subject to them is drastic*", that decision cannot rationally be taken without affording affected persons an opportunity to make representations.[112]

Procedural unfairness and irrationality in relation to ZEP-holders and civil society

103 Given the grave and lasting impact of the extension decision on the rights of ZEP-holders both individually and as a group, a rational and procedurally fair decision would require, at the very least, that ZEP-holders and civil society organisations representing their interests be afforded an opportunity to make representations on the proposed extension before it was approved.

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[111] Id at para 51 to 52.

[112] *Esau v Minister of Co-Operative Governance and Traditional Affairs* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) at para 103.

104 ZEP-holders and civil society were well-placed to inform the Minister on:

104.1 Whether the circumstances in Zimbabwe which justified the exemption programme had changed;

104.2 The particular impact that the decision not to extend the ZEPs would have on individual ZEP-holders, as well as their families and children;

104.3 Whether a 12-month extension until 31 December 2022 would provide them with sufficient time to obtain alternative status under a permit or visa under the Immigration Act; and

104.4 Whether a longer extension period would be more suitable to protect their rights and interests.

105 The Minister contends that various press statements and two letters to organisations purporting to represent Zimbabweans in South Africa advised ZEP holders of their right to make representations "*regarding the non-extension of exemptions and the 12-months' period*".[113] This, so the Minister contends, provided ZEP holders, civil society and the public with a meaningful opportunity to be heard.

106 In each of these communications, the following was conveyed:

106.1 First, that the Minister had taken a decision in terms of the Immigration Act "*not to extend the exemptions granted to Zimbabwean nationals*".[114]

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[113] AA p 010-56 para 162.

[114] "AA2" p 010-140; "AA3" p 010-143; "AA4" p 010-145; and "AA6" p 010-149.

106.2 Second, that there would be a 12-month grace period allowing ZEP holders "*to apply for one or more of the visas provided for in the Immigration Act*" and, further, that ZEP holders were "*required*" to make use of the 12 month period to make such applications.[115]

106.3 Third, that ZEPs holders should forward representations to the Director General "*should [they] have any representations to make regarding the non-extension of the exemptions and the 12 months period*".[116]

107 This invitation for representations did not provide a meaningful opportunity to be heard for three reasons:

107.1 It came after the decision not to extend the ZEPs had already been taken.

107.2 It was meaningless in the circumstances because it did not indicate the nature and purpose of the representations it intended eliciting from ZEP holders and the public.

107.3 The opportunity for individual exemption, which these notices are alleged to have communicated, would in any event not cure the unfairness of the decision not to extend the ZEPs.

The invitation for representations came after the fact

108 As noted, the Minister clearly communicated a decision to terminate the ZEP programme and to refuse further extensions. Although there is evidence that the

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[115] Id.

[116] Id.

decision was taken well before its publication,[117] there is no question, given the clear statement of the decision in the January 2022 notices and press releases, that by January 2022 the decision not to extend ZEPs was a *fait accompli*.

109 Yet it is at this point that the Minister says representations were invited from ZEP holders.

110 Part and parcel of a meaningful opportunity to be heard is that the opportunity arises *<u>before the decision is taken</u>*.[118] Inviting representations on a decision that has already been taken runs counter to the very purpose of procedural fairness and procedural rationality, which is to ensure that before the ultimate decision is taken, an administrative functionary has an open mind and a complete picture of the facts and circumstances that have a bearing on the decision.

111 In this regard, Baxter in *Administrative Law* writes as follows:

> *"Once a decision has been reached in violation of natural justice, and even if it has not yet been put into effect, a subsequent hearing will be no real substitute: one has then to do more than merely present one's case and refute the opposing case – one also has to convince the decision maker that he was wrong. In a sense, the decision maker is also prejudiced."*[119]

112 The grounds on which an after-the-fact hearing can be afforded are narrow, requiring a demonstration of exceptional circumstances.[120]

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[117] See FA p 001-36 paras 36-7.

[118] *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) (*Pridwin*) at para 205; *Attorney-General Eastern Cape v Blom and Others* 1988 (4) SA 645 AD at 668D-E; and *Everett v Minister of the Interior* 1981 (2) SA 453 (C) at 458E.

[119] Baxter *Administrative Law* (1984) at 587.

[120] See *Nortjè en 'n Ander v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (SCA) at para 19. See also *Trend Finance (Pty) Ltd and another v Commissioner for SARS* [2005] 4 All SA 657 (C) at para 82.

113 In this case, the Minister and Deputy-General have offered no explanation for why representations were invited after the ultimate decision had already been taken. They do not allege urgency, nor do they explain why inviting representations earlier would have been impractical.

114 Instead, the Minister has repeatedly made it clear that his decision is final and will not be reversed. The only conclusion that can be drawn is that the after-the-fact call for representations was not genuine and was simply a tick-box exercise.

115 The absence of procedural fairness is now compounded by the Minister's 2 September 2022 announcement. Yet again, the Minister gave no prior notice that he was considering extending this grace period, nor did he call for representations from affected ZEP-holders, civil society and the public on whether a six-month period would be sufficient. The only information that was considered was a progress report and recommendations from his own Department. This again reflects indifference, bordering on disdain, for fair process.

<u>The invitation for representations was meaningless in the circumstances</u>

116 An opportunity to make representations will be effective only if it relates to the decision to be made and if this is made clear to the affected parties.[121] A call for representations will therefore not be meaningful unless it is clearly demarcated

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[121] *Pridwin* (n 118) at para 192 and *Sokhela v MEG for Agriculture and Environmental Affairs, KwaZulu-Natal* 2010 (5) SA 574 (KZP) at para 58.

as an opportunity to make representations on the specific decision under consideration.[122]

117 The various notices relied upon by the Minister and Director-General advised ZEP holders and the public that they should submit any representations they may have "*regarding the non-extension of the exemptions and the 12 months period*".

118 The Minister and Director-General give an inconsistent account of what, exactly, they were attempting to elicit from ZEP holders and the public.

118.1 In one breath, it is said that the elicited representations were to address "*both the non-extension of exemptions and the 12-month extension period*"[123] - that is, the decision not to grant further exemptions and the decision to grant a 12-month grace period.

118.2 In the next breath, the Director-General suggest that the ZEP-holders were being asked to make "*representations as to why those decisions should not apply to them, based on their particular circumstances*"[124] or "*to make out a case why the impugned decisions . . . should not be applied or should be applied differently*".[125]

118.3 Elsewhere, the Director-General and Minister say that the 6000 ZEP holders who made representations were effectively applying for individual exemptions under section 31(2)(b) of the Immigration Act.[126]

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[122] *Pridwin* id at para 206.
[123] AA p 010-56 para 162.
[124] AA p 010-56 para 163.
[125] AA p 010-62 para 179.
[126] AA p 010-22 para 54.

119 Given the Director-General's own confusion as to the nature and purpose of this invitation for representations, ZEP-holders could hardly have been expected to decipher what was required of them.

120 This confusion was plainly prejudicial to ZEP-holders and civil society. Had ZEP-holders known they could make out a case why the impugned decisions should not be applied to them, no doubt many more would have made representations. Likewise, had civil society organisations known that the Minister was contemplating individual exemptions, they could have assisted individual ZEP-holders to prepare representations.

121 Moreover, if the Minister did indeed intend opening up an individual exemption application process, he should have said so in clear, unambiguous terms. Given the life-altering consequences of the ZEP withdrawal, it was not enough for the Minister to obliquely dangle the possibility of an individual exemption in front of ZEP holders without providing any guidance as to how and on what basis such exemption could be obtained.

122 In response to its Rule 35(12) request, the HSF received several hundred representations that were made to the Minister by individual ZEP-holders, a far cry from the alleged 6000 representations. As is explained in the HSF supplementary affidavit, it is now clear that almost all of these “representations” were enquiries about procedure and desperate pleas for assistance in obtaining

alternative visas and permits. Only a handful address the situation in Zimbabwe[127] and the personal circumstances of the individual ZEP-holder.[128]

123 These "representations" make clear that most ZEP-holders believed that they were only entitled to submit enquiries, not genuine representations on the Minister's decision. Not one could be regarded as a complete application for an individual exemption.

124 In response to these representations, ZEP-holders received a pro forma, automated email advising them that the DHA would "*respond to [them] in due course*" and referring them to generic visa information on the VFS website. HSF has not had sight of any substantive, individual responses to specific representations, presumably because none exist.

<u>An opportunity for individual exemptions cannot cure the unfairness of the decision not to extend the ZEPs</u>

125 The individual exemption procedure now invoked by the Director General cannot cure the patent unfairness in the process. At the level of fact and law, the decision not to extend the ZEPs beyond 31 December 2022 and a decision to grant an individual exemption are distinct. At best, an exemption procedure tempers the consequences of the Minister's withdrawal decision on a case-by-case basis. The mere possibility of an individual exemption procedure thus cannot render the preceding withdrawal decision fair, since a successful

[127] See Bundle 2 p 75; Bundle 3 p 21; Bundle 5 p 65; Bundle 7 p 16

[128] See Bundle 2 p 53; Bundle 2 p 57; p 70; Bundle 3 p 78; Bundle 3 p 61; Bundle 3 p 54; Bundle 3 p 15; Bundle 4 p 3; Bundle 4 p 21; Bundle 5 p 28;

exemption application has no influence on the blanket withdrawal of the ZEP programme and the decision to refuse any further extensions beyond 31 December 2022.

No scope for meaningful input from civil society or the public

126 The Director-General admits that the only attempt to engage with civil society and the broader public was in the form of letters sent to just two NGOs, after the decision was taken.[129] There was no prior attempt to solicit the views of other civil society organisations or the public at large.

127 This is despite the fact that the termination of ZEPs will have far-reaching consequences extending beyond ZEP-holders, affecting their families, communities, and employers.

128 A termination of the ZEP programme will also, as the Minister himself stated in his 7 January 2022 press statement, have an impact "*on national security, international relations, political, economic and financial matters*".[130]

129 The 2017 White Paper further underlines the broad public significance of special dispensation programmes, like the ZEP, noting that these programmes promote national security and public safety, alleviate burdens on public resources, and help to combat corruption, organised crime and human trafficking.[131]

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[129] AA p 010-55 paras 160.6 – 160.7.

[130] Annexure "FA28 " p 001-182 para 13.

[131] Annexure "FA6" p 001-94.

130 Given the material and adverse impact that the Minister's withdrawal decision will have on society at large, it was incumbent on the Minister to comply with the requirements of section 4 of PAJA.

131 Although reference is made to an "*extensive public process*", the Director General in substance denies that there was any obligation to conduct a public consultation process.[132] The Minister and Director General invoke the limited comment procedure referred to above, but do not explain how what was effectively a call for representations from ZEP-holders provided the public at large with a meaningful opportunity to comment on the decision not to extend the ZEP programme beyond 31 December 2022.

132 The Minister and Director General's disregard for the views of the public stems from their belief that the public has nothing to add to the debate. For example, the Director General states categorically that "*the question of whether 12 months would be sufficient time to obtain alternative visas is not a matter which can be adequately answered by the public at large*".[133]

133 Given the manifest impact that the Minister's withdrawal decision will have on society at large, the Director General's derision for the views of the South African public and refusal to engage meaningfully with their views must render the decision procedurally unfair and procedurally irrational.

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[132] The Director General states that "*not every decision that is administrative in nature requires public consultation*" (AA p 010-62 para 177) and goes on to question whether representations from the public were necessary in this case.

[133] AA p 010-62 para 176.6.

134 Even if it were held that the Minister had no obligation to conduct a wider public consultation process, the Minister would, at the very least, have been obliged to consult with civil society organisations with expertise in the field of migrant rights. Our courts have recognised that where decisions have far-reaching consequences, procedural fairness and procedural rationality will often require consultation with civil society groups that have particular expertise.[134]

135 The Director General now seeks to defend this failure of consultation by asserting that civil society is unable "*to speak to the impact of the impugned decisions on ZEP holders*".[135] In effect, on the Director General's version, the views of civil society were meaningless and would have made no difference to the outcome. We address this "no difference" justification below.

No justification for departing from a fair and procedurally rational procedure

136 No proper justification has been advanced for dispensing with a fair process. Instead, the justifications presented only serve to compound the unfairness and irrationality of the process.

137 First, in the answering affidavit in the *African Amity* matter, the Director-General went as far as to assert that because the Minister was dealing with "*a category of foreigners"* there was *"no duty imposed on him to consult with the persons to whom the exemptions are issued.*"[136]

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[134] *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) at paras 70 – 73; *e.tv* (n 108).

[135] AA p 010-61 para 176.5.

[136] AA p 004-44 para 84.1.

137.1 This suggestion that foreign nationals have no entitlement to consultation, where gravely affect their rights and interests, is not only wrong in law, but reflects base prejudice

137.2 This reason alone renders the decision inherently unlawful, arbitrary, and irrational. Indeed, it is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.[137]

138 Second, the respondents assert that ZEP-holders civil society and the public are not capable of meaningfully commenting on the Minister's decision and that their representations would not alter his decision.

139 This is a "*no difference*" argument, which our courts have said is an impermissible excuse for denying a person or group a hearing.[138] As the Constitutional Court has repeatedly held, "*the denial of a fair hearing cannot be excused merely because one party asserts that their mind was made up and that a hearing would have made no difference.*"[139] This again reflects that the decision and comment procedure has not been approached with an open and inquiring mind.

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[137] *Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (Soc) Ltd* [2015] ZASCA 208; [2016] 1 All SA 483 (SCA); 2016 (3) SA 1 (SCA) at paras 44 – 45. See also *Scalabrini Centre, Cape Town v Minister of Home Affairs* [2017] ZASCA 126; [2017] 4 All SA 686 (SCA); 2018 (4) SA 125 (SCA) at paras 62-4.

[138] *John v Rees* [1969] 2 All ER 274 (CH) at 402; *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at para 176; *Pridwin* (n 118) at para 193.

[139] *Pridwin* id.

SECOND GROUND: THE DECISION BREACHES CONSTITUTIONAL RIGHTS

140 In granting exemption permits to Zimbabwean nationals for more than 13 years, the Minister's predecessors recognised that these permits were necessary to protect the rights of vulnerable people. The decision to strip ZEP-holders of this protection from 31 December 2022 amounts to a breach of those rights.

Limitation of rights

The right to dignity and related rights

141 The right to human dignity is a right to a life of human dignity.[140] In *Saidi,* the Constitutional Court acknowledged that visas and permits make such a life of human dignity possible, allowing "*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.*"[141]

142 As the Minister and Director-General concede, the right to human dignity has no nationality – it is inherent in all people, including non-citizens[142]

143 The exemption permits have made a life of human dignity possible for ZEP-holders. The decision to terminate the ZEP programme, and to grant no further

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

[141] Id.

[142] *Minister of Home Affairs & Others v Watchenuka & Another* 2004 (4) SA 326 (SCA) at para 25 (*Watchenuka*).

extensions beyond 30 June 2023, will strip thousands of Zimbabwean nationals of such a life, as it will render them undocumented.

144 Indeed, the termination of the ZEP programme limits the right to dignity in at least four key respects:

144.1 First, the risk of being left undocumented is itself a threat to the right to dignity.[143]

144.2 Second, the loss of working rights further compounds this limitation. In *Watchenuka,* the Supreme Court of Appeal confirmed that *"[t]he freedom to engage in productive work – even where that is not required in order to survive – is . . . an important component of human dignity*".[144] This is because productive employment is linked to "*self esteem and the sense of self-worth*", which are "*most often bound up with being accepted as socially useful*".[145]

144.3 Third, the risk of family separation and further disruption to family life is a further threat to a life of dignity.

144.3.1 In *Nandatu*, the Constitutional Court emphasised that "*[t]he right to family life is not a coincidental consequence of human dignity, but rather a core ingredient of it*".[146]

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[143] *Saidi* (n 140) para 18.

[144] *Watchenuka* (n 144) at para 27.

[145] Id.

[146] *Nandutu v Minister of Home Affairs* [2019] ZACC 24; 2019 (8) BCLR 938 (CC); 2019 (5) SA 325 (CC) at para 1.

144.3.2 Many Zimbabwean ZEP-holders have started families in South Africa and are now at risk of being separated from their partners and children. Relative visas, which do not include work rights, offer a painful choice: remain with family and face impoverishment or leave and break up the family unit.

144.4 Fourth, an abrupt termination of the ZEP programme threatens to strip ZEP-holders of their agency and autonomy.

144.4.1 Since the exemption permits were first granted in 2009, ZEP-holders have forged lives here in South Africa.

144.4.2 This is illustrated by the four ZEP-holders who have filed supporting affidavits have all been in the country for over a decade, have invested in businesses and careers, have built families, have children, and are breadwinners taking care of their families. Their ambitions and life plans are now intertwined with decisions taken in the expectation that the ZEP would not be terminated without due warning or consultation.

144.4.3 The granting of a limited extension of ZEPs, without due warning, and without a proper process, devalues and casts aside the lives and life choices that ZEP-holders have made since they arrived in South Africa.

145 In response, the Director-General asserts that the "*termination of an exemption regime which was always temporary in nature does not implicate the right to*

dignity of the beneficiary of that temporary regime".[147] The Director-General further seeks to create a false equivalence, suggesting that ZEP-holders are in no different position to the holders of temporary work visas, when those visas expire.

146 This reasoning places form over substance and fails to appreciate the lived experience and impact of the Minister's decision on the lives of ZEP-holders.

146.1 The fact that exemptions have been repeatedly extended by successive Ministers, over a period of more than 13 years, demonstrates that these exemptions were anything but temporary in nature and effect.

146.2 ZEP-holders were, on the Director-General's own admission, forced by the dire conditions in their country to come to South Africa. They have been in the country for over a decade, have invested in businesses and careers, built families, have children (some of whom were born and raised in the country) and have forged lives in South Africa for over a decade. They are far from temporary migrant workers.

146.3 Moreover, as the Constitutional Court has acknowledged, a permit to remain and work in the country allows a life of dignity.[148] Without documentation, enjoyment of full membership in society is impossible. Whenever a person is stripped of documentation, their dignity is limited.

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[147] AA, 010-65, para 190.

[148] *Saidi* (n 140) at para 18.

Whether that limitation is *justified* by a law of general application is a separate question.

147 Finally, the Director-General makes a broad floodgates argument, suggesting that if the Minister's decision violates the right to dignity, then this would somehow entitle ZEP-holders to a permanent extension of their permits. This, again, is mistaken.

148 Like all rights, the right to dignity may be limited. The Minister must show that any such a limitation is authorised by law and is reasonable and justifiable in the circumstances - something the Minister has plainly failed to do in this matter.

<u>The rights of children</u>

149 The unconstitutional effect of causing the ZEP to terminate is not confined to adults, as it also impacts on the rights of dependant children.

150 This is illustrated by LM and his family. LM and his wife are both ZEP-holders, with two young daughters aged 6 and 10. The children were born in South Africa, attend primary school, and have known no other home. In his supporting affidavit, LM explains that:

> *"It is not just me who will lose the rights and privileges that come with the ZEP, my wife and children will also lose their hopes and dreams of a future. We will become undocumented migrants because we do not qualify for any other visa in terms of the Immigration Act. My children will lose access to quality basic services such as education and healthcare."*[149]

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[149] LM's affidavit p 011-224 para 21.

151 Courts are duty-bound to consider children's rights in all matters affecting them. Section 28(2) of the Constitution provides that "*a child's best interests are of paramount importance in every matter concerning the child*".

152 In *Centre for Child Law v Media 24 Limited*,[150] the Constitutional Court explained that the "*best interests of the child principle enshrined in section 28(2) of the Constitution is a right in and of itself and has been described as the 'benchmark for the treatment and protection of children*'."[151] This is the "*golden thread*" which runs throughout our law relating to children.[152]

153 Furthermore, all proceedings, actions or decisions in matters concerning children must respect the child's right to dignity, treat the child fairly and equitably and protect the child from unfair discrimination on any ground

154 The Children's Act[153] gives further content and effect to section 28(2) and obliges courts and decision-makers to consider the best interests of children in all matters concerning children. All proceedings, actions or decisions in matters concerning children must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights.[154]

155 The decision to terminate ZEPs violates several established principles underpinning the best interests of the child.

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[150] *Centre for Child Law v Media 24 Limited* [2019] ZACC 46; 2020 (3) BCLR 245 (CC); 2020 (1) SACR 469 (CC).
[151] Id para 37.
[152] Brigitte Clark '*A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African family law*' 2000 Stellenbosch Law Review 3.
[153] 38 of 2005.
[154] Section 6(2) and 9 of the Children's Act.

155.1 First, it is not in the best interests of children to be undocumented for extended periods or to be separated from their parents and siblings, which, given the legal and factual barriers identified above, is likely to occur if the termination decision is allowed to stand.[155]

155.2 Second, termination of all ZEPs without regard to the individual circumstances of permit holders violates the principle that there should be individualised decision-making in all matters concerning children.[156]

155.3 Third, and relatedly, it would also violate the principle that children must be seen as individuals with their own inherent dignity and rights, not as mere appendages of their parents or caregivers.[157]

155.4 Fourth, termination without a proper process violates the duty to ensure that children are heard in all matters concerning their interests, either through their parents, representatives or in person, before actions are taken that have an adverse effect on their rights and life prospects.[158]

156 The Director-General does not deny that the Minister was under an obligation to protect the constitutional rights of children in taking his decision, nor does he deny the various principles flowing from the 28(2) constitutional right.

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[155] *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) (2012) (4) BCLR 329; [2012] ZACC 1 para 24.

[156] *Director of Public Prosecutions, Transva*al v Minister of Justice and Constitutional Development 2009 (4) SA 222 (CC) at para 123.

[157] *S v M (Centre for Child* Law as Amicus Curiae) 2008 (3) SA 232 (CC); 2007 (2) SACR 539; 2007 (12) BCLR 1312 at para 18. (Also see *Director of Public Prosecutions,* id at para123.

[158] *C v Department of Health and Social Development, Gauteng* (n 155) at para 27 (confirmed in *Pridwin* (n 118) at para 73 and in *Centre for Child Law v Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA) at para 22.

157 The Director-General is also unable to point to any evidence to suggest that the Minister or the Department considered the interests of children of ZEP-holders before taking the decision not to extend ZEPs beyond 31 December 2022.

158 Instead, the Director-General contends that there is no limitation of children's rights for two reasons:

158.1 First, ZEP-holders have now been given an opportunity to make representations, after-the-fact, and are free to make submissions on the impact of the decision on their children;

158.2 Second, ZEP-holders can apply for other visas or permits.

159 The first argument is unsustainable. As explained in detail above, the Minister has failed to follow a fair process. It is also obvious that no facet of that process was designed or carried out with children in mind.

159.1 The Minister's duty to ensure that the best interests of children are paramount in all matters concerning the child required that representations be sought <u>before</u> the decision was taken. In this case, representations were invited after-the-fact, once the decision to terminate the ZEP programme had already been taken.

159.2 Nothing in the letters to ZEP-holders informed them that they were asked to address the impact of the decision on their children, nor did these letters indicate that the Minister would consider extending their ZEPs on the basis of such impact. This is of particular significance, as the Director-General now tells the Court that where children are likely

to be separated from their parents "*it stands to reason*" that further extensions of their parents' ZEPs "*are likely to be accepted*".[159]

160 Finally, the suggestion that existing permits and visas are sufficient to protect the rights of children has already been addressed in detail. The legal and practical barriers that stand in the way of ZEP-holders obtaining alternative visas and permits by the 31 December 2022 deadline directly jeopardise the rights of children. However, the Director-General is entirely silent on what measures are in place to protect the rights of children of ZEP-holders where their parents or guardians have been unable to secure alternative visas or permits by this deadline.

Section 36 justification analysis

161 The onus falls on the Minister to prove that these limitations of fundamental rights are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[160]

162 Section 36(1) of the Constitution calls for a proportionality analysis.[161] This requires the Court balance the nature and severity of the limitation of ZEP-holders' rights, on the one hand, with the importance of the Minister's purposes, the extent to which the limitation achieves the purpose, and the availability of less restrictive means to achieve the purpose, on the other.[162]

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[159] AA p 010-72 para 216.1.2.

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

[161] *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) para 35; *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at para 18.

[162] *Esau* (n 112) at paras 108 – 111.

<u>Nature of the rights at stake</u>

163 The starting point in a section 36 justification analysis is the nature of the rights which have been limited because "*the more profound the interest being protected . . . the more stringent the scrutiny*".[163]

164 Although "*there is no hierarchy of rights . . . some rights establish the basic prerequisites for participation in our society*".[164] This includes the right to dignity, which is the font of all other rights in the Bill of Rights.

165 Like dignity, the rights of children should also be specially guarded when assessing whether a rights limiting provision or policy passes constitutional muster. This is because the best interests principle stands as a bulwark protecting some of the most vulnerable members of our society who are completely at the mercy of adults. Indeed, the Constitutional Court has recognised "*the innate vulnerability of children*" and "*the need to protect them and their distinctive status as vulnerable young human beings*".[165]

166 It is because of this innate vulnerability that the denial of a fair, child-centred process should be carefully scrutinised. Any deviation from a fair process gravely imperils the interests of children, who will be silenced unless they are afforded an opportunity to participate in the decisions that determine the course of their lives.

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[163] *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) para 45.

[164] *Secretary of the Judicial Commission of inquiry into Allegation of State Capture, Corruption and Fraud In the Public Sector Including Organ of State v Jacob Gedleyihlekisa Zuma (Helen Suzman Foundation as amicus curiae)* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 at para 222.

[165] *Centre for Child Law v Media 24 Limited* (n 150) at para 64.

<u>The nature and extent of the limitation</u>

167 As O'Regan J wrote in *Manamela*: "*The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be*."[166]

168 In this case, the termination of the ZEP programme trenches deeply into the rights of ZEP-holders. The right to remain in one's home, to take up gainful employment and to live together with one's family are core facets of the right to dignity, and core pillars on which stable childhoods depend.

<u>The putative justifications offered by the Minister and Director-General</u>

169 In his press statement on 7 January 2022, accompanying Directive 1 of 2022, the Minister advanced five primary justifications for the decision to terminate the ZEP programme. He has since abandoned two of them:

169.1 The Director-General now expressly disavows any claim that ZEP-holders have contributed to unemployment among South African citizens, or that the termination of ZEPs would in any way reduce unemployment.[167]

169.2 The Director-General also abandons any appeals to populist sentiments and now attempts to distance the Department from the xenophobia-laden messages of support for the Minister.[168]

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[166] *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 69.

[167] AA p 010-83 para 244.

[168] AA p 010-84 para 248.

170 The Director-General offers no explanation for the Minister’s abrupt abandonment of these justifications.

171 The Director-General asserts three remaining grounds as justification for the limitation of the ZEP-holders’ constitutional right.

171.1 First, he asserts that conditions in Zimbabwe have improved, justifying the termination of the ZEP programme.

171.2 Second, he asserts that the termination of the ZEP programme will alleviate pressure on the asylum system.

171.3 Lastly, he appeals to budget and resource constraints as a reason for terminating the ZEP-programme.

172 Before considering the putative justifications put forward by the Minister and Director-General, it is important to remember the weighty duty they bear to place material before the court that sustains their recourse to factual and policy considerations.

173 In *Teddy Bear Clinic*, the Constitutional Court explained that:

> *“As a starting point, it is important to note that where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law – usually the organ of state responsible for its administration – must put material regarding such considerations before the court. Furthermore, ‘[w]here the state fails to produce data and there are cogent objective factors pointing in the opposite direction the state will have failed to establish that the limitation is reasonable and justifiable’.”*[169]

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[169] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) at para 84

174 In *NICRO*, the Court specifically emphasised that "*[w]here justification depends on factual material, the party relying on justification must establish the facts on which the justification depends".*[170]

The alleged improvement in conditions in Zimbabwe

175 The Minister and Director General contend that, in light of "*the material change in the conditions in Zimbabwe from 2009 to date, the changes to the exemption regime to allow for the extension of ZEPs for a 12-month period . . . constitute a reasonable and justifiable limitation on the rights of ZEP holders*".[171]

176 In making this sweeping claim, the Director-General does not dispute that:

176.1 Rates of extreme poverty in Zimbabwe have increased since 2009, rising from 22.8% of the population to 49% in 2020;[172]

176.2 Inflation rates continue to spiral;[173]

176.3 Political instability and violence remain endemic;[174]

176.4 The human rights situation in Zimbabwe continues to deteriorate[175]

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[170] *NICRO* (n 160) at para 36.

[171] AA 010-75, para 220.

[172] FA p 001-40 – 41 paras 48 - 50; Not denied in AA p 010-100 para 331-333 (*"denied [only] insofar as they do not accurately record what is contained in Annexures FA 16 and FA 17.1*").

[173] Id.

[174] FA p 001-41 paras 51 – 56; Not denied in AA p 010-100 paras 334 – 335 (*"The contents hereof are not disputed insofar as they accurately record what is contained in Annexures FA18 to FA22."*)

[175] Id.

177 The only evidence of an alleged improvement that the Director-General can point to is a minor uptick in GDP between 2021 and 2022, which took place as a result of a single bumper harvest, after the economy contracted the year before.[176]

178 The Director-General also makes a number unsubstantiated claims, including that hyper-inflation has abated and that unemployment in Zimbabwe has fallen to 5.2%.[177] In fact, headline inflation shot up to 256.9% in July 2022[178] and according to the World Bank report annexed to the Director-General's own affidavit, the unemployment rate is 19.1% (excluding those who have given up looking for work)".[179] Applying an expanded definition, which includes discouraged job seekers, the unemployment rate is in over 44%.[180]

179 Again, since claims of improvements are factual claims, it was incumbent on the Director-General to present clear and compelling evidence to support these claims.[181] However, no such evidence has been forthcoming.

180 In sum, the Minister has failed to provide any evidence to suggest that the conditions in Zimbabwe have improved. Nor has the Minister explained how it could be said that the special circumstances that warranted the exemptions for over 13 years have materially changed to an extent that this justifies the termination of the ZEP programme and the limitation of rights that flow from that decision.

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[176] See AA p 010-76-7 paras 223-4; RA p 018-43 para 99.1.

[177] AA p 010-84 para 247.

[178] RA p 018-45 para 100.2 (See annexure RA10).

[179] Annexure AA 9 p 010-163.

[180] Annexure RA11.

[181] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1165.

<u>Burdens on the asylum system</u>

181 The Minister has suggested that the exemptions were initially introduced, in part, to alleviate the burden on the refugee status determination system, as thousands of Zimbabwean nationals had applied for asylum. The suggestion is that this backlog has cleared, thus obviating the need for the ZEP programme.

182 The Director-General also asserts that "*there is no basis to contend that the changes effected to the exemption regime will significantly increase pressure on the asylum system*".[182]

183 To begin with, the Director-General does not dispute that the asylum system is plagued by systemic backlogs and delays.[183]

184 Moreover, the termination of the ZEPs will no doubt exacerbate this problem, as there is nothing preventing the majority for ZEP-holders from applying for asylum at this time. Indeed, the Director-General incorrectly downplays the number of ZEP holders who would likely seek asylum, after their permits have expired. In this regard, the Director-General ignores the many DZP holders who would have applied for asylum in 2009 had they not had the option of obtaining an exemption permit. Those same DZP-holders would have subsequently obtained ZSPs and then ZEPs, as there was little need for them to apply for asylum while they had the protection of these permits.[184]

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[182] AA p 010-79, para 230.

[183] FA pp 010-49 – 50 paras 74 – 77. Noted in AA p 010-102 - 103 paras 350-2.

[184] RA p 018-47 para 105.

185 In these circumstances, any increase in asylum applications from ZEP-holders will inevitably add to the backlogs of asylum-seekers awaiting decisions, further burdening the limited resources in the asylum system.

Budgetary constraints and the prioritisation of resources

186 In his press statements, the Minister referred to unspecified budgetary constraints within the DHA and stated that a decision has been taken to "prioritise" services for South African citizens. In his answering affidavit, the Director-General further makes the bald allegation that due to the impact of Covid-19 and increased demand for civic services for South African citizens, and various budgetary cuts, a decision to prioritise services to citizens had to be made.[185] No further details are forthcoming.

187 In *Rail Commuters Action Group*, the Constitutional Court said the following regarding the evidentiary requirements that must be met before an organ of state can successfully invoke budgetary or resource constraints as a justification for limiting rights:

> "*…In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are*

[185] AA p 010-82, paras 234 – 240.

reasonable and appropriate measures in the overall context of their activities."[186] (Emphasis added)

188 If genuinely intending to rely on budgetary constraints, the Director-General and Minister were therefore required to take this Court into their confidence and place the details of the precise character of the resource constraints before this Court.

189 The Minister's press statement claimed that the total cost of exemption programmes to the state was over R188,7 million, between 2010 and 2020, suggesting that the Department could not afford to extend the programme. Nothing has been provided to substantiate that alleged expense. Moreover, the Minister failed to account for the revenue earned from exemption permits. Indeed, on the figures provided by the Minister himself, the ZSP and ZEP programmes generated approximately R366 million in this period, more than double the alleged cost. These programmes have paid for themselves.[187]

190 The Director-General also fails to draw any comparison between the alleged cost of maintaining the ZEP programme and the laborious alternatives that he proposes, including:

190.1 The case-by-case assessment of individual section 31(2)(b) exemption applications, based upon non-existent criteria and in the absence of any guidance, which is certain to be a more time-consuming and costly task for the Department;

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[186] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 88.

[187] See tabulated estimations; RA p 018-50 para 109, 4

190.2 The adjudication of individual applications for waivers under section 31(2)(c), which is again a convoluted, case-by-case assessment, requiring substantial time and resources;

190.3 The determination of applications for permanent residence and visas which, in many cases, would also require careful case-by-case assessments;

190.4 The adjudication of asylum claims and potential appeals and reviews, adding to an already overburdened and under-capacitated asylum determination system.

Relationship between the limitation and its purpose

191 The Minister's failed justifications reveal that there is no proportionate, let alone rational, connection between the limitation of rights and a legitimate governmental purpose or policy.

192 As established above, the grave incursion into the rights of ZEP-holders and their children, in particular, is not related to any legitimate purpose.

193 Crucially, HSF does not contend that a termination of the ZEP exemption programme could never be justifiable. Its case is that the Minister and Director-General have not justified this particular decision to terminate the ZEP programme, its timing and its implementation. Until they can meet its burden of placing facts before this Court which justify so gross a limitation of rights, their

decision must fall. That is necessary consequence of the culture of justification demanded by the Constitution.[188]

Conclusion on the limitation of rights

194 The Minister's decision is therefore an unjustified limitation of rights, which must be declared unconstitutional and invalid in terms of section 172(1)(a) of the Constitution. It also stands to be reviewed and set aside in terms of section 6(2)(i) of PAJA, as it is unconstitutional and unlawful.

[188] *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 18.

THIRD GROUND: FAILURE TO CONSIDER THE IMPACT ON ZEP-HOLDERS AND THEIR CHILDREN

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

196 However, the respondents have not disclosed any information or documents reflecting such deliberations:

196.1 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.

196.2 On the respondents' own version, the Minister simply approved the Director-General's submissions on the same day they were handed to him, without any further interrogation.[189]

196.3 The Minister's 7 January 2022 press statement, and all subsequent official communications, are also silent on this question of impact.

196.4 In its founding affidavit, the HSF expressly invited the respondents to attach to their answering affidavit all relevant documents and records

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[189] African Amity AA p 018-132 para 90.3 (African Amity Caselines p 004-47).

which were relevant to the Minister's decision, in lieu of a Rule 53 record.[190]

196.5 No documents or information were forthcoming. 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.[191] No details were forthcoming as to what information was considered, by whom, and when.

196.6 Such unsubstantiated claims do not give rise to any genuine dispute of fact on the well-established principles set out, *inter alia*, in *Fakie NO v CCII Systems (Pty) Ltd*[192] and *Wightman v Headfour (Pty) Ltd*.[193] The respondents' approach is also inconsistent with the special duties of organs of state in constitutional litigation, which require that they be candid and fully transparent with the Court.[194]

196.7 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

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[190] FA p 001-28 para 20.

[191] AA 010-86, para 255.

[192] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 55 -56.

[193] *Wightman v Headfour (Pty) Ltd* (n 82) at paras 12-3.

[194] See n 83 above.

families.[195] This was met with a blanket refusal from the respondents.[196]

197 There is no evidence that the Minister applied his mind to this critical issue. And even if the Minister did, 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. The fact that the Minister failed to call for representations from affected ZEP-holders and civil society before taking a decision compounds the error.

198 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.

199 This also renders the decision unreasonable under section 6(2)(h) of PAJA. The guiding principles on reasonableness, as summarised in *Bato Star*,[197] specifically require an assessment of the "*the nature of the competing interests involved and the <u>impact of the decision on the lives and well-being of those affected</u>.*" (Emphasis added)

200 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.

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[195] RA 1 p 018-85 para 4.

[196] RA 2 p 018-89 para 8.

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

201 In *e.tv*,[198] the Constitutional Court recently addressed a similar failure by the Minister of Communications in determining the switch-off date for analogue television signals.

201.1 In addition to the Minister's the failure to consult, the Court also invalidated that decision on the basis that the Minister had failed to investigate the impact of this cut-off date on households that were unable to obtain set-top boxes in time.

201.2 The Court repeated the three-stage test laid down in *Simelane*[199] for procedural irrationality involving a failure to consider relevant information, requiring an assessment of:

201.2.1 Whether the factors ignored are relevant;

201.2.2 Whether this failure to consider relevant facts is rationally connected to the purpose of the decision; and

201.2.3 Whether ignoring relevant facts "*colours the entire process with irrationality*".[200]

201.3 The Court held that each of these elements were satisfied, as the Minister's "*determination was made without any reliable sense of its impact on millions of indigent persons, whose currently working television sets will be rendered useless.*"[201]

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[198] *e.tv* (n 108).

[199] *Simelane* (n 105) at para 39.

[200] Id.

[201] *e.tv (Pty) Limited v Minister of Communications and Digital Technologies* (n 108) at para 78.

201.4 This information was both relevant and essential to a rational decision. *"If a central purpose of the analogue switch-off decision is to mitigate the adverse impact of switch-off,"* the Court held, *"a process that failed to provide guidance on the number of households requiring STBs is inevitably coloured with irrationality."*[202]

201.5 While the Court held that the *Minister was "at large to determine how such information was obtained"*, it was impermissible for her make a decision without having called for relevant information on the impact the decision would have on television viewers.[203]

202 This reasoning applies with equal, if not greater, force to this case, as the Minister's decision has far more profound consequences for the lives of ZEP-holders and their children than a decision to terminate television signals.

202.1 First, the impact of the decision on their lives is certainly a relevant consideration.

202.2 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" was to mitigate the disruptive consequences of the decision, but that required the Minister to be apprised of information on the likely impact.

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[202] Id.

[203] Id at para 79.

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

FOURTH GROUND: CONDITIONS IN ZIMBABWE

203 The respondents' false claims about alleged improvements in Zimbabwe, which we have addressed in detail above, provide further grounds to review and set aside the Minister's decision.

204 First, these claims involve material errors of fact, on the test established in *Pepcor*[204] and *Dumani v Nair*.[205]

205 Such errors arise where a decision-maker is mistaken as to facts that are "*objectively verifiable*" and are material to the decision.[206] Where established, they provide grounds for review under both PAJA and the principle of legality.

206 The respondents' insistence that the "*the economic situation has improved in Zimbabwe since 2009*" is an objectively contestable statement of fact, which has been demonstrated to be false. Zimbabwe's spiralling rates of extreme poverty, its persistently high inflation rates, and its unemployment rates are not matters of subjective evaluation.

207 These facts were also material to the decision. Successive Ministers renewed the exemption programmes under section 31(2)(b) on the basis that the dire conditions in Zimbabwe provided "*special circumstances*", justifying exemptions. The Minister has now concluded that those conditions no longer exist, on the basis of demonstrable errors.

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[204] P*epcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) at para 48.

[205] *Dumani v Nair and Another* 2013 (2) SA 274 (SCA) at para 32.

[206] *See Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) at para 12.

208 Second, the Minister's assessment of these conditions, and his conclusions on the existence of "*special circumstances*" under section 31(2)(b), are not left to his mere say-so. On the contrary, the existence of "*special circumstances*" is a jurisdictional fact, meaning that the Minister's conclusions are objectively justiciable.[207]

209 In *Walele v City of Cape Town*,[208] the Constitutional Court explained that "*[m]ore is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist*". Even where jurisdictional facts may be framed in subjective terms, "*[t]he decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds*". (Emphasis added). That requires, at minimum, that the information before the decision-maker "*constituted reasonable grounds*" for the decision-maker's opinion.

210 This means that, regardless of whether the jurisdictional requirements of section 31(2)(b) are cast as objective (a matter of fact) or subjective (a matter of discretion), there must be reasonable grounds, based in information before the Minister, for his determination that the special circumstances which warranted the ZEPs no longer exist or that they no longer warrant further extensions of the ZEPs.

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[207] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) at para 78: "*The conditions precedent are those facts that must be complied with before the discretion may be exercised. They are determined by the Legislature. The official has no choice in respect of these conditions. The exercise of a discretionary statutory power by an administrative official therefore, must be linked to compliance with the conditions precedent. The official must be satisfied that the conditions precedent or jurisdictional facts are present before exercising the discretionary power.*"

[208] *Walele v City of Cape Town* 2008 (6) SA 129 (CC) at para 60.

211 The respondents have failed to disclose any information or documents that the Minister consulted on the conditions in Zimbabwe before reaching his decision. Nor has the Minister deposed to an affidavit explaining his decision-making process and what information he considered. The absence of any transparency is once again fatal, in circumstances where the respondents have a duty to take this Court into their confidence.

212 As already noted above, the Director-General has belatedly sought to rely on a 2019 World Bank report, which was attached to HSF's papers, and two 2022 reports produced by the World Bank and the IMF, which both post-date the Minister's decision.

213 Such *ex post facto* attempts at justification are impermissible, as the reasonableness and rationality of the Minister's decision must be assessed by the information that was before the Minister at the time.[209]

214 In any event, as we have shown, the Director-General's attempt to cherry-pick recent GDP growth figures from these reports could not conceivably provide any reasonable, let alone rational, basis for concluding that conditions in Zimbabwe have materially improved. The respondents blithely ignores all other indicators in these reports, which reflect economic turmoil and dire poverty.

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[209] See *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) paras 24 – 28; *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA) at para 11; *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd* 2020 (1) SA 450 (CC) at para 39.

FIFTH: THE DECISION IS OTHERWISE UNREASONABLE AND IRRATIONAL

215 The Minister's decision was also irrational and unreasonable in a range of further respects. We concentrate on three.

216 First, the respondents have provided no explanation as to why the Minister chose to extend ZEPs for only 12 months, and now a further 6 months, despite the Director-General's recommendation that the Minister consider "*extending the validity of the exemptions for a period of three years, alternatively a period of 12 months*".[210]

216.1 In the answering affidavit, the Director-General offers the evasive response that there is "*no automatic entitlement to another three-year renewal*", without answering why the Minister chose to disregard the Director-General's recommendations.[211]

216.2 The Minister's latest press statement, announcing a further extension until 30 June 2023, also offers no explanation for why he has chosen this limited period, let alone an explanation as to why he now considers the original 12-month extension deficient.

216.3 In the absence of any explanation, the only conclusion can be that the Minister failed to apply his mind to this issue and that he lacks reasonable and rational grounds for his decision.

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[210] FA 8 p 001-100 para 6.

[211] AA p 010-89 para 265.

217 Second, given the Minister's attempt to justify his decision on the basis of alleged backlogs and budgetary incapacity, it was incumbent on the Minister to explain how his decision to terminate the ZEP programme is rationally and reasonably connected to these goals. As we have demonstrated above, no rational or reasonable explanation has been provided, in circumstances where the Minister's decision is likely to increase backlogs and demands on his Department's resources.

218 Third, all parties are agreed that a human rights-based approach entitled each ZEP-holder to make representations.[212] However, that principle was plainly ignored when the Minister decided to terminate the ZEP programme and to refuse further extensions, without hearing from ZEP-holders or the broader public.

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[212] AA p 010-90 para 268.

REMEDY

219 The applicant seeks three forms of relief, in terms of this Court's remedial powers under section 172(1) of the Constitution and section 8 of PAJA.

220 First, the applicant seeks a declaration that the Minister's decision is unconstitutional, unlawful and invalid.

220.1 Whenever this Court finds that conduct is inconsistent with the Constitution, it is bound to declare the conduct invalid under section 172(1)(a) of the Constitution. That is a mandatory duty that cannot be avoided.[213]

220.2 We stress that this order is not intended to interfere with the legal validity of the existing extensions of ZEP permits until 31 December 2022 and again until 30 June 2023, or the further protections afforded by the Minister's Directives 1 of 2021 and 2 of 2022.

220.3 This order is solely directed at the Minister's decision to terminate the ZEP programme and not to grant any further exemptions or extensions beyond 30 June 2023.

221 Second, it is just and equitable to set aside the decision and to remit it back to the Minister to make a fresh decision, following a proper, procedurally fair process that complies with the requirements of sections 3 and 4 of PAJA.

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[213] *Rail Commuters Action Group* (n 186) at paras 107 – 108.

221.1 In terms of section 8(1) of PAJA, a remittal order such as this is the default remedy, with or without appropriate directions.

221.2 The applicant does not seek to substitute the Minister's decision, nor does the applicant seek to dictate to the Minister what type of fair process ought to be followed.

222 Third, it is rust and equitable to grant an appropriate temporary order, to protect the rights of ZEP-holders while the Minister conducts a fair process and makes a fresh decision.

223 This temporary relief would entail that pending the conclusion of a fair and lawful process and the Minister's further lawful decision:

223.1 Existing ZEPs will not expire and will remain valid;

223.2 ZEP-holders will continue to enjoy the protections afforded by Directive 1 of 2022, namely that:

> *"1. No holder of the exemption may be arrested, ordered to depart or be detained for purposes of deportation or deported in terms of the section 34 of the Immigration Act for any reason related to him or her not having any valid exemption certificate (i.e permit label / sticker) in his or her passport. The holder of the exemption permit may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act*
>
> *2. The holder of the exemption may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for the reason of not having valid permit indicated in his or her passport; and*
>
> *3. No holder of exemption should be required to produce-*

> *(a) a valid exemption certificate;*
>
> *(b) an authorisation letter to remain in the Republic contemplated in section 32(2) of the Immigration Act when making an application for any category of the visas, including temporary residence visa."*

224 This remedy falls within the scope of this Court's just and equitable remedial discretion under section 8 of PAJA and section 172(1)(b) of the Constitution. Both provisions empower this court to grant "*any*" just and equitable remedy. Section 8(1)(e) of PAJA specifically empowers the Court to grant temporary relief.

225 The Constitutional Court has emphasised that the phrase "*any order*" in section 172(1)(b) of the Constitution is "*as wide as it sounds*",[214] serving as an injunction to do *"practical justice, as best and as humbly as the circumstances demand*".[215]

226 These powers have been used to fashion wide-ranging temporary remedies to protect vulnerable groups, pending further decisions and processes. For example:

226.1 In *Allpay II*[216], the Constitutional fashioned an interim measure to protect vulnerable social grant beneficiaries. The Court invalidated the contract for payment of social grants, but suspended the invalidity, for a maximum period of five years until a new tender was awarded so as not to interrupt the payment of social grants.

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[214] *Corruption Watch NPC v President of the Republic of South Africa* 2018 (10) BCLR 1179 (CC) at para 68.

[215] *Mwelase v Director-General, Department Of Rural Development And Land Reform Another* 2019 (6) SA 597 (CC) at para 65.

[216] *Allpay Consolidated Investment Holdings (Pty) Ltd And Others v Chief Executive Officer, South African Social Security Agency And Others* 2014 (4) SA 179 (CC).

226.2 In *Black Sash Trust v Minister of Social Development,*[217] the Constitutional Court fashioned a further interim order to protect the rights and interest of grant recipients, after the tender for payment of social grants was due to expire on 31 March 2017.

226.3 In *South African Informal Traders Forum v City of Johannesburg*,[218] the Constitutional Court granted an interim interdict to prevent the City of Johannesburg from interfering with the rights of informal traders in the inner city.

227 In the circumstances of this case, considerations of justice and equity demand similar temporary protection for the rights of ZEP-holders, their families, and their children pending a further decision.

228 The respondents wrongly characterise this temporary remedy as a substitution order, replacing the Minister's decision with a decision of the Court's own. This is incorrect:

228.1 First, the effect of this order is simply to preserve the *status quo* pending the outcome of a fair process and the Minister's further decision.

228.2 Second, this temporary order retains the directives that the Minister published on 7 January 2022 and 2 September 2022. Far from imposing a new decision on the Minister, it keeps the Minister's existing

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[217] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* 2017 (3) SA 335 (CC).

[218] 2014 (4) SA 371 (CC).

directives in place until such time as the Minister has made a fresh decision.

228.3 Third, such relief falls squarely within this Court's powers under section 8(1)(e) of PAJA to grant "temporary relief", which is distinct from a substitution order under section 8(1)(c)(ii)(aa) of PAJA. In any event, the relief is plainly "just and equitable" in terms of section 172(1)(b) of the Constitution.

229 Finally, the respondents' bald appeals to the separation of powers, without more, carry little weight in the assessment of a just and equitable remedy. The Constitutional Court reminds us that "*the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility*" to grant just and equitable remedies.[219]

230 In any event, since the temporary relief is merely an extension of the protections that the Minister has seen fit to grant in favour of ZEP-holders, this Court is not asked to impose a novel solution on the executive.

CONCLUSION AND COSTS

231 For the reasons set out above, this application ought to succeed, with costs – including the costs of three counsel. This is in accordance with the *Biowatch* principle.[220]

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[219] *Mwelase*(n 215) at para 51.
[220] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

232 In terms of section 31.2 of the LPC Code, we confirm that we act *pro bono* in this matter.

STEVEN BUDLENDER SC
CHRIS MCCONNACHIE
ZIPHOZIHLE RAQOWA

Counsel for HSF
Chambers, Sandton
7 September 2022

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32323/22

In the matter between:

HELEN SUZMAN FOUNDATION **Applicant**

and

MINISTER OF HOME AFFAIRS **First Respondent**

DIRECTOR-GENERAL OF HOME AFFAIRS **Second Respondent**

and

CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA **Applicant as Intervening Party**

THE HELEN SUZMAN FOUNDATION'S CHRONOLOGY

THE CHRONOLOGY ON MERITS

DATE	EVENT	REFERENCE
April 2009	Introduction of the Dispensation of Zimbabweans Project (DZP), which resulted in approximately 242,731 Zimbabwean applicants receiving exemption permits.	FA p 011-24 para 5.1; and at FA p 001-30 para 28; AA p 010-43 para 110.

September 2011	The DHA briefed the Portfolio Committee of Home Affairs on the rationale for the DZP and its impact.	FA p 001-30 para 29; Annexure FA1 p 001-82; Not denied: AA p 010-94 para 290.
21 May 2014	Press statement from the DHA wherein former Minister Gigaba praised the success of the DZP and emphasises that "*[i]t is not South Africa's intention to reverse the benefits of the dispensation*".	FA p 001-31 para 30.3; Annexure FA3 p 001-89; Not denied: AA p 010-93 para 293.
12 August 2014	Announcement of the Zimbabwean Special Permit (ZSP), to replace the DZP. Approximately 197,790 permits were granted to DZP-holders.	FA p 001-24 para 5.2; p 001-31 para 30; Annexure FA2 p 001-87; AA p 010-46 paras 126 – 127; AA p 010-48 paras 136.
September 2017	Announcement that the ZSP would be replaced by the Zimbabwe Exemption Permit (ZEP). Approximately 178,412 permits were granted to ZSP-holders.	FA p 001-33 para 33; Annexure FA5 p 001-92; AA p 010-49 para 140; p 010-95 para 301 – 302.
20 September 2021	Memorandum from the Director-General to the Minister, recommending that the Minister "*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.*"	FA p 001-60 para 119; Annexure FA 8 p 001-96 - 102; African Amity AA p 018-132 para 90.3 (African

	The Minister approved the recommendation on the same day.	Amity Caselines p 004-47).
19 November 2021	First public statement on ZEPs, advising that "*No decision has been made on the Zimbabwean Exemption Permit*" and that "*the matter of the Zimbabwean Exemption Permit is still to be considered by the cabinet.*"	FA p 001-35 para 35; Annexure FA7 p 001-95. Not denied: AA p 010-96 para 307.
24 November 2021	Meeting of the Cabinet to discuss, amongst other things, the future of the ZEP. The next day, 25 November 2021, the Cabinet released a statement reflecting the decision not to extend ZEPs, subject to a 12-month "grace period".	FA p 011-36 para 37; Annexure FA9 p 011-104; Not denied: AA p 010-97 para 315
29 November 2021	DHA issued Directive 10 of 2021 in terms of which the ZEP-holders were granted a 12-month 'grace period' following the expiry of the ZEPs and were instructed to apply for other mainstream visas. This directive further suggested that banks and other service providers should discontinue provision of services to ZEP-holder as from 1 January 2022 unless they have receipts of their applications for mainstream visas.	FA p 001-37 para 38; Annexure FA10 p 001--117; Not denied: AA p 010-98 para 317.
13 December 2021	The DHA issued Directive 11 of 2021,	FA p 001-37 para 39;

	withdrawing Directive 10 of 2021.	Annexure FA11 p 001-118; Not disputed: AA p 010-98 para 317 – 318
29 December 2021	Second public statement on ZEPs, announcing that the DHA had been "successful" in an urgent application challenging Directive 10 of 2021. Respondents concede that the litigation turned on urgency and the merits were not considered or decided.	FA p 001-37 para 40; Annexure FA12 p 001-120; AA p 010-98 paras 319 - 320.
4 January 2022	The Minister sent a letter to the Minister of International Relations and Cooperation; requesting that his decision "*not to extend the exemptions*" be communicated to the Zimbabwean government.	RA p 018-12 para 19; Annexure RA5 p 018-148.
5 January 2022	The Minister issued a public notice, published in various newspapers, informing ZEP-holders that he 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.*"	FA p 001-25 para 8; and at p 001-38 para 42; Annexure FA13 p 001-122; Not denied: AA p 010-98 para 322.
7 January 2022	The Minister published Directive 1 of 2021 in the *Government Gazette*, ostensibly issued on 29 December 2021, recording that the Minister had "*decided to extend the Zimbabwean exemptions granted to Zimbabwean nationals for a period of 12 months*" to allow the ZEP-holders to apply	FA p 001-38 para 43; Annexure FA14 p 001-123; Not denied: AA p 010-99 para 324 and 325. *African Amity* AA p 018-

	for other visas.	137 para 95.4 (African Amity p 004-52)
7 January 2022	The Minister issued a press statement confirming that he made a decision, after considering the Director-General's submissions in September 2021, "*that the exemptions granted to Zimbabwean nationals should not be extended anymore.*	FA p 001-25 para 8; p 001-39 para 44; Annexure FA15 p 001-130 para 10; Not denied: AA p 010-91 para 274; p 010-99 para 326.
18 February 2022	Meeting between the Minister and the Scalabrini Centre of Cape Town wherein the Minister made it clear that he had decided to terminate the ZEP programme.	RA p 018-12 para 20; James Chapman's SA: p 018-290
2 September 2022	Directive 2 of 2022: the Minister issued a new directive and press statements in terms of which the 12-months grace period for ZEPs is extended for a further six months, until 30 June 2023. The purpose of this extension is to afford ZEP-holders "*another opportunity to apply for one or other visas and / or waivers provided for in the Immigration Act*". The press statement concludes that "*There will be no further extension granted by the Minister*".	

PROCEDURAL CHRONOLOGY

DATE	EVENT	REFERENCE
14 June 2022	HSF launched this review application.	001-1 to 001-226
15 June 2022	The application was served on the Minister, the State Attorney and the Director-General.	002-1 to 002-3
20 June 2022	The respondents filed a notice of intention to oppose.	003-1 to 003-4
27 July 2022	CoRMSA launched an application to intervene as co-applicants in the HSF application.	006-1 to 006-144
29 July 2022	A case management meeting was held with the Acting Judge President. Timetable agreed for the combined hearing of the HSF matter, the *African Amity* matter (Case No. 51735/2021); and Zimbabwean Immigration Federation matter (Case No. 6386/22) on 5 – 7 October 2022.	
15 August 2022	The respondents filed their answering affidavit.	AA p 010-1 to 010-267
18 August 2022	HSF filed a notice in terms of Uniform Rule 35 (12) and (14) requesting document relating to waiver applications and representations for further extensions.	011-1 to 011-4
24 August 2022	The respondents filed their reply to HSF's notice.	015-1 to 015-5
29 August 2022	HSF filed its replying affidavit	RA p 018-1 to 018-341

5 September 2022	HSF wrote to the respondents requesting a copy of the DAC’s progress report and recommendations made to the Minister; which formed the basis for Directive 2 of 2022.	
6 September 2022	Sigogo Attorneys wrote to DLA Piper refusing to provide a copy DAC’s progress report and recommendations.	
6 September 2022	HSF filed a notice of intention to amend its notice of motion	019-1 to 019-3