

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

CONSORTIUM FOR REFUGEES AND  
MIGRANTS IN SOUTH AFRICA

Applicant as Intervening Party

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REPLYING AFFIDAVIT


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I, the undersigned,

NICOLE FRITZ

state under oath as follows:

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- 1 I am the Executive Director of the Helen Suzman Foundation (HSF), the applicant in this matter. I was the deponent to the founding affidavit in this application.
- 2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct, to the best of my knowledge and belief.
- 3 Where I make submissions on the applicable law, I do so on the advice of the applicants' legal representatives.
- 4 I have read the answering affidavit deposed to by the Director-General, Mr Makhode. In reply, I will use the terms, acronyms and abbreviations as defined in the founding affidavit.

#### INTRODUCTION AND OVERVIEW

- 5 As at the date of this affidavit, four months remain until the expiry of ZEPs, on 31 December 2022. More than 178,000 ZEP-holders face the risk of being left undocumented, upending their lives, careers and families.
- 6 This impending crisis requires a clear and consistent response from the respondents. Yet the Director-General's 115-page answering affidavit reveals contradiction and utter disarray within his Department – all to the manifest prejudice of acutely vulnerable ZEP-holders and their families.
- 7 The answering affidavit filed in this matter is in critical respects inconsistent with the Director-General's version under oath in the *African Amity* matter. It is

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inconsistent with the Minister's decision, the Minister's various public statements, and the information provided to ZEP-holders over the preceding nine months.

8 In this reply, I will outline these contradictions and their consequences for ZEP-holders. I address the following issues in turn:

8.1 First, I highlight the Director-General's contradictory explanation of the nature and effect of the Minister's decision;

8.2 Second, I outline the facts that are not disputed by the Director-General, which are sufficient to declare the Minister's decision to be unlawful and invalid;

8.3 Third, I address the barriers facing ZEP-holders in obtaining alternative visas and permits before 31 December 2022 and the Director-General's lack of transparency on the measures in place to address these barriers;


8.4 Fourth, I address the impact on ZEP-holders and the Director-General's attempt to discredit the experiences of ZEP-holders;

8.5 Fifth, I deal with the Director-General's responses to the five grounds of review;

8.6 Sixth, I address the question of remedy;

8.1 Seventh, I provide a brief comment on the regrettable public statement that the Minister has issued on this litigation;

8.2 Finally, I provide responses to individual paragraphs in the answering affidavit.

  
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- 9 Before addressing these topics, I make two initial observations.
- 10 First, the Director-General mischaracterises this application as seeking a permanent extension of ZEPs. He goes as far as to suggest that the relief sought would somehow allow all undocumented Zimbabwean nationals to obtain a ZEP. That ignores the notice of motion and the clear explanation that I provided in the founding affidavit. I reiterate that:
- 10.1 The HSF does not contend that the Minister is obliged to extend ZEPs in perpetuity, nor does it claim that the Minister may never, under any circumstances, decide to refuse further extensions.
- 10.2 Instead, the HSF contends that a decision to terminate the ZEP programme and to refuse further exemptions could only be lawful if it follows a fair and rational process, based on sound justification, and ZEP-holders are afforded a meaningful opportunity to regularise their status or to place their affairs in order.
- 10.3 The question is whether the Minister satisfied these minimum criteria in making the decision under review. He plainly did not.
- 10.4 The HSF seeks an order remitting the decision back to the Minister, for him to follow a fair and rational process, coupled with temporary relief pending a fresh decision. The duration of that relief is dependent on the Minister's actions.
- 10.5 This relief is narrowly confined to existing ZEP-holders: the 178,412 people who applied for and currently possess permits affording them the

  
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rights to live, work, run businesses, and study in South Africa. This relief does not extend ZEPs to other Zimbabwean nationals or undocumented persons.

11 Second, the Director-General has failed in his duties to be open and transparent with this Court. He has offered scant information on how the Minister reached his decision, what information was placed before him, and how the Department is currently handling ZEP-holders' applications and representations. This is evident from the many evasive, vague and contradictory responses, which I address below.

12 This lack of transparency led the HSF to deliver a Rule 35(12) / (14) request, requiring the respondents, within five days, to disclose documents, referenced in the answering affidavit, casting light on these internal processes. I attach a copy of this request, marked "RA 1".

12.1 On 25 August 2022, the respondents' attorneys delivered a notice indicating that they will deliver some of the documents, in redacted form, albeit without providing any indication of when they intend to do so. They further refused to provide the balance of the documents. I attach a copy of this response as "RA 2". I submit that that the refusal to deliver these documents was impermissible and unlawful. The HSF's rights in this regard are expressly reserved.

12.2 On the same day, HSF's attorneys responded by email, attached as "RA 3", indicating that we would agree to an extension for the filing of redacted documents, until 31 August 2022, on condition that the respondents

  
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consent to the delivery of a supplementary affidavit addressing these documents.

12.3 At the time of filing this affidavit, the respondents' attorneys have failed to respond to this proposal. The HSF has not had sight of the documents that the respondents have undertaken to provide. Accordingly, I reserve the right to file a supplementary affidavit addressing these documents when they emerge.

#### THE MINISTER'S DECISION AND THE DIRECTOR-GENERAL'S CONTRADICTIONARY VERSION

13 The Director-General now asserts that there was "*no decision taken to terminate all ZEPs*"<sup>1</sup> and that "*no decision has been taken not to grant further exemptions to ZEP-holders*".<sup>2</sup> He contends that the Minister has only decided to extend all ZEPs to 31 December 2022.<sup>3</sup>

14 The Director-General seeks to create the impression that the Minister *may* grant further extensions, beyond the end of this year.

14.1 He suggests that "*if it becomes practically impossible to process visas timeously, there is nothing which precludes the Minister from granting further extensions to deal with backlogs.*"<sup>4</sup>

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<sup>1</sup> First and Second Respondent's Answering Affidavit deposited to by Livhuwani Tommy Makhode on 15 August 2022 (hereinafter referred to as "AA") p 010-14 para 17; p 010-91 para 274.

<sup>2</sup> AA p 010-14 para 18.

<sup>3</sup> AA p 010-14 para 19.

<sup>4</sup> AA p 010-103, para 352.

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- 14.2 He then suggests that the Minister may grant individual extensions to ZEP holders, stating that "*further extensions [are] available based on the individual circumstances of ZEP holders.*"<sup>5</sup>
- 14.3 He does not state that the Minister is, in fact, intending to grant these extensions, what criteria would be applied, or when those decisions will be made..
- 15 The Director-General's attempt to reinterpret the Minister's decision, after the fact, is a contrivance and is unsustainable. Not only is there no required confirmatory affidavit from the Minister, more critically: it is inconsistent with the decision communicated to ZEP-holders and the public at large; it is directly contradicted by the Minister's own public statements, media appearances, and correspondence; and it is inconsistent with the Director-General's version in his answering affidavit in the *African Amity* matter. All of these previous statements and documents confirmed that the Minister has decided to terminate the ZEP programme and will entertain no further extensions of ZEPs beyond 31 December 2022.
- 16 First, the notice issued to all ZEP-holders on 5 January 2022,<sup>6</sup> published in various newspapers, was prominently headed "*non-extension of exemptions*" and 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*"

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<sup>5</sup> AA p 010-75 para 220.

<sup>6</sup> Annexure FA 13 p 001-122.

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Act" (emphasis added). The identical language was used in the letters sent to ZEP-holders in January 2022.<sup>7</sup>

17 Second, the Minister's press statement, issued on 7 January 2022, confirmed that he had made this decision after considering the Director-General's submissions in September 2021 "*that the exemptions granted to Zimbabwean nationals should not be extended anymore*".<sup>8</sup> The Minister further stated that "*I decided to approve the recommendation made by the Director-General not to extend the exemptions to Zimbabwean nationals*."<sup>9</sup>

17.1 The Director-General's September 2021 submissions, referenced in the Minister's press statement, were notably headed "WITHDRAWAL AND/OR NON-EXTENSION" of ZEPs<sup>10</sup> and recommended that the Minister "*exercises [sic] 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*."<sup>11</sup>

17.2 This was echoed in the Cabinet decision on 25 November 2021 which, the Director-General insists, merely endorsed the Minister's decision. The minutes reflect that "*Cabinet decided to no longer issue extensions to the Zimbabwean special dispensations*. However, it decided on a 12 months grace period at the expiry of the current ZEP."<sup>12</sup>

17.3 These documents all reflect that a final decision had been taken.

<sup>7</sup> Annexure AA 4 p 010-145 – 147.

<sup>8</sup> Annexure FA 15 p 001-128 at p 001-130 para 10.

<sup>9</sup> Id p 001-131 para 11.

<sup>10</sup> Annexure FA 8 p 001-96.

<sup>11</sup> Id p 001-100 para 5.

<sup>12</sup> Annexure FA 9 p 001-104 at p 001-108 para 6.3.

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18 Third, the Director-General's answering affidavit filed in the *African Amity* matter contradicts the version that he now seeks to present. In view of the extraordinary contradictions between the position advanced by the Director-General, under oath, in both matters, I attach a copy of that answering affidavit, without annexures, as "RA 4".

18.1 In that previous affidavit, the Director-General confirmed that, on 20 September 2021, he made the recommendation to the Minister that ZEP permits "*should not be extended anymore*".<sup>13</sup>

18.2 The Director-General proceeds to explain that the Minister approved the submission on the same day: "*He approved my recommendation and added the words "12 months". The 12 months written on the document was meant to be the period within which the affected Zimbabwean nationals would be afforded a opportunity to apply for one or other visas provided for in the Immigration Act.*"<sup>14</sup>

18.3 All of this was consistent with a final decision. The purpose of the 12-month period was also made clear. This was solely for the purpose of requiring ZEP-holders to apply for other visas. It was not intended to facilitate further comment or input on the Minister's decision, let alone facilitate further exemption applications to extend individual ZEPs.

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<sup>13</sup> African Amity AA p 004-46 - 47 para 90.2.

<sup>14</sup> African Amity AA p 004-47 para 90.3.

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18.4 If there was any doubt, the Director-General further confirmed that: "*the Minister decided in September 2021 not to extend the exemptions granted to Zimbabwean nationals*".<sup>15</sup>

18.5 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, nor did the Director-General suggest that the Minister was open to considering further extensions of ZEPs, on either a blanket or individual basis, after 31 December 2022.

19 Fourth, in his letter to the Minister of International Relations and Cooperation, 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.*" (Emphasis added) A copy of this letter is attached as "RA 5".

20 Fifth, in his engagements with the Scalabrini Centre of Cape Town following his decision, the Minister has been clear that he has decided to terminate ZEPs with effect from 31 December 2022 and that he will not entertain any further exemptions for ZEP-holders. I refer to the supporting affidavit of Mr James Chapman of the Scalabrini Centre, which will be filed with this affidavit. Mr Chapman describes his meeting with the Minister in February 2022 and subsequent correspondence, which directly rebuts the Director-General's version in the answering affidavit.

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<sup>15</sup> African Amity AA p 004-32 para 61.2.

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21 Sixth, 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. For example:

21.1 In a radio interview on 14 December 2021, shortly after Directive 10 was withdrawn, the Minister told the interview host:

"There should not be any impression that the decision about terminating the Zimbabwean Exemption Permit and then giving them a 12 month grace period to apply for other statuses, there is no withdrawal of that decision." (Emphasis added, Interview time stamp 9:49)

And further:

"The initial decision about the Zimbabwean Exemption Permit, nothing has changed and nothing is going to change. It still stands." (Emphasis added, Interview time stamp: 11:24)

21.2 A recording of the interview can be found at <https://www.702.co.za/articles/434586/decision-to-end-zimbabwean-exemption-permit-has-not-changed-aaron-motsoaledi?ref=pid:94>. I have listened to the recording and confirm that the quotations set out above reflect the Minister's statements.

21.3 In a further statement published by the DHA on 28 June 2022, the Minister called upon "*all affected Zimbabwean nationals to ignore the false hope created by the HSF and adhere to the procedures outlined by the Department in various public notices and communication*". I attach a copy of this statement as annexure "RA 6". I will return to address this statement and the Minister's in further detail below.

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22 Finally, the Director-General's new version directly contradicts what individual ZEP holders have been told when they have attempted to make representations to the Minister.

22.1 In the *African Amity* matter, the Director-General attached to his affidavit, with evident approval, correspondence between Ms Lauren Maliwa, a ZEP holder, and his Department. A copy of this correspondence is annexed as "RA 7"

22.2 On 2 January 2022, Ms Maliwa wrote to the Minister imploring him to "Please consider giving us another 4 years. We have nowhere to stay in Zim and no work".

22.3 On 30 January 2022, the Minister's attorneys, Sigogo Inc, responded to Ms Maliwa, indicating that they act on behalf of the Minister, and stating in no uncertain terms that "*due to the circumstances and reasons advanced in the letter that you have received, the Minister is unable to reverse the decision.*" Ms Maliwa was also told that, "*as requested in the letter, kindly proceed to apply for one or other visa provided for in the Immigration Act.*"

23 As a result, I am constrained to submit that the Director-General's belated attempt to reinterpret the Minister's decision is not genuine and falls to be rejected.

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



24.1 The Minister has decided not to grant any further extensions of ZEPs in terms of section 31(2)(b) of the Immigration Act -- in simple terms, he has decided to terminate the ZEP programme;

24.2 He decided to grant a limited extension until 31 December 2022, solely for the purpose of allowing ZEP-holders to apply for other permits or visas; and

24.3 The Minister has refused to grant further exemptions to ZEP-holders, on either a blanket or individual basis, after 31 December 2022.

#### WHAT IS NOT IN DISPUTE

25 While the Director-General's answer runs to 115 pages, the essential legal principles and material facts that underlie the applicant's case are not disputed.

26 First, the Director-General appears to accept that the Minister's decision could only be lawful if, at minimum, there was:<sup>16</sup>

26.1 A fair and rational process, involving prior notification and an opportunity to make representations;

26.2 Sound justification for the termination; and

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

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<sup>16</sup> AA p 010-85 paras 250 – 251.

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- 27 Second, 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.<sup>17</sup> Instead, the Director-General relies on a call for representations made after the Minister's decision was communicated, contending that this constituted a fair process.<sup>18</sup>
- 28 Third, there is no genuine dispute that the majority of ZEP-holders would not be able to obtain mainstream permanent residence permits and visas before 31 December 2022, due to the legal and practical barriers standing in their way.<sup>19</sup>
- 29 Fourth, 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.<sup>20</sup> The Director-General simply notes the extensive evidence of these backlogs and delays, without offering any meaningful explanation as to how they could possibly be addressed in the four-months remaining.<sup>21</sup>
- 30 Fifth, there is no dispute that Zimbabwe remains politically unstable, political opposition is suppressed, and rates of extreme poverty have increased since 2009.<sup>22</sup> The Director-General points to evidence of a minor increase in GDP

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<sup>17</sup> 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, which is precisely when, at the latest, the decision not to extend and to grant a 12 month grace period was made.

<sup>18</sup> AA p 010-58 para 173.

<sup>19</sup> Founding Affidavit deposed to by Nicole Fritz of the Applicant on 10 June 2022 (hereinafter referred as "FA") p 001-43 para 59. Bald denial AA p 010-100 para 337. The Minister notes 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.

<sup>20</sup> FA p 001-49 - 50 - paras 74 – 77. Noted AA p 010-102 - 3 paras 350-2.

<sup>21</sup> See AA paras 351-2.

<sup>22</sup> 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.

between 2021 and 2022,<sup>23</sup> while conceding all evidence showing that conditions have otherwise deteriorated or not improved.<sup>24</sup>

31 On these common cause facts alone, there is more than sufficient basis to declare the Minister's decision to be unlawful and invalid.

### THE BARRIERS TO OBTAINING ALTERNATIVE VISAS AND PERMITS

32 I highlight several key features of the Director-General's response to the legal and practical barriers facing ZEP-holders in obtaining alternative visas and permits.

33 First, as already noted, there is no dispute that the Department is plagued by systemic backlogs and delays, that stand in the way of the speedy determination of applications for visas and permits.<sup>25</sup> The Director-General simply notes the extensive evidence of the backlogs and delays.<sup>26</sup>

34 The Director-General repeats 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. However, more than eight months later, no further information is provided regarding this special task team or other measures in place to assist and process ZEP-holders' applications. 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

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<sup>23</sup> AA p 010-77 para 224.

<sup>24</sup> AA p 010-100 para 331.

<sup>25</sup> FA p 010-49 – 010-50 paras 74 – 77. Noted AA p 010-102- 103 paras 350-2.

<sup>26</sup> AA p 010-100 para 355.

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detailed account of the supposed special task team. This is even more so given the respondents' special duties as state litigants, who have a higher duty to be fair, honest and forthright with the Court.

- 35 The lack of any information on this "special task team" can be contrasted with the detailed information that was provided when the Department announced the creation of a different task team, on 3 March 2021, to review all immigration permits. The media statement released at the time had detailed information on the members of the permit task team, the scope of its investigations, as well as the proposed deadline that the permit task team had to report back to the Minister. I attach a copy of that media statement as annexure "RA 8".
- 36 The attempt to shift the burden to the HSF to show that visas and applications will not be processed in time is incorrect – these are facts exclusively within the DHA's knowledge and it owes a duty to take this Court into its confidence by presenting full and complete facts. The respondents have manifestly failed in this duty.
- 37 Second, in a new about-turn, the Director-General suggests that ZEP-holders are "*not without remedies*" if they are unable to obtain other visas, as he claims that the Minister will consider individual exemption applications from ZEP-holders under section 31(2)(b) of the Immigration Act.<sup>27</sup> The Director-General further claims that the Minister will somehow decide to grant individual exemptions, on a case-by-case basis, based on the representations submitted by ZEP-holders to the [ZEPenquiries@dha.gov.za](mailto:ZEPenquiries@dha.gov.za) address. This is patently misleading.

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<sup>27</sup> AA p 010-22 para 52.

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37.1 The Director-General contradicts what the Minister told Scalabrini in his letter in April 2022, as confirmed in Mr Chapman's affidavit.

37.1.1 In its letter to the Minister, Scalabrini specifically asked whether the Minister would consider individual exemption applications from ZEP-holders under section 31(2)(b).

37.1.2 The Minister replied "*I do not intend to grant exemptions in terms of section 31(2)(b) anymore.*" A copy of this letter is attached to the affidavit deposed to on behalf of Scalabrini.

37.2 The Minister has always been adamant that he has decided to terminate ZEPs with effect from 31 December 2022 and that he will not entertain any further exemptions for ZEP-holders.

37.3 Furthermore, none of the communications to ZEP-holders have alerted them to any opportunity to apply for individual exemptions, the criteria that must be satisfied, or what information is required. On the contrary, all notices have suggested that ZEP-holders must use the "grace period" to apply for other visas or waivers, with no reference to individual exemptions.

37.4 The call for representations was also silent on any possibility of exemptions. It merely stated: "*Should you 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](mailto:ZEPenquiries@dha.gov.za)".*

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37.5 Moreover, as the Director-General acknowledges, individual exemption applications can only be made through the formal channels prescribed in Regulation 28 of the Immigration Regulations, requiring an application to be made on Form 47.<sup>28</sup> I attach a copy of that form as "RA 9", which sets out the detailed information required from those seeking individual exemptions. In addition, this application has to be made through VFS.

37.6 In their further supporting affidavits, GN, EWS, DJN and LM, all express 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.

38 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.

39 If, however, the Minister and the Director-General have truly changed their stance on the availability of section 31(2)(b) exemptions, that must be publicly communicated to all ZEP-holders, with clear and explicit instructions on the

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<sup>28</sup> AA p 010-22 para 53.

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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.

40 The Director-General fails to explain how such a process could be completed within four months, before the expiry of ZEPs on 31 December 2022, and how tens of thousands of individual applications are to be processed before this deadline. The existing backlogs within the Department make such a process entirely impossible.

41 Third, the Director-General now claims that there are no barriers to ZEP-holders submitting applications for permanent residence under sections 25 and 26 of the Immigration Act, in direct contradiction of what the Minister and the Director-General have previously stated.

41.1 In its letter to the Minister, Scalabrini specifically asked about the feasibility of counting some of the period under the ZEPs towards permanent residence under sections 25 or 26.

41.2 The Minister replied, at paragraph 11 of his letter, stating that "*The period spent in the country under the exemption regime, cannot be counted towards permanent residence status. The permits granted impose a condition that: "ZEP permit does not entitle the holder the right to apply for permanent residence irrespective of the period of stay in the RSA".*"

41.3 In the *African Amity* matter, the Director-General repeatedly stated that ZEP-holders "*do not qualify for permanent residence and direct residence*

*provided for in sections 25 and 26 of the Immigration Act.”<sup>29</sup> He further stated that “There was no condition attached to the exemption that the exemption holder may qualify for permanent residence.”<sup>30</sup>*

41.4 Even if the Department has now changed its stance on permanent residence applications, that would need to be properly communicated to ZEP-holders and proper arrangements would need to be put in place to process their applications.

41.5 Four months would not allow sufficient time for these applications to be determined. The persistent backlogs and delays within the Department again make this an impossibility.

42 Fourth, the Director-General seeks to place blame on ZEP-holders for not applying for waivers, claiming that “only” 4000 waiver applications have been submitted. The HSF has issued a Rule 35(12) request for these applications, to establish whether this is indeed accurate. While the respondents have undertaken to provide redacted copies, no documents had been delivered by the time of filing this reply. But in any event, I point out that:

42.1 The general lack of information from the Minister and the Department, the backlogs and delays inherent in the process, coupled with the legal complexity, uncertainty and costs of submitting waiver applications, all explain why ZEP-holders may be reluctant to make such applications.

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<sup>29</sup> African Amity AA p 004-42 para 77.2.

<sup>30</sup> African Amity AA p 004-43 para 80.3.

- 42.2 In order to apply for a waiver in terms of the Immigration Act, one is required to identify the specific provisions in the Immigration Act and Regulations which the applicant requests the Minister to waive and must show “good cause” for the granting of such a waiver.
- 42.3 In practical terms, this means that a ZEP-holder would have to demonstrate that there is compelling justification for the Minister to waive a particular regulatory requirement.
- 42.4 Therefore, waiver applications are, in their very nature, highly technical and require the involvement of lawyers to properly prepare these applications. Most ZEP-holders would simply be unable to afford the costs.
- 42.5 Without the assistance of legal practitioners, ZEP-holders would not know which regulatory requirements they should ask the Minister to waive – let alone the procedural requirements.
- 42.6 There is the further barrier of non-refundable application fees, payable to VFS.
- 42.7 The Minister has not created any streamlined process for the submission of waiver applications by ZEP-holders and has not provided any clarity and certainty as to timelines in light of the 31 December deadline for the ZEPs.
- 42.8 The ZEP-holders are still left in the dark as to what the Minister requires from them for purposes of the waivers, how the process will unfold and whether they get an opportunity to challenge the Minister's decision should it be unfavourable.

42.9 I refer to the affidavit of FW, an employer of a ZEP-holder, who describes, in detail, her experience assisting her employee in attempting to obtain a waiver. She and her employee ultimately gave up, in frustration at the complexity, costs and delays in the process. This offers direct rebuttal to the Director-General's suggestion that the waiver process is somehow an easy and effective remedy.

42.10 It is therefore disingenuous for the Director-General to blame ZEP-holders for not applying for waivers when there has been no guidance and transparency from his Department.

43 In respect of the 4000 alleged waiver applications, the Director-General fails to provide any meaningful explanation as to how these waiver applications are being processed: who will read them, when will decisions be communicated, and how will this process be finalised before the 31 December 2022 deadline. Instead, the Director-General, simply avers that "*these applications are currently being considered*", with no further details.<sup>31</sup>

43.1 In our Rule 35 (12)/(14) notice, the HSF requested the respondents to provide all documents which show how many of these waiver applications have been refused, how many have been granted and/or are still being considered.

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<sup>31</sup> AA p 010-30 para 72.

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43.2 The respondents have refused to provide these documents, but state that *"in any event, the Minister has not as yet taken any decision on the waiver applications"*.<sup>32</sup>

43.3 This is an astonishing admission: in more than nine months not a single decision on waiver applications has been taken. The effect is that approximately 4000 ZEP-holders are left in a state of paralysis - not sure what to do to regularise their stay in light of the approaching deadline.

44 Fifth, the Director-General suggests that ZEP-holders are entitled to apply for asylum in terms of the Refugees Act.<sup>33</sup>

44.1 This contradicts what the ZEP-holders and civil society were told by the Minister. In his letter of April 2022, the Minister said *"I have never in the meeting held on 18 February 2022 said that the exemption holders may apply for asylum...I do not believe that they satisfy the qualification criteria for refugee status..."*.

44.2 The divergence between the Minister and the Director-General on this question of eligibility offers little comfort to affected ZEP-holders.

44.3 In any event, the Director-General does make any attempt to meaningfully deny the backlogs and delays in the asylum system.<sup>34</sup>

44.4 Nor does the Director-General meaningfully deny that the termination of ZEPs would place further strain on the asylum system, as ZEP-holders

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<sup>32</sup> RA 2 para 6.2.

<sup>33</sup> AA p 010-100 para 335.

<sup>34</sup> AA p 010-102 – 103, paras 351 - 2.

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may seek to apply for asylum as a means to regularise their status. He simply contends that there has been no increase in the asylum applications, without providing any details or specifics to support this claim.

44.5 In any event, ZEP-holders' permits currently give them protection, which explains why they may be reluctant to apply for asylum at this stage. However, it is natural to expect a surge in the asylum applications shortly before and after 31 December 2022, as ZEP-holders are likely to resort to the asylum process after exhausting other options.

45 In sum, the vigour with which this application is opposed by respondents stands in stark contrast to the utter failure to provide full and complete details of the Department's internal processes. It remains clear that the majority of ZEP-holders have no meaningful opportunity to regularise their status before the 31 December 2022 deadline and the Department has no coherent plan in place to address this.

#### THE IMPACT ON ZEP-HOLDERS

46 The Director-General claims that the impact on ZEP-holders is "speculative" and repeatedly denies that ZEP-holders face the risk of being left undocumented, with all the vulnerabilities that entails.

47 This denial is based on the two assertions, already addressed above, that a) the Minister has not made any decision to terminate the ZEP programme, and b) that there are meaningful opportunities available to ZEP-holders to regularise their

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status before 31 December 2022. Both assertions are false, for the reasons set out above.

- 48 The Director-General makes no attempt to deny the experiences of the four ZEP-holders who deposed to affidavits in support of this application. Instead, the Director-General repeats the same refrain in response to each of these affidavits, blaming the ZEP-holders for not making representations to the Minister.

*"I point out that GN does not state that she has made submissions to the Minister seeking an extension of her ZEP or that she has applied for and been refused a visa. Her complaint that she will be forced to leave South Africa is entirely speculative. If she chooses not to take up the opportunities afforded to her to regularise her stay in the country, the consequences of that choice will follow."<sup>35</sup>*

- 49 The four individuals, GN, EWS, DJN and LM, have all deposed to further affidavits, responding to the Director-General's criticisms. A further ZEP-holder, SSK, who attempted to make representations to the Minister, has also deposed to an affidavit describing his experiences. Their affidavits explain that:

49.1 While the Director-General claims that letters were emailed to all ZEP holders in January 2022, this was not always the case.

49.2 It was clear to the deponents that the Minister had already decided to terminate ZEPs, leading them to believe that there was no point in making representations.

49.3 None were aware that they were being called on to make representations on possible individual exemptions, as the Minister's position was clear that

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<sup>35</sup> AA p 010-111 para 405.

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he did not intend to renew any ZEPs, either on a blanket or individual basis. The Director-General's statements have taken them by surprise.

49.4 All express confusion about the effectiveness and legality of securing an extension of their permits in terms of section 31(2)(b) via an email sent to [ZEPenquiries@dha.gov.za](mailto:ZEPenquiries@dha.gov.za). Historically, the process has entailed a highly formalised application that required compliance with clear guidance and assessment criteria. Achieving the same goal by a simple email seemed unbelievable to them.

49.5 Despite the lack of any information, EWS and SSK attempted to make representations by emailing the [ZEPenquiries@dha.gov.za](mailto:ZEPenquiries@dha.gov.za) address, but have received no response, not even an acknowledgement of receipt.

50 The Director-General's response to the individual ZEP-holders further betrays the artificiality and formalism of his stance. Faced with detailed accounts of their personal circumstances, on affidavit, the Director-General does not once suggest that their circumstances would make them eligible for further extension of their ZEPs or fresh exemptions under section 31(2)(b). Instead, their accounts are met with the blanket insistence that they should have made representations to the Minister, even though the Minister has been unequivocal that his mind is made up and that no further exemptions would be considered.

#### FIRST GROUND: PROCEDURAL UNFAIRNESS AND IRRATIONALITY

51 At no point in the answering affidavit does the Director-General seek to suggest that there was any public participation process or attempt to solicit representations from ZEP-holders before the Minister took his decision.

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52 Instead, the Director-General refers in his affidavit to an "*extensive public process implemented to seek comment from every affected ZEP holder and from civil society organisations representing the interests of ZEP holders*", which is all alleged to have occurred after the Minister's decision was announced in January 2022.<sup>36</sup>

53 This declaration marks yet another about-face by the Director General and Minister, who categorically stated in *African Amity* that "*there is no duty imposed upon [the Minister] to consult with the persons to whom the exemptions are issued*".<sup>37</sup> The Minister and Director-General now seek to convince this Court that, despite holding this view, they nevertheless conducted an "*extensive public process*" that gave ZEP holders and the public a meaningful opportunity to make representations regarding the decision not to extend the ZEP programme.

54 The disingenuity of this stance is apparent in the poorly formulated invitation for representations, which was clearly an afterthought.

55 As explained below, the Minister's reliance on this putative invitation for representations falters in several respects:

55.1 First, the invitation came after the decision not to extend the ZEPs had already been taken.

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<sup>36</sup> AA p 010-62 - 63 para 180.

<sup>37</sup> *African Amity* AA p 004-44 para 84.1.

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55.2 Second, the invitation 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.

55.3 Third, the opportunity for individual exemptions which the Director General and Minister tout cannot cure the unfairness of the decision not to extend the ZEPs.

55.4 Fourth, there was neither engagement with civil society nor the public at large.

The invitation for representations came after-the-fact

56 Part and parcel of a meaningful opportunity to be heard is that the opportunity arises *before the decision is taken*. 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.

57 As noted, the Minister clearly communicated a decision not to entertain further extensions of ZEPs beyond 31 December 2022 in January 2022. Although there is evidence that the decision was taken well before its publication,<sup>38</sup> 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*.

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<sup>38</sup> FA p 001-36 paras 36-7.

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58 Yet it is at this point that the Minister says representations were invited from ZEP holders. The ultimate decision having already been taken, it is unclear how representations made at that point could have given ZEP holders and the public a meaningful hearing.

The invitation for representations was meaningless in the circumstances

59 It is also trite that 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.

60 The Minister contends that various press statements and two letters to organisations purporting to represent Zimbabweans in South Africa advised ZEP holders and the public of their right to make representations "*regarding the non-extension of exemptions and the 12-months' period*".<sup>39</sup> This, so the Minister contends, provided ZEP holders and the public with a meaningful opportunity to be heard.

61 In each of these communications, the following was conveyed to ZEP holders and the public:

61.1 First, that the Minister had taken a decision in terms of the Immigration Act "*not to extend the exemptions granted to Zimbabwean nationals*".<sup>40</sup>

61.2 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*

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<sup>39</sup> AA p 010-56 para 162.

<sup>40</sup> Annexures AA2; AA3; AA4; and AA6.

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*Immigration Act*" and, further, that ZEP holders were "*required*" to make use of the 12 month period to make such applications.<sup>41</sup>

61.3 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*".<sup>42</sup>

62 It is unclear what ZEP-holders were meant to make of the Minister's communiques.

63 To begin with, the notices are inherently contradictory, conveying a decision not to extend the ZEP that had already been taken, together with an invitation to make representations on that decision. Any ZEP holder or member of the public would justifiably wonder what was expected of them, given the obvious futility of making representations on the merits of a decision that had already been taken.

64 Tellingly, the Director-General does not provide a clear account of what, exactly, was being elicited from ZEP holders and the public.

64.1 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*"<sup>43</sup> - that is, the decision not to grant further exemptions and the decision to grant a 12-month grace period.

64.2 In the next breath, the Director-General suggest that the ZEP-holders were being asked to make "*representations as to why those decisions should*

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<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> AA p 010-56 para 162.

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*not apply to them, based on their particular circumstances"<sup>44</sup> or "to make out a case why the impugned decisions . . . should not be applied or should be applied differently".<sup>45</sup>*

64.3 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.<sup>46</sup>

65 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.

66 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.

An opportunity for individual exemptions cannot cure the unfairness of the decision not to extend the ZEPs

67 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

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<sup>44</sup> AA p 010-56 para 163.

<sup>45</sup> AA p 010-62 para 179.

<sup>46</sup> AA p 010-22 para 54.

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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 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 consultation with civil society

68 The Director-General admits that the only attempt to engage with civil society was in the form of two letters sent to the NGOs in the *African Amity* matter.

69 Not only was this attempt patently inadequate, it was also disingenuous. Indeed, the Director General reveals in his affidavit that he believed that these were organisations which merely "*claim[ed] . . . to represent the interests of Zimbabweans living in South Africa*".<sup>47</sup> The Director General was not convinced that sending letters to these organisations would adequately canvas the views of organisations representing and advocating for the interests of ZEP holders.

70 The Director General further states that civil society is unable "*to speak to the impact of the impugned decisions on ZEP holders*"<sup>48</sup> and, further, that as far as the present state of the Zimbabwean economy is concerned, the views of the Zimbabwean government should be preferred over that of civil society.<sup>49</sup>

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<sup>47</sup> AA p 010-60 para 176.2.

<sup>48</sup> AA p 010-61 para 176.5.

<sup>49</sup> AA p 010-60 para 176.3.

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71 Here again the Director General and Minister have made paltry gestures at engagement while revealing that they are intent on disregarding anything that civil society organisations may say.

#### No public participation

72 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. According to the Director General, “[w]hat is in issue in this application is whether . . . (individual) ZEP holders will have a meaningful opportunity to be heard”.<sup>50</sup> The views of the public at large are dismissed out of hand on the basis that they will amount to “*broad generalisations and emotive language, based on no objective evidence*”.<sup>51</sup>

73 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.

#### **SECOND GROUND: UNJUSTIFIED LIMITATION OF RIGHTS**

74 The main themes which emerge from the answering affidavit in respect of the limitation of rights are:

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<sup>50</sup> AA p 010-62 para 178.

<sup>51</sup> AA p 010-62 para 176.7.

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74.1 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*".<sup>52</sup>

74.2 Those ZEP-holders with children are entitled to make representations relating to their particular situations. For this reason, the Director-General asserts that the decision is not in breach of the children's section 28 rights.<sup>53</sup>

74.3 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 with the possibility of further extensions based on individual circumstances constitute a reasonable and justifiable limitation on the rights of ZEP holders*".<sup>54</sup>

### ***The right to dignity and related rights***

75 The Director General agrees that the right to human dignity has no nationality – it is inherent in all people, including non-citizens. As long as a person is in the Republic, he enjoys this fundamental right.

76 In the answering affidavit, the Director General accepts that unless a ZEP-holder can qualify for an asylum seeker permit, a temporary visa or permanent residence permit under the Immigration Act, the decision not to extend the ZEPs

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<sup>52</sup> AA p 010-65, para 190.

<sup>53</sup> AA p 010-72, para 216.1.

<sup>54</sup> AA p 010-75, para 220.

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will render the ZEP-holder undocumented and liable for arrest, detention and deportation.<sup>55</sup>

77 However, the Director-General denies that the Minister's decision to terminate the ZEP programme violates the right to dignity on four grounds.

78 First, the Director-General contends that the expiry of a temporary regime does not implicate the right to dignity. "*It does not lie in the mouth of the beneficiaries of a temporary exemption regime*", the Director-General asserts, "*to accept the benefits of the temporary regime and then to claim when the regime comes to an end that the temporary nature thereof violates their rights.*"<sup>56</sup>

78.1 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. People have built lives, families and careers in South Africa over this time.

78.2 The right to dignity calls for an assessment of the lived experience and impact of the Minister's decision on the lives of ZEP-holders, not a formalistic focus on the alleged "temporary" nature of their permits. Substance must be placed over form.

79 Second, the Director-General contends that there is no breach of the dignity right if ZEP-holders do not qualify for other visas or permits.<sup>57</sup> In effect, his answer is that if ZEP-holders do not follow the rules, there is no violation of dignity.

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<sup>55</sup> AA p 010-66 – 67, paras 196 and 198.

<sup>56</sup> AA p 010-65 para 191.

<sup>57</sup> AA p 010-67 para 196.

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- 79.1 This response again reflects complete disregard for the reality facing ZEP-holders.
- 79.2 ZEP-holders followed the rules, by submitting applications and paying the fees for exemption permits, which were granted to them under section 31(2)(b). The Minister has now decided to remove this legal avenue and to refuse any further exemptions to ZEP-holders.
- 79.3 The legal and practical barriers facing ZEP-holders would now make it impossible for most to obtain alternative visas and permits before the deadline, even if they qualified.
- 79.4 The Director-General's utter confusion as to the remedies available to ZEP-holders, coupled with his failure to disclose any plans to address the admitted backlogs and delays in his Department, betray his insistence on rule-following.
- 80 Third, 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.
- 80.1 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 failed to do in this matter.
- 80.2 In any event, the relief sought is clear. If this Court agrees that the Minister's decision is unlawful and unjustifiably limits rights, it must be

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remitted to the Minister to allow him to make a fresh decision, following a proper process that allows for due consideration of the rights of ZEP-holders.

81 Fourth, the Director-General 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. This is not true.

81.1 The ZEP-holders were, on the Director-General's own admission, forced by the dire conditions in their country to come to South Africa. These ZEP-holders 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.

81.2 Moreover, holders of temporary work visas are also restricted in their activities and the type of work they may engage in. No such restrictions were placed on ZEP-holders, who were allowed to live, work, study and operate businesses.

82 Therefore, it cannot be seriously denied that the Minister's decision limits the right to dignity. That limitation is compounded by the Minister's refusal to engage with ZEP-holders before taking his decision, sending the message that their voices and experiences count for nothing.

  
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### *The rights of children*

83 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.

84 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.

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

85.1 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;

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

86 The first argument is unsustainable. The Minister has failed to follow any fair process, for the reasons set out above.

87 These general principles of procedural fairness have particular importance where children are concerned. The respondents have a higher duty to tread carefully when children's rights are implicated and section 28(2) puts the rights of children at the forefront of any decision.

88 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 before

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the decision was taken. The best interests of children must be considered when the decision is taken, not after the fact.

89 Moreover, 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.

90 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*".<sup>58</sup>

91 However, there is nothing in the letters to ZEP holders or the public notices which states that the Minister was contemplating further extensions on those grounds, let alone any request for ZEP-holders to make representations on the risk of family separation. On that basis alone, the process followed was deficient.

92 Second, 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.

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<sup>58</sup> AA p 010-72 para 216.1.2.

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**Section 36 analysis**

93 The Director-General's justifications for the termination of ZEPs falls short of the standard required under section 36 of the Constitution. The state bears the onus to prove that the limitations of rights are justified, requiring it to be transparent and to provide evidence to support its factual claims.

94 At the outset, I note that the Director-General now abandons justifications previously advanced by the Minister in his press statement and notices to ZEP-holders.<sup>59</sup>

94.1 The Director-General 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.<sup>60</sup>

94.2 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.<sup>61</sup>

95 It will be contended that this, alone, is fatal to the decision.

96 In what follows, I briefly address the remaining justifications

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<sup>59</sup> Annexure AA4 paragraph 7 on p 010-146

<sup>60</sup> AA p 010-83 para 244.

<sup>61</sup> AA p 010-84 para 248.

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The alleged improvement in conditions in Zimbabwe

97 The Director-General persists in asserting that conditions in Zimbabwe have improved, justifying the termination of the ZEP programme.

98 In making this sweeping claim, the Director-General does not dispute the following facts:

98.1 Rates of extreme poverty in Zimbabwe have increased since 2009, rising from 22.8% of the population to 49% in 2020;<sup>62</sup>

98.2 Inflation rates continue to spiral;<sup>63</sup>

98.3 Political instability and violence remain endemic;<sup>64</sup>

98.4 The human rights situation in Zimbabwe continues to deteriorate<sup>65</sup>

99 The only evidence of an alleged improvement that the Director-General can point to are minor economic improvements between 2021 and 2022, as reported by the World Bank and the IMF in reports published in 2022, which post-date the Minister's decision. This is hardly a sign of genuine and material improvements in living conditions in Zimbabwe.

99.1 GDP growth of 5.8% in 2021 comes off a low base, and follows after Zimbabwe's economy contracted by 8.1% in 2019. It goes without saying that GDP growth tells one nothing about how wealth is distributed, nor is

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<sup>62</sup> 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*").

<sup>63</sup> Id.

<sup>64</sup> 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.*")

<sup>65</sup> Id.

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there a direct correlation between GDP growth and the reduction of poverty.

99.2 Indeed, the IMF report on which the Director-General relies records that *"poverty has risen and about a third of the population is at risk of food insecurity"*.<sup>66</sup>

99.3 The World Bank's April 2022 report, which the Director-General annexes to his affidavit, also places these relatively modest economic gains in 2021 in proper perspective:

"The extreme poverty rate has increased steadily in 2011 and 2020, only declining in 2021 following exceptionally good harvest and disinflation policies."

99.4 The Director-General glosses over the World Bank's repeated emphasis on the fact that the modest decline in poverty between 2020 and 2021 was *"primarily driven by rural areas thanks to the bumper harvest of 2021"*.<sup>67</sup> This explains the relative decline of severe or moderate food insecurity between March 2021 and November 2021. Notably, during the same period, there was a marked *"lack of improvement in the extreme poverty rate in urban areas"*.<sup>68</sup>

99.5 Against this backdrop, the IMF's projections for the Zimbabwean economy remain subdued: GDP growth will decline as agricultural output contracts, with poverty levels declining only *"marginally"*, while remaining significantly higher than 2009 levels.<sup>69</sup>

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<sup>66</sup> Annexure FA16 001-135.

<sup>67</sup> "Annexure AA9 p 010-164.

<sup>68</sup> Id.

<sup>69</sup> Id.

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100 The Director-General makes further unsupported claims, contending that hyper-inflation has abated and that unemployment in Zimbabwe has fallen to 5.2%.

100.1 An inflation rate of 60.7% by end-2021 would be staggeringly high in any other context and marks an improvement only because the recent baseline was 838%.

100.2 Moreover, temporary decreases in inflation say nothing about the conditions driving inflation, which persist. This is illustrated by the fact that a Mid-Term Monetary Policy Statement issued by the Reserve Bank of Zimbabwe on 11 August 2022 reported that headline inflation increased from 60.7% in January 2022 to 256.9% in July 2022. A copy of this press release is annexed hereto marked "RA 10".

101 The Director-General does not provide any source for the alleged 5.2% unemployment rate in Zimbabwe.

101.1 It is contradicted by the World Bank report, annexed to the Director-General's own affidavit, which records an official rate of unemployment in Zimbabwe of 19.1% in 2021, a figure that excludes those who have given up looking for work.<sup>70</sup>

101.2 The Zimbabwe National Statistics Agency's 2022 first quarter report reflects an unemployment rate of over 44% on the expanded definition, which includes discouraged job seekers. I attach an extract of this report as "RA 11".

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<sup>70</sup> Annexure AA 9 p 010-163.

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101.3 Since claims of improvements are factual claims, it was incumbent on the Director-General to present clear and compelling evidence to support these claims. However, no such evidence has been forthcoming.

102 The Director-General's attempt to compare Zimbabwe's economic conditions favourably with South Africa are also specious. While both countries are undoubtedly facing difficulties, it cannot be seriously suggested that Zimbabwe is faring better than South Africa.

103 The Director-General's oblique suggestion that the decline in economic conditions in South Africa somehow justifies the termination of ZEPs is entirely unsubstantiated.<sup>71</sup>

103.1 Nowhere does the Director-General refer to studies, statistics or evidence to suggest that the South African economy would benefit by summarily stripping ZEP-holders of their permits.

103.2 On the contrary, as I pointed out in the founding affidavit, the Department's own White Paper and successive Ministers have lauded the ZEP-programme as a measure that has contributed significantly to the South African economy.<sup>72</sup> The Director-General offers no response.

#### Burdens on the asylum system

104 As already noted, the Director-General does not dispute that the asylum system is plagued by systemic backlogs and delays.<sup>73</sup>

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<sup>71</sup> AA p 010-79 para 229.

<sup>72</sup> FA p 001-71 para 149.

<sup>73</sup> FA pp 010-49 – 50 paras 74 – 77. Noted in AA p 010-102 - 103 paras 350-2.

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105 However, the Director-General seeks to deny that the Minister's decision will have any impact on these backlogs. The Director-General asserts that "*the introduction of the exemption regime did not alleviate the pressure on the asylum system and consequently there is no basis to contend that the changes effected to the exemption regime will significantly increase pressure on the asylum system*".<sup>74</sup> There are two obvious errors in the Director-General's reasoning.

105.1 First, the Director-General misrepresents the cause of the backlogs and delays in the asylum system.

105.1.1 The number of new asylum applicants in South Africa has fallen significantly since the ZEPs were introduced in 2009, falling from over 157,000 new applications in 2009 to little over 18,000 new applications in 2018. I refer to the figures provided by the Minister, in response to questions in Parliament, dated 8 July 2019, attached as "RA 12".

105.1.2 While the number of new applications has fallen, the number of asylum seekers awaiting decisions on their applications, appeals and reviews has increased.

105.1.3 The Director-General acknowledged this fact in his September 2021 submissions to the Minister, noting that the backlogs have been "*exacerbated in prevailing years with an accumulation of appeals and referrals within the statutory bodies responsible for rejected or failed asylum applications.*"

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<sup>74</sup> AA p 010-79, para 230.

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105.1.4 As a result, the present cause of the backlogs in the asylum system is the slow pace of decision-making.

105.1.5 It is therefore disingenuous for the Director-General to seek to blame the ZEP programme for failing to address a problem which is entirely of the Department's own making: the failure to ensure sufficient capacity and resources to adjudicate asylum claims.

105.2 Second, the Director-General incorrectly downplays the number of ZEP holders who would likely seek asylum, after their permits have expired.

105.2.1 The Director-General relies on a single statistic, alleging that only 17% of the original applicants for DZPs in 2009 had previously made asylum applications. This, he suggests, indicates that the majority of ZEP-holders will have no interest in applying for asylum.

105.2.2 This statistic fails to account for DZP-holders who would have applied for asylum in 2009, if they did not have the option of obtaining an exemption permit.

105.2.3 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.

106 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.

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107 While acknowledging these backlogs, the Director-General suggests that this will somehow be addressed by the activation of an online process for the renewal of asylum seeker permits.<sup>75</sup> The Director-General confuses two entirely separate processes.

107.1 An asylum seeker permit is the permit issued to all asylum seekers, in terms of section 22 of the Refugees Act, while they await final decisions on their asylum applications. That permit must be renewed every three months, which may now be done online. The issuing and renewal of these permits is a purely bureaucratic process, which involves no determination of the merits of asylum claims.

107.2 The renewal of permits is distinct from the adjudication of the merits of asylum claims. That requires an asylum application, a first-instance hearing, followed by an internal appeal or review if asylum is refused.

107.3 The backlogs in the system are to be found here, at the adjudication stage. Online systems for permit-renewal have no material impact on those backlogs in decision-making.

107.4 The Director-General's confusion of distinct processes underlines the absence of any reasonable justification.

#### Budgetary constraints and the prioritisation of resources

108 The Director-General again appeals to budget constraints as a reason for terminating the ZEP-programme. The Director-General makes a bald allegation

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<sup>75</sup> AA p 010-80 para 231.

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The letters "NLF" written vertically.

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.<sup>76</sup> No further details are forthcoming.

109 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, which shows that the permits have paid for themselves.

109.1 As I demonstrated in my affidavit, the issuing of ZEP permits would have brought in over R194 million in revenue for the Department.

109.2 On the figures now provided by the Director-General, the ZSP would have generated at least R172 million in fees.

109.3 The total revenue earned from the ZEP and ZSP would have been no less than R366 million (excluding the unknown revenue from the original DZP), more than double the alleged cost to the Department.

109.4 I have tabulated these estimations below, using figures provided in the answering affidavit:

Programme	Recipients	Application fee	Sub-total
DZP	242 731 <sup>77</sup>	-	-

<sup>76</sup> AA p 010-82 paras 234 – 240.

<sup>77</sup> AA p 010-44 para 117.

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ZSP	197 790 <sup>78</sup>	R870.00 <sup>79</sup>	~R172,077,300.00
ZEP	178 412 <sup>80</sup>	R1090.00	~R194,469,080.00
		<b>TOTAL:</b>	<b>~R366,546,380.00</b>

110 The Director-General baldly denies that exemption permits have paid for themselves, but offers no figures or records to substantiate his bare denials. He faintly suggests that VFS fees and administrative costs must be taken into account, but provides no figures to substantiate this claim, not even an estimation.

111 The state will not be absolved of its constitutional duties on the basis of a bald assertion of resource constraints, particularly where the relevant evidence is exclusively within its knowledge. The respondents have a duty to take the court into their confidence and must provide details of the precise character of the resource constraints, whether human or financial. The Director-General has failed to do so. This will be addressed further in argument.

112 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:

<sup>78</sup> AA p 010-48 para 136.

<sup>79</sup> AA p 010-48 para 132. R870 was charged to adults, R800 to minors, with an additional fee of R1350 for the transfer of permits to new passports. The breakdown of adults to minors is unknown, as is the number of applicants who paid the additional fee for the transfer of permits between passports.

<sup>80</sup> Annexure AA 3 p 010-144 para 8.

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112.1 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;

112.2 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;

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

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

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

113 The Director-General states that *"the question of the impact on children and families weighed heavily in the deliberations of the Department and the Minister."*<sup>81</sup>.

114 However, the Director-General has failed to provide any details of these supposed deliberations. There is no reference to when such deliberations took

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<sup>81</sup> AA p 010-86 para 255.

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place, what was discussed, who was present, and what information was considered.

115 The question of impact was not addressed in the Director-General's initial submissions to the Minister on 20 September 2021, nor is it reflected in the Minister's decision or press statements. This is reinforced by the fact that the Minister simply signed the Director-General's submissions on the same day they were handed to him, on 20 September 2021, without any hint discussion or debate. On the Director-General's version in the *African Amity* matter:

"It will be seen from the submission ("AA25") that I signed the submission on 20 September 2021 and the Minister signed on the same day. He approved my recommendation and added the words "12 months".<sup>82</sup>

116 In my founding affidavit, I expressly invited the respondents to attach to their answering affidavit all relevant documents and records which were relevant to the Minister's decision, in lieu of a Rule 53 record.<sup>83</sup>

117 In the Rule 35(12) notice, the HSF further requested the respondents to deliver any documents, including minutes, of the alleged deliberations on the question of the impact on children and their families. In response to this notice, the respondents have refused to provide any such documents. I deny that the respondents have any basis for this refusal, but the refusal again speaks volumes.

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<sup>82</sup> African Amity AA p 004-47 para 90.3.

<sup>83</sup> FA p 001-28 para 20.

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118 In the circumstances, the only conclusion that can be drawn is that there were no genuine deliberations on the impact of the decision on children or families, let alone a broader assessment of the impact on all ZEP-holders.

#### FOURTH GROUND: CONDITIONS IN ZIMBABWE

119 The repeated assertion that political and economic conditions in Zimbabwe have materially improved is objectively false, for all the reasons already canvassed. The Director-General's assertion that the Minister's conclusions on this score are beyond scrutiny is incorrect and will be addressed further in argument.

120 Furthermore, the Director-General has failed to disclose what information and documents, if any, he consulted before making the submission to the Minister that "*[t]he political and economic situation has improved in Zimbabwe since 2009*". Equally, it has never been suggested that the Minister consulted further information before approving this submission. The respondents have failed to disclose any documents that the Minister consulted before reaching his decision.

121 Instead, the Director-General relies solely 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.

122 As already noted above, the Director-General rests his claims on GDP growth, ignoring increasing rates of poverty, inequality, unemployment, and deteriorating political and human rights conditions. The respondents, surprisingly, do not address these conditions.

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123 In these circumstances, the Minister not only committed a material error of fact in relying on the Director-General's submissions, but he also arrived at a decision that had no rational or reasonable connection to any information before him.

**FIFTH GROUND: THE DECISION IS OTHERWISE UNREASONABLE AND IRRATIONAL**

124 The Director-General offers evasive responses to the five further grounds of unreasonableness and irrationality.

125 First, the Director-General provides no explanation as to why the Minister chose to extend ZEPs for only 12 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*".<sup>84</sup> The Director-General offers the evasive answer that there is "*no automatic entitlement to another three-year renewal*", without answering why the Minister chose to disregard the Director-General's recommendations.<sup>85</sup> In the absence of any explanation, the only conclusion can be that the Minister failed to apply his mind to this issue.

126 Second, the Director-General offers no evidence that the Minister applied his mind to the impact of a limited extension of only 12 months and the barriers facing ZEP-holders.

127 Third, on the likely backlogs that will be created by ZEP-holders applying for other visas and asylum, the Director-General is again content to assert that "*there has*

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<sup>84</sup> Annexure FA 8 p 001-100 para 6.

<sup>85</sup> AA p 010-89 para 265.

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*not been a deluge of applications for extensions or other visas.*" No further details or statistics are provided.

127.1 This was also the subject of a Rule 35(12) request. As I have indicated, the documents have not yet been provided.

127.2 Even if the Director-General is correct, there is an obvious explanation for this lag effect. The barriers to submitting applications for alternative visas and permits, the lack of clear communication of the options available to ZEP-holders, and the lack of any certainty that these applications will be processed before 31 December 2022 has inevitably created inertia.

128 Fifth, I agree with the Director-General that a human rights-based approach entitled each ZEP-holder to make representations.<sup>86</sup> 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.

## REMEDY

129 The respondents agree that if the Minister's decision is found to be invalid, it must be set aside and remitted back to the Minister. That is necessary to ensure that a fair and rational process is followed, that respects the rights of ZEP-holders.

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<sup>86</sup> AA p 010-90 para 268.



130 The respondents, however, dispute that any temporary remedy should be granted to protect the rights of ZEP-holders pending the Minister's further decision.

131 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 mischaracterisation will be addressed further in argument. For present purposes, it suffices to state the following:

131.1 First, this is a temporary order, seeking to preserve the status quo pending the outcome of a fair process and the Minister's further decision.

131.2 Second, this temporary order merely retains the directives that the Minister issued in January 2022. Far from imposing a new decision on the Minister, it simply keeps the Minister's existing directives in place until such time as the Minister has made a fresh decision.

131.3 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.

#### THE MINISTER'S ATTACK ON THE HSF

132 The Minister has seen fit to express himself on this litigation in the form of a press statement attacking the HSF for launching this court action. That extraordinary statement seeks to characterise the HSF's action as "*destructive*" and maintains

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that "South Africa is now under the dictatorship of some of the NGOs with some having faceless and dubious funders" and that "their ultimate aim is to assist in the dislodgement of the Government of the day from power by all means available." It also insists that the HSF is "engaged in a desperate bid to blackmail the nation" and that it is "now conveniently playing the victim card by alleging that it has been threatened." I previously attached a copy of this statement as RA 6.

133 The Minister's overwrought invective might be readily dismissed were it not indicative of a disturbing misunderstanding of the role court process serves in a constitutional democracy: it is the means by which we peacefully resolve disputes. It is precisely not an avenue by which dictatorships are imposed or governments are dislodged.

134 But the Minister's statement, issued by the Department, is more disturbing still, considering the specificities of this matter. There can be no denying the vulnerability of ZEP-holders. Explaining why the power of judicial review was vested in our courts by our new legal order, then president of the Constitutional Court, Justice Chaskalson observed that it –

*"was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be sure that our own rights will be protected."*<sup>87</sup>

135 That the HSF should earn such scorn from the Minister, for acting in the public interest and attempting to secure relief for a particularly vulnerable grouping in South Africa, is an affront to the best traditions of our Constitutional order. In a

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<sup>87</sup> S v Makwanyane & Another 1995 (6) BCLR 665; 1995 (3) SA 391 at para 88.

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context which the Minister well knows to be febrile, it also demonstrates reckless disregard as to the endangerment of the HSF and those in whose interest it seeks to act.

#### **RESPONSES TO INDIVIDUAL PARAGRAPHS IN THE ANSWERING AFFIDAVIT**

136 I now turn to address individual allegations in the answering affidavit to the extent necessary. I do not intend to address all of the allegations, most of which are legal disputes which will be addressed in argument. Any allegation which is not addressed and which is inconsistent with what is stated above and the founding affidavit must be taken to be denied.

##### *Ad Introduction*

##### *Ad paragraphs 1 – 2 of the answering affidavit*

137 Save to deny that all facts in the Director-General's affidavit are true and fall within his personal knowledge, I note the contents of these paragraphs.

##### *Ad paragraphs 1 – 7*

138 Save to note the purposes of the Immigration Act and Immigration Regulations, I deny that the Minister's decision is consistent with these purposes.

##### *Ad paragraphs 8 – 9*

139 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.

*Ad paragraphs 10*

140 The Director-General's attempt to portray the exemption process as a failure stands at odds with the 2017 White Paper and the position adopted by successive Ministers.

141 The more than 245,000 Zimbabwean nationals who received the DZP, the 197,790 who received the ZSP, and the 178,412 who received the ZEP could not be described as a "small number". It is also inaccurate to describe this as a "steady decline", particularly as ZEPs were only offered to those who held ZSPs and ZSPs were only available to those who held DZPs.

*Ad "The True Nature of the Relief Sought"*

*Ad paragraphs 12 – 14*

142 I again deny that the HSF is seeking a "permanent exemption for ZEP-holders". I have addressed this mischaracterisation of the relief sought above.

*Ad paragraph 15*

143 I deny that all ZEPs "expired by effluxion of time" on 31 December 2021. This directly contradicts what the Director-General has stated in the *African Amity* matter, in which he insisted that Directive 1 of 2021 was issued on 29 December 2021, resulting in the extension of all ZEPs to 31 December 2022, without any lapse or expiry.

144 At paragraph 95.4 of his answering affidavit in that matter, the Director-General stated: "[t]he allegation that there was a vacuum ... between 31 January 2021

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*and 1 January 2022 when the exemption holders had no valid permits in their passport is without merit. I have indicated that on 29 December 2021 the Minister had already issued a directive extending the validity of the exemptions until 31 December 2022.”<sup>88</sup>*

***Ad paragraph 16***

145 I deny that the purpose of the extension was to allow ZEP-holders to make representations. As I have demonstrated above, the call for representations was an afterthought, after the Minister had already taken the final decision not to grant any further exemptions to ZEP-holders. The so-called “grace period” was solely intended for ZEP-holders to apply for other visas.

***Ad paragraphs 17 – 19***

146 Save to note that all ZEPs were extended until 31 December 2022 and remain valid, I deny the contents of these paragraphs for the reasons set out above.

147 The Minister plainly took a decision to terminate the ZEP programme and to refuse any further exemptions beyond 31 December 2022.

***Ad paragraphs 20 – 26***

148 The Director-General again deliberately mischaracterises the HSF’s submissions. I have addressed these issues in detail above.

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<sup>88</sup> *African Amity AA p 004-52 para 95.4.*

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*Ad paragraphs 27 to 30*

149 On the conditions in Zimbabwe, the Director-General again distorts the true issues.

149.1 The primary question is whether the Minister had a reasonable or rational basis, on the information before him at the time of making his decision, to conclude that conditions in Zimbabwe have significantly improved, such that there are no longer "special circumstances" warranting an exemption.

149.2 It is telling that the Director-General has refused to disclose what information, if any, was before the Minister. The Director-General instead cherry picks from World Bank and IMF documents that post-date the decision.

149.3 I accordingly deny the suggestion that this Court is asked to act as the "sole arbiter" of the conditions in Zimbabwe.

*Ad paragraph 31 – 32*

150 This application is solely concerned with the rights of existing ZEP-holders, who satisfied the requirements for ZEPs. It does not concern the rights of undocumented Zimbabwean nationals who did not apply for or did not qualify for ZEPs. The "flood gates" arguments raised by the Director-General are unsustainable.

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*Ad paragraphs 33 – 34*

151 The relief sought is a temporary order to protect ZEP-holders, on the same terms as the Minister's Directive 1 of 2021, pending the conclusion of a fair public consultation process and a fresh decision. The duration of that temporary relief will depend on whether the Minister takes appropriate action.

152 I deny that ZEP-holders are somehow undeserving of this temporary protection because "only" 6000 made representations to the Minister. 6000 representations is hardly an insignificant number. In any event, and for all the reasons set out above, the call for representations was a meaningless after-the-fact gesture, issued without any clarity as to its purpose, and with no explanation as to what was required from ZEP-holders. ZEP-holders can hardly be blamed for not submitting representations in these circumstances.

*Ad paragraphs 35 – 38*

153 I deny that the temporary relief sought is a substitution order, for the reasons stated above. This will be addressed further in argument.

*Ad "Legislative and Regulatory Scheme"*

*General*

*Ad paragraphs 39 – 44*

154 Save to note the description of the legislative scheme, I deny the imputation that ZEP-holders have somehow taken "advantage of the system" or have adversely impacted the South African labour market. ZEP-holders all applied, paid the fee, and were granted exemption permits, in terms of the dispensations established

  
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by successive Ministers. Their contributions to our economy and society have been celebrated by successive Ministers.

*Ad paragraphs 45 – 50*

155 I note the contents of these paragraphs, to the extent that they are consistent with the history of the DZP, ZSP and ZEP set out in the founding affidavit.

*Ad paragraphs 51*

156 I deny the contents of this paragraph. The Director-General again misrepresents the relief sought.

*Ad paragraphs 52 – 54*

157 For the reasons set out in detail above, I deny that an individual exemption application in terms of section 31(2)(b) affords ZEP-holders any meaningful remedy. I have addressed this point in detail above, at paragraphs 37 to 40, highlighting the Director-General's contradictory position.

*Ad paragraphs 56 – 65 (Permanent residence: sections 25 – 26 of the Immigration Act)*

158 The suggestion that adult ZEP-holders would be eligible for permanent residence under section 26 directly contradicts the position previously adopted by the Director-General and the Minister. I refer to paragraph 41 above, which sets out these contradictory statements.

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159 The information on how many ZEP-holders hold general work permits or are in good faith spousal relationships is uniquely within the knowledge of the Director-General and his Department. HSF has no access to this information and the Director-General has failed to disclose it.

160 I further note that it is highly unlikely that any ZEP-holder would also hold a general work permit. If they had a work visa, there would have been no need for them to go to the additional effort and expense of obtaining a ZEP.

161 In addition, the Director-General has failed to disclose how many applications for permanent residence have been submitted by ZEP-holders, how many have been rejected, and how many remain outstanding. That, again, is information that is uniquely in the Department's knowledge, which it has failed to disclose.

*Ad paragraphs 66 – 68 (Permanent residence: section 27 of the Immigration Act)*

162 I note the onerous requirements for permanent residence under section 27 of the Immigration Act, to the extent that they are consistent with the Immigration Act and the Regulations.

163 It can hardly be contentious to state that the overwhelming majority of ZEP-holders would be unable to satisfy the requirements for immediate permanent residence, such as net worth of over R12 million or retirement earnings of R37,000 per month. If ZEP-holders were able to satisfy these requirements, there would have been no need for them to obtain a ZEP.

  
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164 Once again, the Director-General fails to disclose whether any ZEP-holders have submitted applications for permanent residence and the status of such applications.

*Ad paragraphs 69 – 72 (General work visas)*

165 I note the onerous requirements for a general work visa, including the requirement of a certificate from the Department of Labour confirming that the employer is unable to find a suitable citizen or permanent resident with qualifications or skills equivalent to the applicant.

166 HSF has no knowledge of the 4000 alleged waiver applications and has called upon the Director-General to disclose the contents of these applications.

167 As noted above, the Director-General has not yet supplied details of these waiver applications and has confirmed that no decisions have yet been taken in respect of any of these applications. The Director-General has further failed to explain what steps are being taken to process these applications, when they will be considered, by whom, and when applicants will receive a decision.

*Ad paragraphs 73 –104 (Critical skills, relatives and study visas)*

168 I note the requirements for obtaining the various visas addressed here, to the extent that they are accurate summary of the relevant provisions of the Immigration Act and the Regulations.

169 The Director-General neglects to note that, in terms of regulation 9(2) of the Immigration Regulations, an application for a visa can generally only be made

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from outside of the country, requiring ZEP-holders or their children to potentially leave the country in order to be eligible to apply, with the evident risks of family separation, loss of livelihood, and other disruptions to their lives.

170 Once again, the Director-General has exclusive knowledge as to how many ZEP-holders have applied for such visas, the status of their applications, and the timeframes in which decisions on their applications and any waivers or exemptions will be determined. The Director-General's failure to provide any of this information is once again a breach of his duties of transparency and candour in constitutional litigation.

171 I have also addressed the Director-General's contention that families which are at risk of separation should submit an exemption application to that effect, for the extension of their ZEPs.

171.1 The Minister has previously foreclosed that option, stating unequivocally that he will not consider any individual exemption applications in terms of section 31(2)(b).

171.2 If this option is now available to families, it is incumbent on the Director-General to outline the procedure for processing and deciding such applications before 31 December 2022.

172 I therefore maintain that these visas do not afford any meaningful pathway for ZEP-holders to regularise their status before the 31 December 2022 deadline.



*Ad "The Three Exemptions Granted to Zimbabweans"*

*Ad paragraphs 105 - 110*

173 I note the contents of these paragraphs, to the extent that they are consistent with the history and purpose of the DZP, ZSP and ZEP set out in the founding affidavit.

*Ad paragraphs 111 – 125*

174 I deny the suggestion that the exemption programme was a failure.

174.1 I again note that the Director-General's statements are odds with the statements of all previous Ministers and the Department's 2017 White Paper, which have all held out the exemption programme as a necessary measure which has successfully regularised the status of tens of thousands of Zimbabwean nationals.

174.2 There is no precise estimate of how many undocumented Zimbabweans are in the country. The figure of 1.5 million is presented by the Director-General without any substantiation and with no reference to official sources.

174.3 In any event, the 242,731 permits issued by the DHA under the DZP process is a tremendous number – far from a failed system.

174.4 I have also addressed the new allegation that the DZP failed to alleviate pressure on the asylum system. I refer to paragraph 105 above.

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174.5 There is also no basis for the speculation that a number of people viewed the asylum seeker permits and prospect of refugee status as a better option.

174.6 I further note that one of the biggest impediments to Zimbabwean nationals applying for the original DZP in 2009 was the requirement that they present valid, non-expired passports.<sup>89</sup> This would have excluded many asylum seekers, as they would have been unable to travel back to Zimbabwe to obtain a valid passport, as doing so would have placed them at risk.

174.7 After the issuing of the DZP, the exemption process remained a closed system. Only holders of the DZP were eligible for the ZSP, and only holders of the ZSP were eligible for the ZEP. The slight decline in the numbers of ZEP-holders when compared with DZP-holders reflects a natural rate of attrition, certainly not a lack of need.

*Ad paragraphs 126 - 139*

175 I note the contents of these paragraphs, to the extent that they are consistent with the history and purpose of the ZSP, set out in the founding affidavit.

176 I am informed that the ZSP was only available to DZP-holders. It was not, to my knowledge, available to unsuccessful applicants for the DZP.

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<sup>89</sup> AA p 010-43 para 106.

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*Ad paragraphs 140 - 148*

177 I note the contents of these paragraphs, to the extent that they are consistent with the history and purpose of the ZEP, set out in the founding affidavit.

*Ad paragraph 149.3*

178 I again note the Director-General's contradictory stance on ZEP-holders' entitlement to apply or for permanent residence.

*Ad paragraph 150*

179 I repeat that these permits were repeatedly extended by successive Ministers, over a period of more than 13 years. The lives, careers, businesses and families that ZEP-holders have established in this country are neither transient nor temporary.

*Ad First Ground of Review: Procedural unfairness / irrationality*

*Ad paragraphs 154 – 157*

180 The allegations contained in these paragraphs are admitted.

*Ad paragraph 158*

181 I deny that the extension was granted for the purpose of allowing ZEP-holders to make representations. All communications at the time indicated that the limited extension was solely for the purpose of requiring ZEP-holders to apply for other visas.

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***Ad paragraphs 159 and 160.4-5***

182 I have no knowledge of the content of the alleged 6000 representations or the responses to these representations. HSF has filed a Rule 35(12) / (14) request for access to documents reflecting their content. HSF will address these documents in a supplementary affidavit, when they are made available.

***Ad paragraphs 160 – 160.3, 160.5 and 160.6***

183 The allegations contained in these paragraphs are noted.

***Ad paragraphs 161 – 163***

184 The allegations contained in these paragraphs are denied. For the reasons set out above, I deny that the various invitations for representations issued by the Minister were clear or offered a meaningful opportunity to influence the Minister's decision not to extend the ZEP programme, which is the decision that is the subject of this review.

185 I further deny that the call for representations afforded ZEP holders an opportunity to apply for individual exemptions, as there was nothing in the notices communicating that fact.

***Ad paragraph 164***

186 The allegations contained in this paragraph are denied.

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187 Procedural fairness requires that there be adequate and meaningful engagement regarding a decision before it is taken. The decision, as communicated, was final and was not preceded by adequate and meaningful consultation.

188 I further deny that the practical impact of the Minister's decision will only be felt on 31 December 2022. The Minister's decision had an impact prejudicial effect on all ZEP-holders, who were faced with uncertainty as to their future and the prospect of being forced to liquidate their assets, quit their employment, and leave their communities by the end of the year.

***Ad paragraphs 165 -- 168***

189 Save to admit that the 7 January 2022 press statement referred to (Annexure 28 to the founding affidavit) did not advise ZEP holders of their right to make representations, the contents of these paragraphs are denied.

190 It is difficult to understand the point being made in these paragraphs. On the one hand, the Director General and Minister admit that the 7 January 2022 press statement did not advise ZEP holders of their right to make representations. On the other, the Director General and Minister deny that the press statement was not issued for the purposes eliciting representations from ZEP holders and the public. Plainly, and as was conceded by the Minister, the press statement was indeed issued for the narrow purpose of "*clear[ing] the confusion which existed at the time*".

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***Ad paragraphs 169 and 170***

191 I deny that the press statements referred to were "*widely published in the media*" and I deny that letters to two organisations purporting to represent Zimbabweans in South Africa constituted adequate engagement with civil society organisations and the public. Save as aforesaid, I note the allegations contained in these paragraphs.

***Ad paragraphs 171 - 173***

192 The allegations contained in these paragraphs are denied. For the reasons set out above, I deny that the various invitations for representations issued by the Minister offered a meaningful opportunity to influence the Minister's decision not to extend the ZEP programme.

***Ad paragraphs 174 and 175***

193 The allegations contained in these paragraphs are noted to the extent that they accurately recorded what is said in the applicant's founding affidavit.

***Ad paragraph 176.1***

194 The allegations contained in these paragraphs are denied. For the reasons set out above, I deny that the various invitations for representations issued by the Minister offered a meaningful opportunity to influence the Minister's decision not to extend the ZEP programme. I also reiterate that there was nothing in these invitations that informed ZEP holders of any right to make representations regarding a possible individual exemption.

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***Ad paragraph 176.2***

195 I deny that letters to two civil society organisations constituted adequate engagement with civil society and the public and I deny that any opportunity to make representations afforded to them was adequate and meaningful. Save as aforesaid, the contents of this paragraph are noted.

***Ad paragraph 176.3***

196 The allegations contained in this paragraph are denied. Consultation with the Zimbabwean government is not equivalent to, and cannot replace, adequate and meaningful engagement with ZEP holders and the public. Moreover, it is hardly surprising that the Zimbabwean government has been reluctant to speak out against the termination of the ZEP, given that it is largely responsible for the conditions that caused ZEP-holders to flee their country.

***Ad paragraph 176.4***

197 The allegations contained in these paragraphs are denied. Reports by credible international organisations, such as the World Bank, the IMF, and Human Rights Watch are unanimous that conditions in Zimbabwe remain dire.

***Ad paragraphs 176.5 – 176.7***

198 The allegations contained in these paragraphs are denied. Civil society organisations have the mandate and expertise to speak to the effects of government policies and laws on particular segments of society, such as ZEP

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holders. In particular, they have a wealth of experience and knowledge regarding the impediments to obtaining visas faced by ZEP holders.

199 I further deny the suggestion that the public at large would have nothing useful to say about the decision. The Minister evidently regarded public opinion as important when he referred, approvingly, to social media messages from members of the public expressing support for his announcement that ZEPs would be terminated. The Director-General also saw fit to attach such messages to his answering affidavit in the *African Amity* matter. It goes without saying that a random sampling of messages on Twitter is no replacement for a meaningful process of public comment and participation. Moreover, it is no answer for the Director-General to suggest that public participation would have made no difference to the decision, in circumstances where procedural fairness demands such a process.

***Ad paragraphs 177 and 178***

200 The allegations contained in these allegations are denied. Where a decision, such as this, materially and adversely affects the rights of the public, an administrator owes a duty of procedural fairness to the public at large.

***Ad paragraphs 179 – 181***

201 The allegations contained in these paragraphs are denied. For the reasons already stated, I deny that ZEP holders and the public at large were given a meaningful opportunity to make representations relating to the Minister's decision not to extend the ZEP programme.

***Ad Second Ground: Limitation of Constitutional Rights***

***Ad paragraph 183***

202 I deny the allegations contained in this paragraph for the reasons already stated above. This ignores the relief sought in the notice of motion and the clear explanation that I provided in the founding affidavit.

***Ad paragraphs 184 (including subheadings)***

203 Save to deny that the dignity and related rights challenge is unclear, I note the contents of these paragraphs.

***Ad paragraphs 185 – 187***

204 These allegations are repetition of points already addressed and are denied for the reasons set out in detail above.

***Ad paragraph 188 - 189***

205 Save to note the content of the paragraphs, I reiterate that, despite the exemption regimes being labelled as temporary, their significance and effects are not.

***Ad paragraphs 190 – 194***

206 I deny the contents of these paragraphs. I have addressed these allegations at paragraphs 75 to 81 above.

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*Ad paragraph 195*

207 I have addressed the contradictory positions adopted by the Minister and the Director-General on the possibility of ZEP-holders applying for asylum. The Director-General's suggestion that ZEP-holders should simply apply for asylum again fails to acknowledge the backlogs within this system and the very purpose of the exemption regime, which was remove pressure from this overburdened system.

*Ad paragraph 196*

208 I addressed these allegations in detail above. I have also addressed the legal and practical barriers to obtaining alternative visas and/or permanent residence. These barriers have not been meaningfully denied by the Director-General.

*Ad paragraphs 197 - 198*

209 I deny that the threat of being rendered undocumented, the loss of access to services, and the prospect of deportation is not a limitation of dignity.

209.1 First; being rendered undocumented deprives individuals of a life of dignity. It means, on the Director-General's own admission, that they cannot access services. In the current climate of xenophobia, the loss of documentation also exposes individuals to harassment and attacks.

209.2 Second, although deportation is a further step in the process, being left undocumented will render the Zimbabweans susceptible to arrest and detention, regardless of whether deportation ultimately follows.

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209.3 Third, the threat of deportation is itself an ordeal, regardless of the outcome or the procedural rights available to challenge that outcome.

*Ad paragraphs 199 - 201*

210 I deny the allegations made in these paragraphs for reasons already stated. I refer to paragraph 81 above.

*Ad paragraphs 203 – 204*

211 The contents of these paragraphs are denied, for the reasons addressed above.

211.1 The Director-General again fails to address the barriers preventing ZEP-holders from obtaining such visas and permits before 31 December 2022.

211.2 The risks of family separation remain ever-present, particularly as temporary visas can, in general, only be obtained from outside of the country, and most do not confer any working rights.

211.3 The fact that no measures are in place to fast-track ZEP-holders who are at risk of family separation is sufficient demonstration of the threat to dignity.

*Ad paragraph 206*

212 I deny the contents of this paragraph. The first public announcement of the refusal to extend ZEPs was only issued in late November 2021. The Minister decision to terminate the ZEP programme, to grant a limited extension of only 12 months, and to refuse all further exemptions to ZEP-holders was only communicated in January 2022.

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*Ad paragraphs 207 – 210*

213 The contents of these affidavits are denied. The 16 supporting affidavits illustrate the rights-limiting impact of the Minister's decision on ZEP-holders. That broader impact is not meaningfully denied.

*Ad paragraphs 213 – 215*

214 These allegations are denied. A further supporting affidavit of LM is attached in this affidavit, responding to the Director-General's allegations.

*Ad paragraphs 216 – 217*

215 I have addressed these allegations at paragraphs 83 to 92 above.

216 The Director-General has not denied 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. The facts show that the Minister failed to comply with these principles.

217 The Director-General's suggestion that individual exemptions are available to protect children's rights contradicts the Minister, who has always been adamant that he has decided to terminate ZEPs with effect from 31 December 2022 and that he will not entertain any further exemptions.

*Ad paragraphs 218 - 233*

218 I have addressed these allegations in detail above, particularly at paragraphs 93 to Error! Reference source not found.. I deny that the respondents have

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demonstrate any reasonable or justifiable basis for the limitations of rights flowing from the Minister's decision.

*Ad Third Ground: Failure to consider the impact on ZEP holders and their children*

*Ad paragraphs 253 - 256*

219 These allegations are denied for reasons already stated.

220 In particular, it is denied that the Department and the Minister deliberated on the question of the impact on children and families. It is further denied that the respondents gave any notices calling for representations on the question of impact prior to the Minister's decision.

*Ad Fourth Ground: Conditions in Zimbabwe*

*Ad paragraphs 258 – 260*

221 These allegations are denied for reasons already stated above. I reiterate that:

221.1 The Zimbabwean economy has not materially improved;

221.2 The percentage of Zimbabweans living in extreme poverty in 2009 had more than double by 2020; and

221.3 The political violence, instability, and social upheaval have also remained constant.

221.4 The respondents have further failed to demonstrate that the Minister's decision was reasonably or rationally based on any information before him at the time.

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***Ad Fifth Ground: The decision was otherwise unreasonable and irrational***

***Ad paragraphs 264 - 270***

222 I have addressed these allegations in detail at paragraphs 124 to 128 above.

223 The respondents agree that:

223.1 the Minister made the decisions without submissions from affected parties;  
and

223.2 the purpose which the Minister's decisions sought to achieve cannot be  
meaningfully assessed without submissions from affected parties.

224 However, despite this appreciation, the Minister went ahead to make the decision without taking proper steps to obtain submissions from the affected ZEP-holders, civil society, or the public. That is sufficient demonstration that the decision is irrational and unreasonable.

***Ad Responses to GN, EWS, DJN and LM***

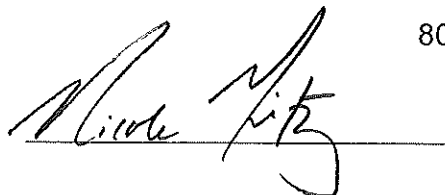
***Ad paragraphs 401 – 422***

225 I refer to the further affidavits deposed to by GN, EWS, DJN and LM, who respond to these allegations.

**CONCLUSION**

226 For the reasons set out above, the HSF persists in seeking the relief set out in the notice of motion.

NLF



NICOLE FRITZ

Signed and sworn before me at OTB on this the 5 day of September  
2022, the deponent having acknowledged that <sup>N she NLF</sup> they know and understand the contents  
of the affidavit, <sup>N she NLF</sup> they have no objection to taking the prescribed oath and <sup>she NLF N</sup> they consider  
such oath to be binding on <sup>her N NLF</sup> their conscience.

  
COMMISSIONER OF OATHS

TITLE / OFFICE: **YA-HAN HUANG**

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Park Town

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Commissioner of Oaths  
Ex Officio Practising Attorney R.S.A.

