IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32323/22

In the matter between:

HELEN SUZMAN FOUNDATION	**First Applicant**
CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	**Intervening Applicant**

and

MINISTER OF HOME AFFAIRS	**First Respondent**
DIRECTOR-GENERAL OF HOME AFFAIRS	**Second Respondent**
ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA	**Intervening Respondent**

NOTICE OF MOTION: APPLICATION FOR INTERIM ENFORCEMENT

KINDLY TAKE NOTICE THAT the First Applicant, the Helen Suzman Foundation (HSF), will apply at the hearing of the application for leave to appeal on 18 September 2023, alternatively a date to be determined by the Full Court (the Honourable Justices Collis J, Malindi J & Motha AJ), for an order in the following terms:

1 To the extent necessary, the forms, time limits and service provided for in the Rules of Court are dispensed with and the matter is to be heard on an expedited basis in terms of Rule 6 (12) of the Rules of this Court.

2 The operation and execution of paragraph 147.4 (including sub-paragraphs) of the order of the Full Court, dated 28 June 2023, under case number 32323/22, is not suspended by any application for leave to appeal or any appeal, and these paragraphs of the order continue to be operational and

enforceable and will be executed in full until the final determination of all present and future leave to appeal applications and appeals.

3 It is accordingly directed that until the final determination of all present and future leave to appeal applications and appeals:

3.1 Existing ZEPs shall be deemed to remain valid;

3.2 ZEP-holders will continue to enjoy the protections afforded by Immigration Directive 1 of 2021 and Immigration Directive 2 of 2022, namely that:

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

4 The first respondent is, in his personal capacity, ordered to pay 50% of the costs of this application, including the costs of three counsel.

5 Any party opposing this application is ordered to pay the balance of the costs of this application, jointly and severally, including the costs of three counsel.

6 Further and/or alternative relief.

TAKE NOTICE FURTHER that the applicant will rely of the affidavit of **NICOLE FRITZ** in support of this application.

TAKE NOTICE FURTHER that if any of the respondents intends to oppose this application, such respondent must:

(a) File a notice of intention to oppose by no later than Tuesday, 5 September 2023.

(b) File an answering affidavit, if any, by no later than Friday, 8 September 2023.

(c) Thereafter, the applicant will file its replying affidavit by Tuesday, 12 September 2023.

DATED at **JOHANNESBURG** on this the 1st day of **SEPTEMBER 2023.**

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32323/22

In the matter between:

HELEN SUZMAN FOUNDATION	**First Applicant**
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MINISTER OF HOME AFFAIRS	**First Respondent**
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ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA	**Intervening Respondent**

FOUNDING AFFIDAVIT: APPLICATION FOR INTERIM ENFORCEMENT

I, the undersigned,

NICOLE FRITZ

state under oath as follows:

1 I am the Executive Director of the Helen Suzman Foundation (HSF), the applicant in this matter.

2 I was the deponent to the HSF's affidavits in its application under the above case number, which I will refer to as the "*main HSF / CORMSA application*".

3 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

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knowledge and belief. Where I make submissions on the applicable law I do so on the advice of the applicant's legal representatives.

PARTIES

4 The parties in this application are as described in the founding affidavit in the main *HSF / CORMSA* application. I will continue to use the abbreviations and acronyms described there.

INTRODUCTION AND OVERVIEW

5 This is an urgent application in terms of section 18 of the Superior Courts Act 10 of 2013 for immediate interim enforcement of the temporary relief granted by this Court in paragraph 147.4 of its order, pending the finalisation of all applications for leave to appeal and any subsequent appeals.

6 This Court's order directed that, pending the conclusion of a fair process and reconsideration by the Minister of Home Affairs ("**Minister**") of his decision to terminate the Zimbabwean Exemption Permit ("**ZEP**"):

6.1 existing ZEPs shall be deemed to remain valid for the next twelve months; and

6.2 ZEP-holders will continue to enjoy the protections afforded by Immigration Directive 1 of 2021, including protection from arrest and/or deportation and the right to enter into or depart from the Republic, provided he or she complies with all other requirements for such entry and departure, apart from possession of a valid permit in his or her passport.

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7 This Court granted this temporary order "*to preserve the* status quo" (para 145.1). Any steps taken which breach the protections afforded to ZEP-holders by those orders would subvert that intention.

8 The HSF trusted that the Minister would respect this temporary order and the purpose for which it was granted, notwithstanding the respondents' pending application for leave to appeal. It accordingly sought an undertaking, by 25 August 2023, that the Minister would abide by this Court 's order pending any appeal processes in the matter.

9 The Minister has refused to provide this undertaking.

10 The effect of the Minister's position is that, by 31 December 2023, 178,000 ZEP-holders, their family members and children, face the risk of being stripped of their existing rights, arrested, detained and deported, <u>despite</u> this Court's judgment and order.

11 That consequence would follow <u>even if</u> this Court refuses leave to appeal. The Minister has made it clear, in press statements, that he refuses to accept this Court's judgment and order, labelling it a "dangerous precedent". I attach a copy of the Minister's 29 June 2023 press release as **Annexure HSF 1**.

12 This will no doubt entail a petition to the Supreme Court of Appeal and an appeal to the Constitutional Court, processes that would only be concluded long after 31 December 2023.

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13 ZEP-holders would also be deprived of their rights even if the SCA and the Constitutional Court ultimately dismiss the Minister's appeal, as any judgment from the appellate courts would only be expected in a year or more.

14 Accordingly, this application is necessary to avert a human catastrophe which this Court has explicitly sought to prevent.

15 I am advised that a section 18 application requires an applicant to establish:[1]

15.1 Exceptional circumstances for interim enforcement or interim suspension, as the case may be;

15.2 Irreparable harm if the court refuses to grant this order; and

15.3 No irreparable harm to the respondents if the order is granted.

16 I am further advised that the respondents' lack of prospects of success on appeal is also an important consideration.

17 In what follows, I will address each of these requirements in turn. Before doing so, I will address the relevant background to this matter and relevant events that have occurred since judgment was handed down. I will conclude by addressing urgency.

[1] *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at para 16; *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 36; *University of the Free State v Afriforum and another* 2018 (3) SA 428 (SCA) at para 11.

BACKGROUND AND RECENT EVENTS

18 The main *HSF / CORMSA* application concerned a challenge to the Minister's decision to terminate the ZEP programme and to refuse all future extensions of ZEPs.

19 This Court characterised this case as one "*both of great importance and of striking ordinariness*". It is of profound importance because it concerns the rights of 178,000 people who have built their lives, homes, families and businesses in South Africa. But the applicants asked nothing more from this Court than to apply settled legal principles in reviewing the Minister's decision.

20 The full history of the application is set out in the papers filed in the main *HSF / CORMSA* application, which have been uploaded to Caselines. It is unnecessary to repeat that history here. It suffices to request that the contents of the applicants' affidavits and the respondents' responses (or lack thereof) in the main application be read as incorporated here.

21 Between 11 and 14 April 2023, the Full Court heard the main HSF / CORMSA application alongside the parallel applications in *Magadzire and Another v Minister of Home Affairs and Others* ("Magadzire") and *African Amity v Minister of Home Affairs*.

22 This Court handed down judgment in the *HSF / CORMSA* and *Magadzire* matters on the same day, on 28 June 2023. I attach copies of these judgments as Annexure **HSF 2** and **HSF 3** respectively.

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23 In *HSF / CORMSA*, this Court granted two categories of relief:

23.1 First, in paragraphs 147.1 – 147.3 of the order, this Court granted *final relief*, reviewing and setting aside the Minister's decision and remitting it back for fresh determination, following a fair process (paragraphs 147.1 – 147.3 of the order).

23.2 Second, in paragraph 147.4 of the order, this Court granted *temporary relief*, preserving the rights of ZEP-holders pending the conclusion of this fair process and the Minister's further decision, which is to be concluded within 12 months of this Court's order (paragraph 147.4 of the order).

24 In the *Magadzire* judgment, this Court granted the applicants an interim interdict, pending the outcome of a further review application to be launched within the next twelve months. In terms of that interim order, this Court interdicted the arrest, deportation or detention of ZEP-holders for failing to produce a valid exemption certificate and allowed ZEP-holders to enter into or depart from the Republic provided he or she meets the requirements for such entry or departure.

25 Shortly before these judgments were handed down, the Minister issued Directive 2 of 2023, which had the effect of further extending ZEP-permits to 31 December 2023. But, like all previous extensions, this did not reverse the Minister's decision to terminate the ZEP-programme, nor did the Minister make any attempt to consult ZEP-holders and the broader public. The announcement issued with that directive also made it clear that there will be no further extensions. I attach a copy of the latest Directive and the accompanying press statement as **Annexure HSF 4**.

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26 On 13 July 2023, the Minister and Director General filed their notice of application for leave to appeal in both the *HSF / CORMSA* main application and the *Magadzire* application.

27 The third respondent, the All Truck Drivers Forum and Allied South Africa ("Truckers"), filed their application for leave to appeal in the *HSF / CORMSA* matter the next day.

28 The applicants believed that the Minister would respect and comply with both the temporary order in *HSF / CORMSA* and the interim interdict in *Magadzire*. This Court granted its orders with the clear intention of protecting the rights of ZEP-holders and providing them with certainty.

29 On 21 August 2023, after receiving confirmation of the dates for the hearing of the application for leave to appeal, the applicants wrote to the Minister seeking confirmation and an undertaking that he would respect these orders. I attach a copy of the letter as **Annexure HSF 5**.

30 The HSF initially gave the Minister until 25 August 2023 to respond. When no response was received, the HSF's attorneys gave the Minister until the close of business on 28 August 2023 to provide the undertaking.

31 On 29 August 2023, Minister's new attorneys addressed a letter to the HSF's attorneys refusing to provide any undertaking to comply with this Court's orders "*now and in the future*". The Minister's legal representatives again chose to refer to this Court's orders in disparaging tones, suggesting that this Court had granted

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relief "*through the backdoor*". A copy of this letter is attached as **Annexure HSF 6.**

32 As a result, the HSF has no choice but to approach this Court for an urgent relief. The Minister's stance has necessitated this application and, as indicated below, must attract an order of personal costs.

THE CHARACTERISATION OF THIS COURT'S ORDERS UNDER SECTION 18

33 I am advised that section 18 of the Superior Courts Act draws a clear distinction between interlocutory orders and final orders. While an application for leave to appeal or a pending appeal suspends the operation and effect of final orders (section 18(3)), interlocutory orders are immune from these consequences (section 18(2)).

34 It follows that the interim interdict granted in *Magadzire* is not suspended by the Minister's application for leave to appeal and any future appeals.

35 The same can be said for the temporary order granted by this Court in paragraph 147.4 of the order in *HSF / CORMSA*. This Court was clear that this order was merely temporary in nature. It does not finally determine the rights of ZEP holders. Moreover, it would be open to this Court to amend or supplement that temporary order if the circumstances require it, in terms of its remedial powers under section 172(1)(b) of the Constitution. Accordingly, the applicants will argue that this temporary order is also protected from suspension by virtue of section 18(2).

36 Nevertheless, and out of an abundance of all caution, the applicants have brought this application for interim enforcement in the *HSF / CORMSA* matter in terms of section 18 to cover all eventualities.

36.1 If the temporary relief is interlocutory in nature, and is not suspended, it would be in the interests of justice to declare that it is enforceable, in terms of section 18(2).

36.2 If the temporary relief is final and is suspended, it would be necessary to direct that it nevertheless be enforced in terms of section 18(3).

37 Given the extraordinary risks facing ZEP-holders, their rights should not depend on an interpretive quibble over section 18. In the interests of certainty, it is prudent to grant a section 18 order for interim enforcement of the temporary relief granted in the *HSF / CORMSA* matter, regardless of how this Court's order is properly characterised.

EXCEPTIONAL CIRCUMSTANCES

38 This Court has already acknowledged that this is a case of profound importance, both for ZEP-holders, the Department of Home Affairs, and the broader public.

39 This Court's order shields thousands of ZEP-holders and their children from the chaos and upheaval of arrest and deportation. It safeguards their constitutional rights pending the conclusion of a lawful process.

40 Should this Court's temporary order be suspended pending appeal, ZEP holders will be stripped of their rights on 31 December 2023. Thousands of lives and

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livelihoods that have been nurtured and developed over many years will be decimated. The consequences will be irrevocable. That fact, in and of itself, renders this case extraordinary.

41 This Court's judgment also recognised the exceptional circumstances in which HSF's application was brought, the grave interests at stake in this litigation and the egregious shortcomings in the Minister's decision-making. It recognised that:

41.1 This case implicated the rights of 178,000 ZEP-holders and their children.[2] It is *"a case of considerable public significance"*[3] that will have "*profound consequences for ZEP-holders*".[4]

41.2 Exemption programmes like the ZEP have great importance because they advance "*national security, prevent[s] corruption, and protect[s] vulnerable migrants from exploitation and harassment*".[5]

41.3 The Minister has demonstrated a "*disdain for the value of public participation*".[6] There was also no evidence before this Court that the Minister assessed the impact of the termination decision on ZEP-holders and their children before the decision was made.[7] The Minister also "*failed to disclose any information or documents that the Minister consulted on the conditions in Zimbabwe before reaching his decision*".[8]

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[2] *HSF* at para 1.
[3] Id at para 2.
[4] Id at paras 5 and 8.
[5] Id at para 32.
[6] Id at para 74.
[7] Id at paras 85 and 95.
[8] Id at para 119.

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42 To this list may now be added the Minister's stance in these proceedings. Rather than taking the sensible and humane approach of respecting the need to protect ZEP-holders' rights, the Minister has instead expressed his disdain for this Court's judgment. The clear intention of paragraph 147.4 of the order is to preserve the *status quo* pending the final determination of the matter. One would expect a senior member of the Executive to respect that intention. Instead, the Minister seeks to subvert it. This response is itself exceptional.

43 All of this demonstrates that this case is exceptional, both in the scale and magnitude of its consequences and in the egregious unlawfulness at issue. It is a case marked by profound consequences and profound indifference to proper procedure and constitutional rights that warrant a deviation from the default position under section 18(1) of the Superior Courts Act.

IRREPARABLE HARM TO ZEP-HOLDERS AND THE PUBLIC

44 There can be no genuine dispute that ZEP-holders and the public will be irreparably harmed if interim enforcement of the temporary protections is refused.

45 In the judgments in both the *HSF / CORMSA* and *Magadzire* matters, this Court has already acknowledged that termination of the ZEP will cause irreparable harm:

45.1 It will bring "*an end to the basis on which a multitude of . . . people have built their lives, homes, families and businesses in South Africa*".[9] If deported, ZEP-holders stand to "*lose their homes, businesses and jobs*".[10]

45.2 It will compromise "*national security, international relations, politics" as well as "economic and financial matters*"[11] and will scupper important policy objectives, including crime reduction, reducing the exploitation of vulnerable migrants and human trafficking and economic growth.[12]

45.3 Children whose "*entire livelihoods and existence [has] been in South Africa*", will be "*uprooted*", potentially in the middle of the academic year.[13]

45.4 Families will be broken up.[14]

46 All of these impacts are the unavoidable consequences of this Court's order being suspended pending the Minister's appeal. They cannot be remedied after the fact and, accordingly, constitute irreparable harm.

47 In *Magadzire*, this Court acknowledged that if it did not grant the interim interdict sought by the applicants, their success in Part B of the application would be "*a hollow victory*".[15] The applicants' ultimate success on appeal will likewise be illusory if this Court's order is not enforceable pending the Minister's appeal. Indeed, once the lives of ZEP-holders are decimated by arrest and deportation,

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[9] *HSF* at para 2.
[10] *Magadzire* at para 78.
[11] *HSF* at para 8.
[12] Id at paras 31-2.
[13] *Magadzire* at para 71.
[14] Id at para 72.
[15] Id at para 78/

any lawful decision by the Minister regarding the fate of the ZEP will be meaningless.

48 Added to these harms is a further consideration. After this Court handed down judgment, ZEP-holders would have been entitled to believe that they were protected pending the Minister's future decision.

49 The intricacies of section 18 of the Superior Courts Act are not widely understood by non-lawyers. Most ZEP-holders would be shocked to discover that, on 31 December 2023, they may be stripped of their rights despite this Court's order.

50 However unwittingly, if this Court does not grant immediate execution of its order, the message it will send to ZEP-holders is that the Minister can use his considerable legal resources to avoid the consequences of his unlawful and unconstitutional conduct and that their challenge, although successful, will have been for nothing.

51 The letter from the Minister's attorneys, dated 29 August 2023, itself acknowledges that the appeal process "*will take long to conclude*". Yet the Minister refuses to respect this Court's orders and the protections they confer pending the conclusion of this process.

52 To avoid these consequences, this Court's order must be operative pending the finalisation of the Minister's ill-fated appeal.

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NO IRREPARABLE HARM TO THE RESPONDENTS

53 On the other hand, there can be no irreparable harm to the Minister, his Department or any other party, if this Court's order is immediately operative.

54 The Minister has himself repeatedly issued directives purporting to extend the validity of ZEPs and to protect the rights of ZEP-holders. The temporary relief granted by this Court does no more and no less than to preserve those protections. As this Court noted, its order merely "*keeps the Minister's existing directives in place until such time as the Minister has made a fresh decision*".[16]

55 This Court's temporary relief places no additional burdens on the Department, it does not call for the deployment of any further resources, nor does it require any fundamental change. Again, its purpose and effect is to preserve the *status quo*.[17]

PROSPECTS OF SUCCESS ON APPEAL

56 The respondents' applications for leave to appeal have no reasonable prospects of success for reasons that will be addressed fully in argument. It suffices to say that this Court upheld the application on multiple grounds, any one of which is entirely fatal to the Minister's appeal. Even if an appeal court were to disagree with one or more of these grounds, there would be no basis to set aside this Court's order.

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[16] *HSF* at para 145.2.
[17] Id at para 145.1.

URGENCY

57 This application has been brought on an urgent basis, to ensure that it is heard together with the application for leave to appeal or on a suitable date determined by this Court.

58 The urgency of this matter stems from the severe consequences for ZEP-holders if this Court's temporary order is suspended by the appeal process, which we have addressed in detail above.

59 The applicants and ZEP-holders would be deprived of substantial redress if this matter were heard in the ordinary course.

59.1 Securing an opposed hearing date before 31 December 2023 would be extraordinarily difficult, as the long history of this matter has already shown.

59.2 But even if a hearing could be secured before 31 December 2023, there is the risk that any further automatic rights of appeal in terms of section 18(4) would drag out long after 31 December 2023.

59.3 Accordingly, it is necessary for the matter to be decided now, to account for further potential delays and automatic appeals.

59.4 It is also necessary to ensure that ZEP-holders have certainty and can make adequate plans for their lives. If they are to be stripped of their rights by 31 December 2023, purely by virtue of pending appeals, they need to know this well in advance so that they can plan their lives.

60 The applicants have acted swiftly to bring this application, after the Minister failed to provide any undertakings by the stipulated deadline.

61 The applicants had previously trusted that the combined effect of the Magadzire and HSF / CORMSA temporary orders would be sufficient to protect ZEP-holders despite any pending applications for leave to appeal or appeals.

62 However, the Minister's letter, dated 29 August 2023, has now disabused us of that trust.

63 It was not possible for the applicants to have brought this application sooner due to the availability of our legal team and uncertainty over the hearing dates for the application for leave to appeal.

63.1 As has been widely reported, our counsel, Steven Budlender SC, has left the Bar to pursue a new career and was unavailable to consult during July and August.

63.2 During that time, the applicants were left in the dark over the hearing dates for the leave to appeal. The dates were confirmed by the Minister's legal representatives without consulting our attorneys or counsel.

63.3 Our attorneys received confirmation of the hearing date for the leave to appeal application on 14 August 2023. We then had to secure new senior counsel at short notice.

63.4 Carol Steinberg SC has now agreed to replace Mr Budlender. She accepted and received her brief on 17 August 2023 and had to set aside substantial time to read into the matter.

63.5 The newly constituted legal team was only available to consult on this matter on 18 August 2023.

63.6 Following that consultation, it was agreed that it would be necessary to write to the Minister to clarify his stance on the binding effect of the orders. HSF's attorneys of record addressed a letter to the Minister which required him to communicate his position by no later than Friday, 25 August 2023.

63.7 No response was received from the Minister on 25 August 2023. On 28 August 2023, the HSF's attorneys sent a follow-up communication to the Minister's attorneys.

63.8 This application was prepared over the weekend of 26 to 27 August 2023.

63.9 After receiving the Minister's response, dated 29 August 2023, this application was finalised at short notice.

64 The respondents will not be unduly prejudiced. The urgency is entirely due to the Minister's intractable position.

65 The applicants have also sought to set out a timetable that will afford the respondents sufficient time to respond before the leave to appeal hearing.

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PERSONAL COSTS

66 It would be appropriate, in the circumstances, to hold the Minister personally liable for the costs of this urgent application:

66.1 The application has been entirely necessitated by the Minister's refusal to respect this Court's judgments and orders pending the outcome of the appeals process.

66.2 The Minister has expressed contempt for this Court's judgments and orders, which he has described in disrespectful and disdainful terms.

66.3 The Minister has equally shown utter disregard for the rights of ZEP-holders and their children.

66.4 This is in circumstances where this Court has already held that the Minister failed to give any consideration to the impact of his decisions on the rights of ZEP-holders and their children.

67 In these circumstances, the Minister's conduct indicates bad faith, recklessness and gross negligence in the face of a pending humanitarian disaster, warranting personal costs.

CONCLUSION

68 For these reasons, the applicants seek an order in terms of the notice of motion in this interim enforcement application.

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NICOLE FRITZ

Signed and sworn before me at Johannesburg on this the 31st day of August 2023, the deponent having acknowledged that she knows and understands the contents of the affidavit, that she has / have no objection to taking the prescribed oath and that she considers such oath to be binding on her conscience.

COMMISSIONER OF OATHS

TITLE / OFFICE:
FULL NAMES:
ADDRESS:

UTARA INARMAN
8 Sherborne Road
Parktown
Johannesburg
Commissioner of Oaths
Ex Officio Practising Attorney R.S.A.

"HSF 1"

home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

To: All Media/ News Editors

Media Statement

Issue Date: 29 June 2023

FOR IMMEDIATE USE

PRESS STATEMENT ON THE JUDGMENTS DELIVERED BY THE FULL COURT, GAUTENG DIVISION, PRETORIA ON 28 JUNE 2023 DEALING WITH ZIMBABWEAN EXEMPTION PERMITS

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1. The full court delivered the judgments in Helen Suzman Foundation ("HSF") v Minister of Home Affairs ("Minister") with the Consortium for Refugees and Migrants in South Africa ("CORMSA") and All Truck Drivers Forum and Allied of South Africa ("ATDFASA") joined as intervening parties and Zimbabwe Immigration Federation v Minister of Home Affairs and Others.

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HSF matter

2. The Minister has carefully studied the judgment and has taken legal advice on it.

3. The two judgments cannot go unchallenged as they set a dangerous precedent in that :

3.1. The finding of the court on the applicability or otherwise of sections 3 and 4 of the Promotion of Administrative Justice Act ("PAJA") is highly questionable, particularly the requirement for public participation when a decision of this nature is taken, affecting a specified category of persons only. In this instance, the affected Zimbabwean nationals.

3.2. The decision that the Minister took not to extend the Zimbabwean exemptions involves weighing of policy considerations which falls within the domain of the Executive.

3.3. The judgment also deals with matters relating to a sacrosanct principle of separation of powers. The Minister believes that this is another strong ground for appeal. The Minister believes that the decision he took was correct and took into consideration all the interests and rights implicated, including those of children.

Zimbabwean Immigration Federation – Interim Interdict

4. The Minister will be challenging the outcome of this matter on appeal on the same basis as outlined above.

5. It is not clear as to what is the purpose of interdict when in fact the Minister issued directives to ensure that the affected Zimbabwean nationals continue to enjoy the protections afforded by the directives. The last Minister's Immigration Directive was issued on 7 June 2023. Since the Minister took the decision, no Zimbabwean national has been threatened in any manner whatsoever and/or deported. They continue to enjoy freedom of movement between South Africa and Zimbabwe and anywhere, as pleaded in the affidavits filed in court on behalf of the Minister showing significant movements to and from Zimbabwe by the affected Zimbabwean nationals and their families.

6. Furthermore, many affected Zimbabwean nationals continue to apply for other visas and waivers in large numbers as provided for in the Immigration Act 13 of 2002.

Application for leave to appeal

7. The Minister has already instructed the legal representatives to launch an application for leave to appeal against the judgments and orders of the court without any further delay.

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8. The Minister would like to take this opportunity to assure the nation that he will do everything in his power to ensure that the Immigration Laws of the Republic of South Africa are enforced without fear or favour.

Media Enquiries:

Siya Qoza, 082 898 1657 (Spokesperson for the Minister of Home Affairs)

ISSUED BY DEPARTMENT OF HOME AFFAIRS

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"HSF2"

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED

28 June 2023
DATE

SIGNATURE

CASE NO: 32323/2022

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	Second Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR GENERAL OF HOME AFFAIRS	Second Respondent
ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA	Third Respondent

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This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Senior Judge's secretary. The date of this judgment is deemed to be 28 June 2023.

JUDGMENT

THE COURT

INTRODUCTION

[1] This application concerns matters both of great importance and of striking ordinariness. It concerns the rights of over 178,000 holders of Zimbabwean Exemption Permits ("ZEPs"), which are due to expire on 30 June 2023. On 2 September 2022, the Minister decided to terminate the ZEP programme and to refuse any further exemptions.

[2] Central to this application, therefore, is the legality of the decision to terminate the rights extended to 178 000 Zimbabwean Exemption Permit ("ZEP") holders, thereby bringing an end to the basis on which a multitude of these people have built their lives, homes, families and

businesses in South Africa. This is thus a case of considerable public significance, not only to all ZEP holders but to the Department of Home Affairs ("the Department") as well.

[3] While the Minister has recently extended the "grace period" by a further six months, until 30 June 2023,[1] his decision to end the ZEP programme remains unchanged. The applicant, the Helen Suzman Foundation ("HSF"), supported by the intervening party, CORMSA,[2] is challenging the Minister's decision.

[4] In terms of the said programme and for approximately the past fourteen years, qualifying Zimbabwe nationals have been granted permission by the Minister of Home Affairs to live, work and study in South Africa.

[5] As a consequence of being granted these permits, ZEP-holders have established lives, families, and careers in South Africa. The termination of this programme has placed all these in jeopardy which decision holds profound consequences for ZEP-holders. This much is common cause between the parties.

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

2 Granted leave to intervene on 16 September 2022.

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[6] It is further common cause that the decision so taken by the Minister to terminate the ZEP-programme, was taken without any prior notice to or consultation with ZEP-holders and the public; secondly, that an invitation for representations from ZEP-holders was only issued in January 2022, this after the Minister's decision had been announced.[3]

[7] Furthermore, the Minister has repeatedly made his intentions clear to the ZEP-holders and the public that he will not reconsider the decision to terminate the ZEP-programme. All that has changed is the "grace period", which will not be extended further.[4]

[8] The Minister has acknowledged that the decision has profound consequences for the lives of ZEP-holders, their children, and the broader society including an impact on national security, international relations, political, economic and financial matters.[5]

[9] It is this decision that is the subject of the current review proceedings and this challenge is taken primarily on four grounds, i.e.:

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3 Answering Affidavit para 160 p 010-54-55.

4 Press Statement Annexure SRA1 P 022-13.

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

9.1 firstly, the applicants contend that the decision is procedurally unfair and procedurally irrational, in the absence of any prior consultation process with affected ZEP- holders, civil society and the public at large;

9.2 secondly, it is a breach of the constitutional rights of ZEP-holders and their children;

9.3 thirdly, it was taken without any regard to the impact on ZEP-holders; and

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

[10] It is not the applicants' case that the Minister may not terminate the ZEP programme. Their case is that the decision so taken by the Minister should not fall short of any fundamental constitutional requirements; such as that when officials exercise public power, they ought to do so after having embarked on a fair process, with due consultation with affected parties and for clear reasons which demonstrate good cause for the decision made.

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[11] It is therefore the gravamen of the applicants' that the First Respondent ("the Minister") has failed to meet this standard. Affected parties, including the Intervening Party ("CORMSA")[6] but also the holders of ZEPs themselves, were not afforded any fair right to make representations prior to the Minister making his decision and on this basis amongst others the decision so taken is reviewable. It should also be mentioned that in the present proceedings, All Truck Drivers Forum and Allied of South Africa ("ATDFASA") was also joined as an intervening respondent by order of the court.[7] They seek a declaratory order and if the court finds for them, an order which would allow ZEP-holders a period of 18 months within which they should be afforded an opportunity to apply for mainstream visas and enjoy the protection afforded by the Immigration Act.

THE PARTIES

[12] The first applicant, HSF, is a non-governmental organization with a long history promoting South Africa's commitments to democracy, constitutionalism, rule of law and human rights.

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6 CORMSA's intervention application was granted on an unopposed basis on 16 September 2022.

7 See Judgment Davis J dated 10 February 2023 p 046A.

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[13] The second applicant is the Consortium for Refugees and Migrants in South Africa ("CORMSA") a registered non-profit organization tasked with promoting and protecting the human rights of refugees, asylum seekers and international migrants in ways to promote the well-being of all in South Africa.[8]

[14] The first respondent is the Minister for Home Affairs, cited in his official capacity as the member of the executive responsible for granting exemptions under section 31(2)(b) of the Immigration Act.

[15] The second respondent is the Director-General of the Department of Home Affairs, in his official capacity as the departmental official responsible for the day-to-day operations of the DHA.

[16] The third respondent is All Truck Drivers Forum and Allied South Africa ("ATDFASA"). It is a non-profit organization which is registered as such with registration number: K2020760307. It is an organization whose mission and vision is, amongst others, to promote truck driving as a professional section to optimize and open job opportunities. It has as its aim to ensure that no undocumented workers are involved in the trucking industry.[9] Following an order granting leave to intervene as a

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8 Founding Affidavit para 15 p 006-14 CORMSA Intervention Application.

9 Founding Affidavit para 5 & 6 p 026-7 ATDFASA Intervention Application.

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respondent in the main application, ATDFASA delivered a counter-application in which it sought the following relief to declare unlawful and invalid: the dispensation of Zimbabweans Project ('DZP'); the ostensible extension of the DZP by the Minister in December 2014; the Zimbabwean Special Permit ('ZSP'); the ostensible extension of ZSP by the Minister in December 2017; the Zimbabwean Exemption Permit ('ZEP'); and the extensions of the current ZEP's by the Minister in December 2021 in December 2022.[10]

[17] The gist of their contention is, *inter alia*, that the Minister was not empowered to grant illegal foreigners an exemption in terms of section 31(2)(b) of the Immigration Act 13 of 2002 (the Act) and that the exemption in terms of the Act could not be granted on the basis of nationality. It further contends that the exemption was designed for an unlawful purpose and that the Minister has no power to extend a permit once it had lapsed by effluxion of time. Finally, that there were no special circumstances present for the Minister to grant exemptions.[11]ATDFASA abandoned its challenge to the DZPs and ZSPs.[12]

[10] Heads of argument filed by First and Second respondents
[11] Intervening respondents Replying affidavit of 2.2
[12] Supra paragraph 5.3

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[18] It is common cause and was public knowledge that ZEP was implemented in 2017. In terms of 7 (1) of Promotion of Administrative Justice Act (PAJA), ATDFASA had 180 days within which to launch its review application. It did not since its inception in 2020. Having brought its application outside the 180 days, ATDFASA, in terms of section 9 (1), should have brought an application for condonation. Section 9(1)(b) provides that:

"90 days or 180 days referred to in Section 5 and 7 may be extended for a fixed period, by agreement between the parties or failing such agreement, by court or tribunal on application by the person or administrator concerned."[13] There is no application before this court for condonation, accordingly, ATDFASA has failed to comply with Section 7(1) of PAJA. Furthermore, this court is of the view that a period of over two years is an unreasonable delay, especially when there are no reasons justifying and explaining the delay. Accordingly, the ATDFASA does not comply with the test as set out in Khumalo and Another v MEC for Education, KwaZulu-Natal.[14]

[13] Promotion of Administrative Justice Act 3 of 2000.
[14] 2014 (5) SA 579 (CC) at para 49 "in Gqwetha[34] the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); [35] and if so (2) whether the court's

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[19] This application, therefore, falls to be dismissed with costs.

[20] Prior to addressing the merits of the application, it will be apposite to set out the historical background which led to the present state of affairs.

THE HISTORY OF THE ZEP

The 2009 DZP

[21] In April 2009, the Minister of Home Affairs, in response to the political and economic instability in Zimbabwe which had caused an exodus to South Africa, created the Dispensation of Zimbabwean Project (DZP).[15]

[22] The result of this programme was that it allowed undocumented Zimbabweans in South Africa to apply for exemptions, provided that they possessed a valid Zimbabwean passport and had proof of employment, registration at an educational institution, or proof of running a business, among other requirements.[16]

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discretion should be exercised to overlook the delay and nevertheless entertain the application."

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

[16] Answering Affidavit p 010-43 para 108.

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[23] The programme had as its aim to regularise the legal status of Zimbabweans residing in South Africa illegally; curbing the deportation of Zimbabweans who were in SA illegally; reducing pressure on the asylum seeker and refugee regime, which was overwhelmed with Zimbabwean asylum seekers; and providing amnesty to Zimbabweans who obtained SA documents fraudulently.[17] To this end the Department approved 242,731 applications, granting qualifying Zimbabweans the rights to work, conduct a business, or study.[18] The process of issuing formal documentation under the DZP began in September 2010, with permits set to expire at the end of December 2014.[19]

The 2014 ZSP

[24] In August 2014, the former Minister, Mr Gigaba, announced that the DZP would be replaced by the Zimbabwean Special Permit ("ZSP"). Applications were exclusively opened to DZP-holders[20] and had to be submitted via Visa Facilitation Services Global ("VFS"), at a fee of between R800 to R1350,[21] together with the required documentation.[22]

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17 Answering Affidavit p 010-42 para 105

18 Answering Affidavit p 010-43 para 110.

19 Founding Affidavit p 001-30 para 28.

20 Answering Affidavit p 010-46 para 127.

21 Answering Affidavit p 010-47 para 132.

22 Answering Affidavit para 131-134 p 010-47 – 48.

Eventually, some 197,790 ZSP permits were issued to successful applicants,[23] which were valid until 31 December 2017.[24]

[25] Minister Gigaba made a public statement at the time in which he set out in detail the rationale behind his decision not to abruptly terminate the DZP.[25] Amongst others, he noted that "*the approaching expiry date of the DZP has caused anxiety for many permit holders, particularly those who are not ready to return to Zimbabwe, as they contemplate their next steps.*" He further acknowledged that Zimbabwe's recovery would be fraught with challenges. He stated that "*We are aware that it will take time for her to fully stabilise.*" The ZSP was therefore part of South Africa's commitment to Pan-Africanism and its role in supporting "*Africa's stability, security, unity and prosperity.*"

[26] The current Minister's predecessor had noted the positive contribution that Zimbabweans had made to South Africa's economic and social life. In particular, he observed that "*Zimbabweans have made notable contributions in our education and health sectors and also in many other sectors*". He further acknowledged the need to "*continue the productive engagement [with] stakeholder formations during the DZP*

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23 Answering Affidavit para 136 p 010-48.

24 Founding Affidavit para 31 p 001-32.

25 Founding Affidavit para 32 p 001-32 – 33.

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process four years ago" and expressed a willingness to *"work with new stakeholders that have emerged since".*

The 2017 ZEP

[27] The ZSP era was followed by the ZEP programme. This was announced in September 2017, by the then Minister of Home Affairs, Ms Mkhize.[26] This programme was confined to holders of the ZSP,[27] who were again required to apply for exemptions through VFS, at a fee of R1090, together withthe necessary proof of employment, study, or business.[28] The permits so obtained were granted for a further four years and were initially due to expire on 31 December 2021.[29]

[28] Like her predecessor, Minister Mkhize made a public statement at the time in which she too set out in detail the rationale behind the decision to not terminate the exemption programme, but to create the ZEP instead.[30] She framed the reasons for replacing the ZSP with the ZEP with reference to Oliver Tambo's concerns for *"international solidarity,*

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26 Annexure FA 5 p 001-92.

27 Answering Affidavit p 010-49 para 141.

28 Answering Affidavit p 010-49 para 142.

29 Founding Affidavit p 001-34 para 33.

30 Founding Affidavit p 001-34 para 34. Annexure FA 5 p 001-92.

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conscious of the political imperative to build peace and friendship in the continent and in the world as a whole."

[29] Similarly, as with her predecessor, Minister Mkhize, maintained "*that migrants play an important role in respect of economic development and enriching South African social and cultural life*". Moreover, she emphasized the importance of special dispensations as part of a well-functioning immigration system that serves South Africa's national security. She noted that "*these dispensations have assisted in enhancing national security and the orderly management of migration*".

[30] These exemption programmes provided Zimbabwean nationals with a streamlined application process to obtain permits, provided that they satisfied the requirements and paid the necessary fees. ZEPs were exclusively made available to those who held the original DZP in 2009.[31]

The 2017 White Paper

[31] The 2017 White Paper saw the day of light during that year. In essence it was the national policy of the ZEP programme. The 2017 White Paper

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31 Answering Affidavit para 141 p 010-49.

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on International Migration Policy (White Paper) framed the value of exemption programmes as follows,[32] namely, to provide *"National security and public safety depend on knowing the identity and civil status of every person within a country. In addition, the presence of communities and individuals who are not known to the state but for whom the state has to provide, puts pressure on resources and increases the risk of social conflicts. Vulnerable migrants pay bribes and are victims of extortion and human trafficking. This increases levels of corruption and organised crime. Regularising relationships between states, however, improves stability, reduces crime and improves conditions for economic growth for both countries."*[33]

[32] The 2017 White Paper remains government policy and has not been withdrawn. Its justification for exemption programmes such as the ZEP – including reasons of national security, resource constraints, the protection of vulnerable groups, and economic growth – remain unchanged and it recognizes the importance of these exemption programmes: they advance national security, prevent corruption, and protect vulnerable migrants from exploitation and harassment.

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32 Founding Affidavit p 001-34 para 34.4. (See annexure FA6).

33 Annexure FA6 p 001-94.

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LEGAL FRAMEWORK

[33] Section 1(c) of our Constitution provides as follows:

> *"The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
>
> *(c) Supremacy of the constitution and the rule of law."*[34]

[34] Section 1 of PAJA, defines "administrative action", *inter alia*, as:

> *"...any decision taken, or any failure to take a decision, by –*
>
> *(a) an organ of state, when –*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
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> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) which adversely affects the rights of any person and which has a direct, external effect....."*[35]

[35] Section 31(2)(b) of the Immigration Act 13 of 2002 gives the Minister the power to grant individuals or categories of non-citizens the rights

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34 The Constitution Act 108 of 1996.

35 Promotion of Administrative Justice Act 3 of 2000.

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of permanent residence for a specified or unspecified period. Section 31 provide, in relevant part, as follows:

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

[36] Given the various exemption programmes set out above, the successive Ministers determined that "special circumstances" existed

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which justified the creation of exemption programmes for Zimbabwean nationals under section 31(2)(b). The various programmes amongst others, established streamlined procedures for Zimbabwean nationals to apply for exemption permits under section 31(2)(b), if they satisfied the eligibility criteria, and followed the steps prescribed by the Minister.

TERMINATION ANNOUNCEMENT

[37] On 19 November 2021 the Department made its first public statement on the fate of the 2017 ZEP – just over a month before ZEPs were due to expire. The decision to terminate the ZEP programme was made in September 2021, behind closed doors and without any public consultation.[36] The reasons for the decision by the Minister were revealed to the public some months later and set out to be the following:

37.1 The Minister's decision was prompted by submissions from the Director-General, dated 20 September 2021 and prominently headed "WITHDRAWAL AND/ OR NON-EXTENSION" of ZEPs.[37]

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36 Founding Affidavit p 001-36 para 36. Answering Affidavit (African Amity) p 018-132 para 90.3.

37 Annexure FA 8 p 001-96.

37.2 The Director-General recommended that the Minister "*exercise his powers in terms of section 31(2)(d) of the Immigration Act to withdraw and/or not extend the exemptions granted to the Zimbabwean nationals.*"[38]

37.3 While the Director-General recommended the eventual termination of the ZEP programme, he left it to the Minister to determine the duration of any further extension. The Director-General recommended that the Minister "*should consider imposing a condition extending the validity of the exemptions for* a period of three years, alternatively a period of 12 *months and any other period which the Minister deems appropriate*".[39]

37.4 The Minister approved these submissions, with the handwritten addition that he chose an extension period of only 12 months, without providing reasons for doing so.[40]

[38] What followed was that on 24 November 2021, Cabinet released a statement reflecting its decision "*to no longer issue extensions to the Zimbabwean special dispensations*". This was accompanied by the rider

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38 Id p 001-100 para 5.

39 Id p 001-100 para 6.

40 Id p 001-102.

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that Cabinet had "*decided on a 12 months grace period at the expiry of the current ZEP.*"[41] The respondents remain adamant that this decision was the Minister's alone and that Cabinet merely gave its approval.[42]

[39] Soon thereafter on 29 November 2021, the Department, then issued Immigration Directive 10 of 2021[43] directing that ZEP-holders were to be granted a 12-month "*grace period*" following the expiry of their ZEPs. The Directive further suggested that banks and other service providers should discontinue provision of services to ZEP-holders as from 1 January 2022, unless ZEP-holders could produce receipts of their applications for mainstream visas. On 13 December 2021 this Directive was however withdrawn by the Department.[44]

[40] Thereafter, on 5 January 2022, the Department published a notice in several newspapers headed "*non-extension of exemptions*", which informed all ZEP-holders that "*the Minister of Home Affairs has exercised his powers in terms of section 31(2)(d) of the Immigration Act 13 of 2002 not to extend the exemptions granted in terms ofsection 31(2)(b) of the Immigration Act*".[45] This notice repeated that ZEP-

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41 Annexure FA 9 p 001-108 para 6.3.

42 Answering Affidavit (African Amity) p 018-114 para 58.2.

43 Founding Affidavit p001-37para 38. (See annexure FA10).

44 Founding Affidavit p 001-37para 39 (See annexure FA11).

45 Annexure FA 13 p 001-122.

holders were afforded a 12-month grace period, solely for purposes of obtaining alternative visas. Identical language was used in the letters that were emailed to ZEP-holders at the time.[46]

[41] On 7 January 2022, the Minister published Immigration Directive 1 in the *Government Gazette* (Directive 1 of 2021).[47] The directive stated that the Minister had decided to extend ZEPs for a period of 12 months "*to allow the holders thereof to apply for one or other visas provided for in the Immigration Act that they may qualify for*".[48] The Minister further directed that no action may be taken against ZEP-holders during the 12-month period.

[42] The directive was accompanied by a press statement from the Minister to "*set the record straight*" and elaborate on the Minister's reasons for his decision.[49] In this statement, the Minister indicated that he had "*decided to approve the recommendation made by the Director-General not to extend the exemptions to Zimbabwean nationals.*"[50]

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46 Annexure AA 4 p 010-145 – 147

47 Annexure FA14 p 001-123.

48 Annexure FA14 p 001-127.

49 FA p 001-3 para 44.

50 Id p 001-131 para 11.

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[43] Both the notice in newspapers and the letters to ZEP-holders concluded by stating that: *"Should any exemption holder have any representations to make regarding the non-extension of the exemptions and the 12 months period, you may forward such representations to Mr. Jackson McKay: Deputy Director General: Immigration services ZEPenquiries@dha.gov.za"*.[51]

[44] Directive 1 was eventually followed up by Directive 2 of 2022. The latter Directive was issued on 2 September 2022, together with an accompanying press statement, extending the grace period for a further six months, until 30 June 2023. The press statement concludes by stating that *"[t]here will be no further extension granted by the Minister"*.

[45] As mentioned in para 9 *supra*, the decision to terminate the ZEP programme and to refuse any further exemptions is primarily being challenged on four grounds. We will proceed to deal with these grounds individually.

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[51] Annexure FA 14 p 001-127.

FIRST GROUND: IS THE MINISTER'S DECISION TO TERMINATE THE ZEP PROGRAMME PROCEDURALLY UNFAIR UNDER PAJA AND OR PROCEDURALLY IRRATIONAL AND THUS REVIEWABLE UNDER THE PRINCIPLE OF LEGALITY?

REVIEW UNDER PAJA

[46] In this regard it was the argument of the applicants that the Ministers' decision to terminate the ZEP programme and to refuse further exemptions is an administrative action and reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the principle of legality inherent in section 1(c) of the Constitution of the Republic of South Africa, 1996 ("the Constitution").[52]

[47] In *Motau*, the Constitutional Court identified seven elements of an administrative action:

> *"There must be: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has*

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52 CORMSA also concurs with HSF [HSF HOA: 20-37, para 87.3] that to the extent that any constitutional rights are limited, such limitation must be reasonable and justifiable under section 36 of the Constitution.

a direct, external legal effect; and (g) that does not fall under any of the listed exclusions".[53]

[48] The above criteria for an administrative action are all fulfilled herein as follows:

48.1 the Minister made a decision to terminate the ZEP system (with transitional provisos) and to refuse further extensions beyond 30 June 2023;

48.2 the decision was taken by the Minister, a natural person;

48.3 who was acting in furtherance of a public function, being the control and management of South Africa's immigration and asylum systems;

48.4 the Minister took his decision in terms of empowering provisions in a statute, i.e. section 31(2)(b) and (d) of the Immigration Act;

48.5 the Minister's decision adversely affected the rights of ZEP holders;

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[53] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) ("Motau") at para 33.

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48.6 in direct, external and legal manner; and

48.7 the impugned decision does not fall within the listed exclusions.

[49] Section 3 of PAJA, sets out that administrative action which materially and adversely affects an individual's rights or legitimate expectations must be procedurally fair, requiring, at minimum:

49.1 a clear statement of the administrative action;

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

49.3 a reasonable opportunity to make representations

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

[51] This is achieved by the administrator either holding a public inquiry (which includes a public hearing on the proposed administrative action, and public notification of the inquiry); followed a notice and comment procedure (which involves publishing the proposed action for public comment and written representations on the proposal); follow both the public inquiry and notice and comment procedures; follow a fair but

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different procedure in terms of an empowering provision; or follow another appropriate procedure which gives effect to the right to procedural fairness in section 3 of PAJA (for example, granting hearings to the entire group affected by the proposed action).

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

[53] This requirement of rationality demands that the decision itself and the process by which it was taken must be rational.[54] In *Simelane*, the Constitutional Court emphasized:

> *"[W]e must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality."*[55]

REVIEW UNDER THE PRINCIPLE OF LEGALITY

[54] In determining a review under the principle of legality section 1(c) of our Constitution quoted above finds applicability.

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

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

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[55] It encompasses law or conduct which not rational offends the principle of legality inherent in the Constitution, and must be held to be invalid.[56]

[56] In order to succeed with this ground of review the applicants must meet the requirements of procedural fairness and procedural rationality.

[57] In *Albutt*,[57] the Constitutional Court further confirmed that there are circumstances in which rational decision-making outside the ambit of PAJA requires specific interested parties to be invited to make representations. Whether this is so depends on the nature and effect of the decision at issue and the expertise or experience of those contending that they had a right to be heard.[58]

[58] Our Constitutional Court held recently in *e.tv (Pty) Limited v Minister of Communications and Digital Technologies* that, where a decision is "*not a mechanical determination*" and "*important interests are at*

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56 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 85 and 90.

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

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

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stake", it is not procedurally rational to take a decision without notice to affected parties to obtain their views on the matter.[59]

EVIDENCE

[59] In turning then to the evidence presented before this court the deponent to the founding affidavit sets out that ZEP holders, civil society, and the general public were not notified of the Minister's intended decision nor were they afforded a meaningful opportunity to make representations before the Minister took his decision.[60] Given the grave and lasting impact of the extension decision on the rights of ZEP-holders both individually and as a group, a rational and procedurally fair decision to extend the ZEP until 31 December 2022 would require at the very least that ZEP-holders and civil society organizations representing their interest be afforded an opportunity to make representations on the proposed extension before it was approved.[61]

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

60 Founding Affidavit para 114 p 001-58 and The Minister and Director General admission that the invitation for representations on which they rely was communicated in notices that communicated the decision not to extend in January 2022. Answering Affidavit pp 010-54-57 paras 159 - 169.

61 Founding Affidavit para 120 p 001-60.

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[60] Instead, the Minister's press statement of 7 January 2022 refers to internal discussions between the Minister and *"affected units within the DHA"*[62] but is silent on the participation of ZEP holders and the public in the decision-making process. It follows thus, that no participation by ZEP holders occurred before the decision by the Minister was taken.

[61] This much is conceded by the Minister himself where he admits that the only *"inputs"* into his decision regarding the extension of ZEPs in September 2021 were provided by DHA officials and a September 2021 submission from the Director General of the DHA.[63]

[62] The only engagement received from the Minister to the matter at hand took the form of letters being sent to two civil society organizations representing Zimbabwean nationals, this after the Minister had already taken a decision. The respondents in turn can point to no any other engagement with civil society or the public at large.

[63] It is on this basis that counsel for the applicants had refuted the Minister's and Director-General's claims that there was an *"extensive public process implemented to seek comment from every affected ZEP holder and from civil society organizations representing the interests*

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62 Annexure "FA28" para 9.

63 Founding Affidavit para 115 p 001-59.

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of ZEP holders".[64] The Minister and Director-General went so far as to suggest that they provided an opportunity for ZEP holders to apply for individual exemptions, something the Minister has expressly stated he would not do.[65]

[64] In response hereto, the Director-General, the deponent to the answering affidavit[66] sets out that ZEP holders have been given an opportunity to make representations with regard to both their individual circumstances and as to whether the exemption regime should be extended for a further period. In these representations they were entitled to raise any issue which they consider relevant to their personal circumstances of ZEP holders generally and if they required more time, they may also raise this in their representations. The same invitation was also extended to two civil society organizations claiming to represent the interest of Zimbabweans living in South Africa.

[65] In the same answering affidavit, the Director-General has further denied that the Minister made a decision to terminate the ZEP programme. In fact therein, he claims that there was "*no decision*

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64 Answering Affidavit p 010-62 - 63 para 180.

65 Replying Affidavit pp 018-9 - 11 paras 16 - 22

66 Answering Affidavit para 176 p 010-59.

taken to terminate all ZEPs"[67] and that "*no decision has been taken not to grant further exemptions to ZEP-holders*".[68] He has further suggested that the Minister may grant individual extensions to ZEP holders under section 31(2)(b), stating that "*further extensions [are] available based on the individual circumstances ofZEP holders."*[69]

[66] This stance adopted by the Director-General who deposed to the Answering affidavit insisting that no final decision had been taken is unsustainable, more so is circumstances where the concerned Minister failed to depose to a confirmatory affidavit. It flies in the face of Directives and press statements which have been issued previously. Consequently, this Court accepts that a decision has been taken to terminate the ZEP programme.

[67] Furthermore, the deponent sets out that the impugned decisions so taken are supported by the Government of Zimbabwe and any mass unemployment and or impending economic upheaval should have been raised through diplomatic channels between South Africa and Zimbabwe, which has not occurred.

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67 Answering Affidavit p 010-14 para 16; p 010-91 para 274.

68 Answering Affidavit p 010-14 para 18.

69 Answering Affidavit p 010-75 para 220.

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[68] He contends further that as circumstances in Zimbabwe have significantly improved since 2008 when the hyperinflation and economic crisis occurred, Zimbabwe has since seen a positive growth in GDP which makes it favourable for Zimbabwean nationals to return.

[69] The deponent further sets out that it is for ZEP holders themselves to speak on how the impugned decision impacts them and that they have been given the opportunity to do so. It is not for civil society to do so, as no rights of civil society bodies is at risk of being breached. Where individual ZEP holders require more time to regularize their stay they should seek such time in individual representations which they make.[70]

[70] From the reply set out in the Answering affidavit it is apparent that the first call for representations was made after-the-fact, after the Minister's decision had already been taken and communicated. There was no attempt made by the Minister to solicit representations from ZEP holders before the Minister took his decision. This attempt so made belatedly after the decision had been taken was also not a genuine consultation, as illustrated in an exchange between a ZEP-holder, Ms Maliwa, and the Minister's attorneys in January 2022. By way of illustration, Ms Maliwa sent an email to the designated address,

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[70] Answering Affidavit para 176.7 p 010-62.

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imploring the Minister to "*Please consider giving us another 4 years. We have nowhere to stay in Zim and no work*".[71]

[71] To this email the Minister's attorneys responded stating that: "*due to the circumstances and reasons advanced in the letter that you have received, the Minister is unable to reverse the decision.*"[72]

[72] The response illustrates that the invitation for representations was vague and not designed to elicit meaningful representations from either ZEP holders or the public. This is so as the invitation was meaningless. It did not indicate the nature and purpose of the representations it intended to elicit from ZEP holders and the public. In his engagements with the Scalabrini Centre of Cape Town, the Minister was clear that he had decided to terminate ZEPs and that he will not entertain any further exemption applications from ZEP-holders, on either a blanket or individual basis.[73]

[73] Prior to a scheduled meeting with the Minister on 18 February 2022, Scalabrini circulated a proposed agenda. On the proposed item "*Scope for discussion and reconsideration*", the Minister responded that "*the*

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71 Annexure RA 7 p 018-152.

72 Id p 018-153.

73 Supporting Affidavit from Scalabrini p 018-290.

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attorneys for the Minister and DHA received representations for reconsideration of the decision that I have made from affected Zimbabweans. They were informed that there is no scope for reconsideration as the decision was taken after careful consideration and supported by the National Executive (Cabinet). It has become practically impossible to continue with the exemption regime".[74]

[74] Following the meeting with the Minister, Scalabrini addressed a letter to the Minister specifically asking whether he would consider individual exemption applications from ZEP-holders under section 31(2)(b).[75] To this the Minister replied, *"I do not intend to grant exemptions in terms of section 31(2)(b) anymore."*[76]

[75] Throughout the Answering affidavit, there is a notable disdain for the value of public participation.[77] Indeed, it is presumed that ZEP holders are capable only of making representations on why the Minister's decision should not apply to them personally and not on the merits of

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[74] Supporting Affidavit from Scalabrini p 018-294 para 10; Annexure SCCT 1 p 018-303 para 8.

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

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

[77] See, AA p 010-61 para 176.5; AA p 010-60 para 176.3; and AA p 010-62 para 176.7.

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the decision itself. While the views of civil society and the public are deemed unnecessary altogether.[78]

[76] To the matter at hand, the respondents accept that the right to a fair hearing is breached *"when an administrator has already made a decision and then contends that any participation process would have made no difference to the ultimate outcome."*[79]

[77] In this regard, counsel for the respondents argued that the September 2022 decision to extend the grace period by 6 months is evidence that the Minister retains an open mind.

[78] This argument, however, the Court cannot accept as it is inconsistent with the existing facts as the engagements embarked upon by the Minister did not affect his decision to terminate the ZEP-programme. What changed was the grace period afforded to ZEP-holders which had been extended until that expiry takes effect.

[79] The invitation for representation after the decision had been taken by the Minister, further runs counter to the very purpose of procedural fairness and procedural rationality which are intended at ensuring that

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[78] See, AA pp 010-61-2 paras 176.5 and 176.6.

[79] Respondents Heads of Argument para 172 p 028-54.

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before a decision is taken an open mind is kept until a complete picture of the facts and circumstances bearing on a decision is placed before the decision-maker. Here the decision was taken behind closed doors, without prior notification or consultation. The accompanying press statement made it clear that *"[t]here will be no further extension granted by the Minister"*.[80]

[80] As in the *e.tv (Pty) Ltd*-judgment *supra* the Minister's failure to conduct any prior consultations, before announcing the decision to terminate the ZEP programme, rendered the decision procedurally irrational given the far-reaching implications of the decision and that "*important interest are at stake*".[81]

[81] Furthermore, the fact that it was notionally possible for affected organizations and individuals to make representations before the decision could be taken, renders the decision so taken as procedurally unfair and irrational. The Minister not only failed to invite representations but also failed to consider any representations, before taking the decision.

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80 Press Statement Annexure SRA1 p 022-13.

81 Id at para 51 to 52.

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[82] This view we further find support for in *Esau*, where the Supreme Court of Appeal recognized that where a decision's "*effect, potential or real, on the rights, lives and livelihood of every person subject to them is drastic*", that decision cannot rationally be taken without affording affected persons an opportunity to make representations.[82]

[83] Our view is also supported by Hoexter who aptly puts it:

> *"[T]he opportunity to make representations should ideally be offered before any decision is taken, and thus before there is any question of a 'clear statement of the administrative action'. There are good reasons for this. As Baxter points out, in a subsequent hearing one has to do far more than present a case and refute an opposing case: one actually has to convince the decision-maker that he or she was wrong."* [83]

[84] The author continues:

> *"The ideal, of course, is a hearing beforehand – and this ideal seems to be reflected in the structure of s3(2) [of PAJA], which envisages notice of the proposed action and a reasonable opportunity to respond before any administrative action id actually taken and a 'clear statement' of the action becomes necessary. It is ideal because, as Corbett CJ noted in Attorney- General, Eastern Cape v Blom, there is a 'natural human inclination to adhere to a decision once taken'. It is easier to sway a decision-maker who has not yet decided, and harder to persuade a decision-maker to change a decision that has already been made. In*

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

83 Hoexter Administrative Law in South Africa (Juta: 3rd ed.) at 521.

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practice, a hearing after the decision has been taken will seldom be as advantageous as a hearing beforehand."[84]

SECOND GROUND: FAILURE TO CONSIDER THE IMPACT ON ZEP-HOLDERS AND THEIR CHILDREN (CONSTITUTIONAL INFRINGEMENTS)

[85] As per the founding affidavit, the deponent sets out that the Ministers public statements, indicate that no attempt was made to assess the impact on ZEP-holders and their children before a decision to terminate the ZEP programme was made.[85]

[86] As a decision of this consequence impacts over 178 000 ZEP-holders, it would have required proper information on who would be affected, to what degree and what measures were in place to ameliorate this impact. It further required a careful assessment of the current conditions in Zimbabwe.[86]

[87] In response to the above, the deponent to the Answering Affidavit denies that the impact on ZEP-holders' children and families were not

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[84] Hoexter at 530, referring to *Attorney-General, Eastern Cape v Blom* at 668E. See also *South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another* 2007 (2) SA 461 (C) at paras 23-24.

[85] Founding Affidavit para 157 p 001-74.

[86] Founding Affidavit para 158 p 001-74.

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considered. As the Minister did call for representations reference to specific information in relation to children and the families of ZEP-holders, if placed before the Minister, would have been considered. The deponent specifically denies that the relevant considerations would have been ignored and sets out that representations would have been considered on an individual basis.[87]

[88] In as far as the conditions in Zimbabwe are concerned, it is denied by the Director-General that the situation in Zimbabwe has not improved since 2008/2009. Furthermore, he sets out that in exercising his discretion that it falls on the Minister to decide whether or not to grant an exemption and whether or not the circumstances in Zimbabwe have improved.

[89] Furthermore, he asserts that the ZEP-programme saw the light of day as a result of profound political instability in Zimbabwe at the time and there is now a need for Zimbabwean nationals to be encouraged to return to Zimbabwe and to build a new and prosperous Zimbabwe.[88]

[90] In respect of this ground of review, the applicant had argued that the respondents have provided no evidence at all on the impact of this

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87 Answering Affidavit para 253-256 p 010-68.

88 Answering Affidavit para 257-262 p 010-87.

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decision on the ZEP-holders and their families or that it was considered by the Minister when the decision was taken. This is more so, as the Minister did not depose to the Answering Affidavit himself, but instead the affidavit was deposed to by his Director-General. In the present instance the Minister further made no Confirmatory Affidavit to confirm the allegations attributable to him as the decision maker as set out by his Director-General in the said Answering Affidavit.

[91] This omission the applicant had argued is significant as the decision-maker in this case was the Minister and not the Director-General and therefore it is the Minister who can testify to what material and considerations he took into account at the time when he made his decision. In the absence thereof, it was therefore argued that the Director-General was not best suited to depose to an affidavit on behalf of the Minister on this score.

[92] In this regard, counsel appearing for CORMSA had argued, that decision-makers must stand or fall by the reasons that they give for a decision at the time of the decision. *Ex post facto* reasons or amendments are impermissible.[89]

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[89] See *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27.

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[93] Furthermore, that no person can give evidence on behalf of another as in the present instance and in the absence of any suggestion that the Minister himself was unable to do so, no basis exists to relax the rule against hearsay in terms of section 3 of the Law of Evidence Amendment Act 45 of 1998. Support for this submission is found in the decision of *Gerhardt v State President* 1989 (2) SA 499 (T) at 504G to the effect that it is not permissible for one State official to make an affidavit for another State official. As Goldstone J (as he then was) put it:

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

[94] In contrast, counsel for the Minister had argued that the Minister *"could do no more than state that he considered such effect"*.[90] Counsel had further argued, that if the Court was to accept that the Minister's decisions are reviewable for these reasons, the Minister would in effect be precluded from ever deciding to terminate the exemption regime, because ZEP holders have lived and worked in South Africa since 2010

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[90] Respondents' HOA p 028-62 para 205.

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alternatively 2014, and as a consequence any decision not to grant them an indefinite extension would be rendered unlawful by virtue of the fact that they have made lives for themselves and their families in the country for several years.[91]

[95] Before this Court, there is simply no admissible evidence from the Minister on whether he took these considerations into account and how. This view taken by us is supported by the following:

95.1 Firstly, the Director-General's submissions to the Minister on 20 September 2021, which formed the basis of his decision, were entirely silent on the impact on the ZEP-holders' families and their children.[92]

95.2 On the Director-General's own version, the Minister simply approved the Director-General's submissions on the same day they were handed to him, without any further interrogation.[93]

95.3 In addition, the Minister's 7 January 2022 press statement, which sought to explain his decision, was entirely silent on this

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91 Respondents' HOA.

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

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

question of impact. The press statement did not call on ZEP-holders to address the specific impact of the decision on their families and children.

95.4 Furthermore, in the Answering affidavit, the Director-General was content to make the bold allegation that *"the question of the impact on children and families weighed heavily in the deliberations of the Department and the Minister"*, without any form of substantiation. No details were provided as to what information was considered, by whom, and when.[94]

95.5 The September 2022 Departmental Advisory Committee's report to the Minister again made no reference to the impact of the decision on ZEP-holders and their children.[95]

95.6 In addition to the above reasons, the Minister flatly refused to engage with these representations with an open mind. This is supported by his stance taken against the Scalabrini Centre in February 2022, where he said *"there is no scope for reconsideration"*.[96]

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94 Answering Affidavit p 010-86, para 255.

95 Annexure SA 4 p 010-354 – 372.

96 Minister's letter to Scalabrini p 018-303.

[96] On the totality of the evidence presented before this Court, the inescapable conclusion that must be drawn is that the Minister failed to consider the impact of his decision on ZEP-holders, their families and their children.

[97] Consequently, the Minister's decision must be reviewed and set aside, on the grounds that he further failed to take into account relevant information under section 6(2)(e)(iii) of PAJA.

[98] The Minister's decision is also found to be further unreasonable under section 6(2)(h) of PAJA. As in the *Bato Star*-decision the guiding principles on reasonableness were summarized specifically as to require an assessment of the *"nature of the competing interest involved and the impact of the decision on the lives and well-being of those affected."* [97]

THIRD GROUND OF REVIEW: THE DECISION UNJUSTIFIABLY LIMITS CONSTITUTIONAL RIGHTS

[99] As per the founding affidavit, the deponent sets out that in granting the exemption permits to Zimbabwean nationals, the Ministers'

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

predecessors recognized that these permits were necessary to protect the rights of vulnerable people. Therefore, the decision taken by the Minister to terminate the ZEP programme as from 31 December 2022, amounts to an unjustified limitation of such rights.[98]

[100] The rights affected by the termination of the ZEP-programme is the right to dignity which encompasses the right to the enjoyment of employment opportunities, access to health, education and protection from deportation. The termination of the ZEP-program the deponent asserts also impacts on the right of dependent children of ZEP-parents,[99] which is guaranteed by section 28(2) of our Constitution.

[101] The termination of the ZEP-programme affects several established principles underpinning the best interests of a child. For example, it is not in the best interest of a child to be undocumented for extended periods of time, it violates the principle that individualized decision-making in all matters concerning children should be made and the termination violates the duty to ensure that all children should be heard in matters concerning their interest.

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98 Founding Affidavit para 134 p 001-65.

99 Founding Affidavit para 139-143 p 001-67 to 68.

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[102] In response, the deponent to the Answering affidavit set out that the rights challenged by the termination of the ZEP-programme will amount to a claim that ZEP-holders are entitled to permanent exemptions. This is denied, as the exemption regime for qualifying Zimbabweans was never meant to be permanent.[100] In fact as counsel for the respondent had argued, the Minister's decisions never constituted a deprivation of rights of ZEP-holders but rather the granting of rights to them.

[103] In the Answering Affidavit, the deponent refutes the applicant's argument that the termination of the ZEP-programme will result in a violation of the holders right to dignity as it would mean that no termination of the programme can ever occur.[101]

[104] In addition, the deponent asserts that it would amount to an egregious breach of the separation of powers by a Court, to decide that a discretionary temporary exemption regime should in effect be converted into a permanent exemption regime, in circumstances where the legislature has determined that it is for the Minister to determine

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[100] Answering Affidavit para 190 p 010-65.

[101] Answering Affidavit para 209 p 010-70.

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whether or not to grant such regime and the conditions under which such regime is to be implemented.[102]

[105] Furthermore, that ZEP-holders have no more rights afforded to them than any other foreigners in South Africa in terms of the Immigration Act and it cannot be asserted that when a visa or permit expires to a foreigner that a violation of a Constitutional right has occurred.[103]

[106] On this basis, the deponent denies that the impugned decisions have breach the ZEP-holders right to dignity.

[107] On behalf of the applicant, it was argued that the Minister's decision is subject to the two-stage limitation analysis. Firstly, a determination should be made as to whether the decision limits fundamental rights and secondly, whether the respondents have demonstrated that the limitation is reasonable and justifiable under section 36 of the Constitution.

[108] On the limitation of rights, the respondent carries the onus to demonstrate that any limitation of rights is reasonable and justifiable

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[102] Answering Affidavit para 194 p 010-66.

[103] Answering Affidavit para 196 p 010-66.

in an open and democratic society based on human dignity, equality and freedom,[104] and which is context-sensitive.

[109] Section 36(1) of the Constitution dealing with the limitation of rights calls for a proportionality analysis.[105] This requires a Court to balance the nature and severity of the limitation of ZEP- holders' rights, on the one hand, with the importance of the Minister's purposes, the extent to which the limitation achieves the purpose, and the availability of less restrictive means to achieve the purpose, on the other.[106]

[110] In assessing a section 36 justification would require an analysis of the nature of the rights which have been limited because *"the more profound the interest being protected. . . the more stringent the scrutiny"*.[107]

[111] O'Regan J wrote in *S v Manamela* that: *"The level of justification required to warrant a limitation upon a right depends on the extent of*

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

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

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

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

the limitation. The more invasive the infringement, the more powerful the justification must be." [108]

[112] The applicants contend that the rights in question which are being infringed are the right to dignity, rights of children, the right to remain gainfully employed and economically viable to mention but a few.

[113] In determining the limitation to any of such rights, one would have to look at what justifications have been offered by the Minister under oath.

[114] In his press statement on 7 January 2022, accompanying Directive 1 of 2022, the Minister advanced his primary justifications for the decision to terminate the ZEP programme. As per the Answering Affidavit the Director-General firstly asserts that conditions in Zimbabwe have improved, justifying the termination of the ZEP programme, secondly, he asserts that the termination of the ZEP programme will alleviate pressure on the asylum system and lastly he appeals to budget and resource constraints as a reason for terminating the ZEP-programme.

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

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

[116] In *Teddy Bear Clinic*, the Constitutional Court explained that:

> *"As a starting point, it is important to note that where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law – usually the organ of state responsible for its administration – must put material regarding such considerations before the court. Furthermore, '[w]here the state fails to produce data and there are cogent objective factors pointing in the opposite direction the state will have failed to establish that the limitation is reasonable and justifiable'."* [109]

[117] The evidence of an alleged improvement that the Director-*General* can point to is a minor uptick in GDP between 2021 and 2022, which took place as a result of a single bumper harvest, after the economy contracted the year before.[110]

[118] The Director-General also makes a number of claims, including that hyper-inflation has abated and that unemployment in Zimbabwe has

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

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

fallen to 5.2%.[111] In fact, headline inflation shot up to 256.9% in July 2022[112] and, according to the World Bank report annexed to the Director-General's own affidavit, the unemployment rate is 19.1% (excluding those who have given up looking for work)".[113] Applying an expanded definition, which includes discouraged job seekers, the unemployment rate is in over 44%.[114]

[119] Apart from these assertions on claims of improvements in the economy of Zimbabwe, no facts were placed before the court presenting clear and compelling evidence to support them.[115] The respondents have failed to disclose any information or documents that the Minister consulted on the conditions in Zimbabwe before reaching his decision. Neither has the Minister deposed to an affidavit explaining his decision-making process and what information he considered.

[120] The Minister has also suggested that the exemptions were initially introduced, in part, to alleviate the burden on the refugee status determination system, as thousands of Zimbabwean nationals had

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111 Answering Affidavit p 010-84 para 247.

112 Replying Affidavit p 018-45 para 100.2 (See annexure RA10).

113 Annexure AA 9 p 010-163.

114 Annexure RA11.

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

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applied for asylum. The suggestion is that this backlog has cleared, thus obviating the need for the ZEP programme.

[121] In this regard, the Director-General further asserts that *"there is no basis to contend that the changes effected to the exemption regime will significantly increase pressure on the asylum system".*[116]

[122] The Director-General further does not dispute that the asylum system is plagued by systemic backlogs and delays.[117]

[123] In his press statements, the Minister referred to unspecified budgetary constraints within the DHA and stated that a decision has been taken to "prioritise" services for South African citizens. In his answering affidavit, the Director-General further makes the bold allegation that due to the impact of Covid-19 and increased demand for civic services for South African citizens and various budgetary cuts, a decision to prioritise services to citizens had to be made.[118] No further details are forthcoming or expanded upon by the Director-General.

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116 Answering Affidavit p 010-79, para 230.

117 Founding Affidavit pp 010-49 – 50 paras 74 – 77. Noted in AA p 010-102 – 103 paras 350-2.

118 Answering Affidavit p 010-82, paras 234 – 240.

[124] In this regard, the decision of Rail Commuters Action Group is instructive where, the Constitutional Court said the following regarding the evidentiary requirements that must be met before an organ of state can successfully invoke budgetary or resource constraints as a justification for limiting rights:

> *"...In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."* [119]

[125] In relying on budgetary constraints, the Director-General and Minister should therefore have taken this Court into their confidence and placed the details of the precise character of the resource constraints before this Court, which they have failed to do.

[126] As a result, and in the absence of any transparency on the part of the respondents, in circumstances where the respondents have a duty to

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

take this Court into their confidence but have not, we must conclude that the Minister failed to prove a justification based on facts which is rational between the limitation of rights on the one hand and a legitimate governmental purpose or policy on the other.

[127] Consequently, in the absence of factual evidence we therefore find that the Minister's decision is an unjustified limitation of rights, which is unconstitutional and invalid in terms of section 172(1) of the Constitution and must be reviewed and set aside in terms of section 6(2)(i) of PAJA.

[128] Given our findings on the first three grounds on review, we hold the view that to express our opinion on the remaining ground of review will be superfluous.

COSTS

[129] In respect of costs the applicants seek costs of three counsel in the event of being successful in accordance with the Biowatch principle.[120] We find no reason to depart from this principle but in the circumstances we deem it fit only to award costs of two counsel.

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[120] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

REMEDY

[130] In as far as an appropriate remedy is concerned, the applicant seeks three forms of relief in terms of this Court's remedial powers under section 172(1) of the Constitution and section 8 of PAJA.

[131] Firstly, the applicant seeks a declaration that the Minister's decision is unconstitutional, unlawful and invalid and whenever a Court finds that conduct is inconsistent with the Constitution, such Court is bound to declare the conduct invalid under section 172(1)(a) of the Constitution. That is a mandatory duty that cannot be avoided.[121]

[132] The order so sought is not intended to interfere with the legal validity of the existing extensions of ZEP permits until 31 December 2022 and again until 30 June 2023, or the further protections afforded by the Minister's Directives 1 of 2021 and 2 of 2022.

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

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

[134] In addition, the applicant seeks an order to set aside the decision of the Minister as it is just and equitable to do so and to remit the decision back to the Minister to make a fresh decision, following a proper, procedurally fair process that complies with the requirements of sections 3 and 4 of PAJA.

[135] In addition, the applicant seeks an order to grant an appropriate temporary order, to protect the rights of ZEP-holders while the Minister conducts a fair process and makes a fresh decision.

[136] This temporary relief would entail that within a period of (12) twelve months, pending the conclusion of a fair and lawful process and the Minister's further lawful decision that:

136.1 For a period of (12) twelve months from date of this judgment, the existing ZEPs will remain valid;

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

> "*1. No holder of the exemption may be arrested, ordered to depart or be detained for purposes of deportation or deported in terms of the section 34 of the Immigration Act for any reason related to him or her not having any valid exemption certificate (i.e permit label / sticker) in his or her*

passport. The holder of the exemption permit may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act

2. *The holder of the exemption may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for the reason of not having valid permit indicated in his or her passport; and*

3. *No holder of exemption should be required to produce –*

   (a) *a valid exemption certificate;*

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

[137] On behalf of the applicants, it was argued that the above remedy falls within the scope of this Court's just and equitable remedial discretion under section 8 of PAJA and section 172(1)(b) of the Constitution. Both provisions empower this court to grant "any" just and equitable remedy. Section 8(1)(e) of PAJA specifically empowers the Court to grant temporary relief.

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[138] Our Constitutional Court has further stated that, "*Once a ground of review under PAJA has been established there is no room for shying away from it.* Section 172(1)(a) of the Constitution requires the decision to be declared unlawful".[122]

[139] The remedies granted by courts under section 172 of the Constitution must further be just, equitable and effective. As stated in Steenkamp:

> "*It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to preempt or correct or reverse an improper administrative function. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.*"[123]

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[122] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) ("Allpay") at para 25.

[123] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 29.

[140] Support for the above relief is found in the decisions of the Constitutional Court where it has emphasized that the phrase "any order" in section 172(1)(b) of the Constitution is "as wide as it sounds",[124] serving as an injunction to do "practical justice, as best and as humbly as the circumstances demand".[125]

[141] The respondents on the relief sought by the applicant had argued that the granting of such a relief will amount to a substitution order as oppose to temporary relief in that such an order will replace the Minister's decision with a decision of the Court.

[142] Furthermore, that the power to grant and/or terminate a temporary exemption from the provisions of the Immigration Act, is a power granted to the Minister alone. The determination as to the circumstances in which it is permissible to exercise that power is quintessentially a policy laden and polycentric one. It is well established that Courts should show due deference to the competent authority in disputes involving matters of a policy nature, to avoid violating the separation of powers.[126] The Constitutional Court in *International Trade*

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

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

[126] *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at paras [21]-[22].

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Administration Commission v SCAW South Africa (Pty) Limited,[127] stated:

> *"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."*

[143] In addition, counsel had argued that a determination of the duration of an extension of a temporary dispensation that lies solely within the field of the executive, calls for judicial deference and warrants interference only in the clearest of cases.[128] Where there is a strong legal principle that admits of only rare exception, the proper standard is 'the clearest of cases'. The high standard ensures courts only depart from these principles when it is '*substantially incontestable*' that departure is required. The present case is not such a case.

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[127] *International Trade Administration Commission v SCAW South Africa (Pty) Limited* 2012 (4) SA 618 (CC) at para [195].

[128] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para [65]. See also *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) at para [53].

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[144] Counsel for the respondent had further argued that the applicants have asked the Court to extend the ZEP-programme after the lapsing date of 30 June 2023. This, counsel had argued is a decision for the Minister to make, if circumstances require it. It would amount to clear judicial overreach for this Court to intervene in circumstances where the Court is ill-equipped to make such a decision and there is no urgent need for it to do so.

[145] We disagree with the above assertions made on behalf of the respondents for the following reasons:

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

145.2 Secondly, this temporary order retains the directives that the Minister published on 7 January 2022 and 2 September 2022. Far from imposing a new decision on the Minister, it keeps the Minister's existing directives in place until such time as the Minister has made a fresh decision.

145.3 Thirdly, 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.

[146] As to the relief sought, the respondents further assert that the granting of such relief will infringe on the separation of powers doctrine. We also disagree with this assertion. This Court carries a constitutional responsibility when a finding has been made of constitutional infringement to grant just and equitable remedies,[129] and in ordering same will not amount to an encroachment on the separation of power doctrine. In the present matter this is what is called for.

ORDER

[147] In the result the following order is made:

147.1 The First Respondent's decision to terminate the Zimbabwean Exemption Permit (ZEP), to grant a limited extension of ZEPs of only 12 months, and to refuse further extensions beyond 30 June 2023, as communicated in:

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[129] *Mwelase* (n 215) at para 51.

147.1.1 the public notice to Zimbabwean nationals on 5 January 2022;

147.1.2 Directive 1 of 2021, published as GN 1666 in Government Gazette 45727 of 7 January 2022 (Directive 1 of 2021);

147.1.3 the First Respondent's press statement on 7 January 2022; and

147.1.4 Directive 2 of 2022, published on 2 September 2022, and the accompanying press statement

is declared unlawful, unconstitutional, and invalid.

147.2 The First Respondent's decision referred to in paragraph 147 is reviewed and set aside.

147.3 The matter is remitted back to the First Respondent for reconsideration, following a fair process that complies with the requirements of sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

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147.4 Pending the conclusion of a fair process and the First Respondent's further decision within 12 months, it is directed that:

147.4.1 existing ZEPs shall be deemed to remain valid for the next (12) twelve months;

147.4.2 ZEP-holders will continue to enjoy the protections afforded by Immigration Directive 1 of 2021, namely that:

"1. *No holder of the exemption may be arrested, ordered to depart or be detained for purposes of deportation or deported in terms of the section 34 of the Immigration Act for any reason related to him or her not having any valid exemption certificate (i.e permit label / sticker) in his or her passport. The holder of the exemption permit may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act.*

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2. *The holder of the exemption may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for the reason of not having valid permit indicated in his or her passport; and*

3. *No holder of exemption should be required to produce –*

   (a) *a valid exemption certificate;*

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

147.5 First Respondent, and any other parties opposing this application, are directed to pay the costs, jointly and severally,

the one paying the other to be absolved, including the costs of two counsel, where so employed.

C COLLIS
JUDGE OF THE HIGH COURT
PRETORIA

G MALINDI
JUDGE OF THE HIGH COURT
PRETORIA

M MOTHA
ACTING JUDGE OF THE
HIGH COURT PRETORIA

APPEARANCES:

Counsel for the Applicant:	Adv S Budlender SC Adv C McConnachie Adv Z Raqowa Adv M Kritzinger
Counsel for Intervening Party:	Adv D Simonsz
Counsel for the Respondents:	Adv I Jamie SC Adv S Rosenberg SC Adv M Adhikari Adv M Ebrahim
Counsel for Intervening Party:	Adv MM Mojapelo Adv D Mtsweni

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Date of Hearing: 11 and 12 April 2023

Date of Judgment: 28 June 2023

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REPUBLIC OF SOUTH AFRICA

"HSF 3"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2022-006386

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED:

28 June 2023
DATE

SIGNATURE

In the matter between:

VINDIREN MAGADZIRE	First Applicant
ZIMBABWE IMMIGRATION FEDERATION	Second Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
MINISTER OF POLICE	Third Respondent
NATIONAL COMMISSION OF THE SOUTH AFRICAN POLICE SERVICE	Fourth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
THE BORDER MANAGEMENT AUTHORITY	Sixth Respondent

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THE SOUTH AFRICAN NATIONAL DEFENCE FORCE Seventh Respondent

JUDGMENT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 June 2023.

THE COURT

Introduction

[1] At the commencement of the hearing, counsel for the applicants made the following remark: "[w]hat happened in Uganda with the expulsion of Indians under Idi Amin's regime will appear to be a picnic compared to the catastrophe that is coming on 1 July." Counsel for the respondents retorted: "[c]ounsel for the applicants' rhetoric took flight when we were told that what will happen on the termination from the 1st of July will make some of the horrific historical scenes of forced evacuation and flight from Uganda pale into insignificance. With great respect this is not an appropriate analogy at all."

[2] Before this Court is an application, under Part A, for an interim interdict pending the review relief sought under Part B. As per their Notice of Motion, the applicants seek the following:

a) An order interdicting and restraining the respondents from arresting, issuing an order for deportation or detaining any holder of the Zimbabwe Exemption Permit ("ZEP") for the purposes of deportation in terms of section 34 of the Immigration Act 13 of 2002 ("Immigration Act") for any reason related to him or her not having any valid exemption certificate in his or her passport;

b) An order directing that any holder of ZEP may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act solely for the reasons that they are a holder of the ZEP; and

c) An order directing that the holder of the ZEP may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for reasons of not having a valid permit indicated in his or her passport.

[3] The main application under Part B is brought in terms of Rule 53 of the Uniform Rules of Court. Even though this Court is not seized with Part B, it must take a judicial peek into the grounds of review which are raised in the main application and assess the strength.[1] The applicants anchor their review application on the following five grounds:

(a) It is beyond the Minister's power to withdraw the rights or exemptions that have been granted to the Zimbabwean nationals, and was therefore *ultra vires*. This is because such powers may only be exercised when there is good cause for withdrawing the rights or exemptions from the category of foreigners.[2]

(b) Even if the decision was not beyond his powers, it was the product of an irrational and procedurally unfair process during which materially interested persons were never given an opportunity to be heard at all.[3]

(c) The Minister failed to take into account relevant considerations in making the impugned decisions.[4]

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[1] *Economic Freedom Fighters v Gordhan and Others* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at paras 48 and 53.
[2] Founding Affidavit at para 46.1.
[3] Id at para 46.2.
[4] Id at para 46.3.

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(d) The Minister took into account irrelevant considerations in making the impugned decision.[5]

(e) In making the decision the Minister was materially influenced by errors of law.[6]

The Parties

[4] The first applicant is an adult male citizen of Zimbabwe who has lived in South Africa for 12 years; also, a Director and member of the second respondent. In bringing this application, he states the following: "I act in my own interest as a holder of Zimbabwean Exemption Permit ("ZEP"), in the interest of the Zimbabwean Immigration Federation and its members, and in the public interest."[7]

[5] The second applicant is a voluntary association of the Zimbabwean Exemption Permit holders and their family members, whose role is to safeguard the constitutional rights of its members and ensure that they can continue to reside in South Africa lawfully. It represents over one thousand holders of the Zimbabwe Exemption Permit, who have been in South Africa for over ten years.[8]

[6] The first respondent is the Minister of Home Affairs who is cited in his official capacity as the public official responsible under section 31(2) of the Immigration Act. The second respondent is the Director-General of the Department of Home Affairs who compiled the answering affidavit. He is also cited in his official capacity.

[7] The third, fourth and fifth respondents are all cited in their official capacities and are the Minster of Police, National Commissioner of South African Police Service and President of the Republic of South Africa respectively. The sixth respondent is the Border Management Authority which is headed by a Commissioner.

[5] Id at para 46.4.
[6] Id at para 46.5.
[7] Id at para 13.
[8] Id at para 14.2.

Its duty is to facilitate and manage the movement of people in and out of ports of entry into South Africa. Finally, the seventh respondent is the South African National Defence Force[9].

Preliminary Objection

[8] At the commencement of these proceedings the applicants sought to move for a final interdict. Counsel for the applicants submitted that the applicants are entitled to move for a final relief if the papers establish a clear right where they had brought an application for an interim relief. In advancing this argument, he relied on the matter of *Majake v Commission of Gender Equality and Others*,[10] in which the Court stated:

> "Although the applicant seeks interim relief, she is entitled to final relief if she can establish a clear right as opposed to a *prima facie* right. If the applicant is to be granted a final order she has to establish not only a clear right, but also an injury actually committed, and the absence of an alternative remedy."[11]

[9] Focusing on this issue, the Court in the matter of *National Gambling Board v Premier, KwaZulu-Natal, and Others*[12] held:

> "Ordinarily, an interim interdict is appropriate when the facts which establish a right to a final order are in dispute. It has been held in some cases that an interim interdict is not appropriate when the facts relating to a final order are not in dispute. In such a case the court will proceed to decide the legal issue pertaining to the main dispute. It will then issue or refuse a final order. In other cases it has been held that there may be circumstances in which the court will issue an interim interdict even if the facts pertaining to the main dispute are not in dispute. Mr Prinsloo contended that the former proposition is correct.[13]

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[9] Id at paras 18-23.
[10] [2009] ZAGPJHC 27; 2010 (1) SA 87 (GSJ); (2009) 30 ILJ 2349 (GSJ).
[11] Id at para 95.
[12] [2001] ZACC 8; 2002 (2) SA 715; 2002 (2) BCLR 156 (*National Gambling Board*).
[13] Id at para 52.

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[10] It bears mentioning that this principle operates where it appears from the answering affidavit that the rights are not in dispute and the facts are common cause. In the present instance, this is not the case.

[11] The respondents vehemently opposed this application. Counsel for the respondents submitted that it is abundantly clear that:

> "This affidavit deals only with the interim relief sought in Part A, as Part B of the review application is to be launched within 15 days of the grant of an order in terms of Part A."[14]

[12] Underscoring his submission, he referred to the applicants' replying affidavit in which the following is stated:

> "The applicants in this matter also still enjoyed a right under Rule 53 to amend, add or vary the terms of this notice of motion and supplement supporting affidavit in its review application of the Minister's decision."[15]

[13] He further contended that at all times the parties were working within the confines of Part A and that the papers were crafted accordingly. Therefore, the respondents would be prejudiced if Part B was to be heard on the papers before Court, and the proper course would be to afford the respondents time to supplement their papers. This of necessity would result in a postponement of the matter.

[14] Waiving their right to the record, which they are entitled to in terms of Rule 53 of the Uniform Rules of Court, counsel for the applicants argued that there is "no other document that would come from the Department. The document they relied upon; they mentioned that in the HSF case, Mr. Rosenberg repeated it today that the Minister's decision is based on the recommendation of the Director-General. There is no other document. That is the only document. We have it in front of us." I will refer to this point later in this Judgment.

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[14] Answering Affidavit at para 10.
[15] Replying Affidavit at para 42.

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[15] In support of this argument, the applicants referred to the matter of *Jockey Club of South Africa v Forbes*,[16] in which the Court, when examining Rule 53 of the Uniform Rules of Court, stated:

> "The primary purpose of the rule is to facilitate and regulate applications for review. On the face of it the rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the rule, slavishly – and pointlessly – to adhere to its provisions. After all: "(R)ules and not an end in themselves to observe for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts..."[17]

[16] Following a short adjournment, the Court ruled that Part A had to be proceeded with.

Historical Background

[17] With the advent of democracy, the new South Africa was and is still confronted with a high number of illegal immigrants, asylum seekers and refugees. Most of these migrants come from the neighbouring countries including Zimbabwe. In 2008 approximately 200 000 people arrived in South Africa seeking asylum, a vast number of whom were Zimbabwean nationals. Again in 2009 another 207 000 arrived also seeking asylum. Similarly, many of them were Zimbabwean nationals.[18] The large detention and deportation of Zimbabwean nationals in South Africa, as a means of deterring illegal immigration and illegal stay, proved to be ineffective and costly; since many deportees simply returned to South Africa within a few days or months after their deportation.

DZP Era

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[16] [1992] ZASCA 237; 1993 (1) SA 649 (AD); [1993] 1 All SA 494 (A).
[17] Id at para 30.
[18] Director-General letter of 31 December 2021 (CaseLines at 001-181).

[18] In April 2009, South Africa implemented the Dispensation of Zimbabwe Project ("DZP") "to regularise the large number of Zimbabweans nationals residing in South Africa irregularly. The extraordinarily high number of applications under the Refugees Act that were lodged by Zimbabwean nationals who had fled to South Africa exceeded the capacity that the Department of Home Affairs had to properly consider and, where appropriate, issue asylum and refugee permits. This raised the need for a special response to the undocumented Zimbabwean migrants in South Africa to reduce the severe pressure on the South African asylum and refugee system."[19]

[19] The DZP was also meant to curb the deportation of Zimbabweans who were in South Africa illegally; and provided amnesty to Zimbabweans who had obtained South African documents fraudulently. Approximately 295 000 Zimbabweans applied for the permit. Just over 245 000 permits were issued and the rest were denied due to the lack of passports or non-fulfilment of other requirements.[20]

[20] It is noteworthy that:

> "74 In order to obtain a permit under the DZP regime, a Zimbabwean national in South Africa was required to prove that:
>
> 74.1 They were Zimbabwean national; and
> 74.2 They were gainfully employed in the Republic.
>
> 75 Applicants for DZPs were also required to provide their fingerprints, surrender their asylum or refugee status, and hand over any fraudulent immigration documents which they possessed."[21]

ZSD Era

[21] The DZP permit- holders were legally allowed to work, conduct businesses and study in South Africa, for the duration of the permit. The DZP was valid from 2010 to 2014. Announcing the closure of the DZP and the creation of the new

[19] Founding Affidavit at para 71.
[20] *Statement by the Home Affairs Minister on the New ZSP*, Founding Affidavit (CaseLines at 001-148).
[21] Founding Affidavit at paras 74-5.

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Zimbabwean Special Dispensation ("ZSD") permit of 2014, Minister Gigaba remarked that "[t]his was a significant gesture of support and solidarity with our neighbouring country of Zimbabwe in response to the large number of Zimbabweans residing illegally in South Africa due to political and economic instability there."[22]

[22] The DZP permit holders who wished to remain in South Africa after the expiry of their DZP permits were eligible to apply for the Zimbabwe Special Permits ("ZSP"), which existed for three years. However, they were subject to certain conditions including:

> "79.1 Possessing a valid Zimbabwean passport;
> 79.2 Providing evidence of employment, business or accredited study;
> 79.3 Having a clear criminal record. All Applicants were required to submit Police clearance both from Zimbabwe and South Africa;
> 79.4 Make payment of a prescribed fee of R850.00 to a private company, VFS Visa Processing (SA) Pty Ltd (VFS);
> 79.5 Providing their biometric information to VFS.
>
> 80 Permit-holders under the ZSP dispensation were entitled to live, work, conduct business and study in South Africa, for the duration of the permit. Holders of ZSPs could not apply for permanent residence; irrespective of the duration of their stay in South Africa. They were also prohibited from amending their immigration status."[23]

ZEP Era

[23] On 8 September 2017, Minister Mkhize announced that 31 December 2017 would see an end to the ZSP regime, which started in 2014. Having confirmed that the total number of ZSP permits issued was 197 941, he announced a new dispensation called the Zimbabwean Exemption Permit ("ZEP"). The ZEP was due to commence on 15 September 2017 and terminate on 31 December 2021.[24]

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[22] See n 20 above.
[23] Founding Affidavit at paras 79-80.
[24] *Statement by Minister Mkhize on the Closure of the Zimbabwean Special Permit (ZSP) and the Opening of the New Zimbabwean Exemption Permit (ZEP)*, 8 September 2017 (CaseLines at 001-152).

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[24] Minister Mkhize confirmed that migrants play an important role in respect of economic development and in enriching social and cultural life. Following his remarks that these efforts would assist in addressing the throes of labour from our neighbours in the SADC region, he concluded that "the ZEP will go a long way in assisting Zimbabweans to rebuild their lives as they prepared, at work, in business and in educational institutions, for the final return to their sovereign state – Zimbabwe – in the near future."[25]

[25] The general conditions for the ZEP were:

> "87.1 the ZEPs holder could work and be employed in the Republic;
> 87.2 the holder could not apply for permanent residence, irrespective of the duration of their stay in South Africa;
> 87.3 the permit was not renewable or extendable; and
> 87.4 the holder could not change the conditions of the permit in South Africa.
>
> 88 Applicants for ZEPs were required to pay an administrative fee of R1092 to VFS and submit the following documents using an online portal administered by VFS:
>
> 88.1 A valid Zimbabwean passport;
> 88.2 Evidence of employment - in the case of an application for work rights;
> 88.3 Evidence of business - in the case of an application for business rights; and/or
> 88.4 Evidence of admission letter from a recognised learning institution - in the case of an application for study rights."[26]

The Dispute

[26] On 31 December 2021 approximately 178 000 ZEP permits were due to expire. The Respondents state, in their answering affidavit and heads of argument, that:

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[25] Id (CaseLines at 001-153).
[26] Founding Affidavit at paras 87-8.

"In September 2021 the Minister decided **not** to extend the exemption regime, as had hitherto taken place. This was communicated to the public in November 2021.

On 29 December 2021, the Minister issued Immigration Directive No.1 of 2021 (Directive 1) extending the validity of the ZEPs to 31 December 2022. Directive 1 of 2021 was gazetted on 7 January 2022.

Directive 1 recorded the Minister's decision to extend the validity of the current ZEPs for a period of 12 months to 31 December 2022 and that ZEP holders had the opportunity to apply for visas... ."[27] (Emphasis added.)

[27] On 2 September 2022, the Minister issued Directive No. 2 of 2022 extending the validity of the ZEPs from 31 December 2022 to 30 June 2023 and granting the same protection to ZEP holders during this further period, as those granted to ZEP holders by Directive 1.[28]

[28] This extension was for the purpose of allowing the ZEP holders to apply for one or other visas provided for in the Immigration Act that they may qualify for. This was made clear on 29 November 2021 when the Director-General issued Immigration Directive 10 of 2021 in which he confirmed that:

"[Cabinet had decided to no longer] issue extensions to Zimbabwean nationals who are holders of the Zimbabwean Exemption Permits (ZEP), but 12 (twelve) month grace period following the expiry of the current ZEP on 31 December 2021 within which these ZEP holders need to regularise their status within South Africa in terms of the Immigration Act, 2002 (Act No. 13 of 2002); ("the Immigration Act") and the Immigration Regulations, meaning 31 December 2022.

During the said 12 (twelve) month period, holders of the ZEP should apply for mainstream visas that they qualify for and ensure that their applications comply with the provisions and requirements of the Immigration Act and Immigration Regulations. At the expiry of this 12 (twelve) month period, those who are not successful will have to leave South Africa or be deported."[29]

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[27] Respondents' Heads of Argument paras 9-11.
[28] Id at para 12.
[29] Founding affidavit at paras 93-4.

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[29] On 7 January 2022, the Director-General issued a notice to all Zimbabwean nationals, which was published in the Star and Sowetan newspapers. At paragraph 2 of the notice, he wrote the following:

> "Kindly note that the Minister of Home Affairs has exercised his powers in terms of section 31(2) (d) of the Immigration Act 13 of 2002 not to extend the exemptions granted in terms of section 31(2)(b) of the Immigration Act from 2017."[30]

[30] The Minister of Home Affairs issued a press statement dated 7 January 2022. On 9 January 2022, the press statement was published in the City Press, Sunday Times and Sunday World. At paragraph 11 of the press statement, he wrote:

> "In or about September 2021 I decided to approve the recommendation made by the Director-General not to extent the exemptions to the Zimbabwean nationals."[31]

[31] On 31 December 2021, the Director-General, L.T. Makhode, addressed a letter to one of the stakeholders. At paragraph 2 of the letter, he stated:

> "Kindly note 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 exemption granted to you in terms of section 31(2)(b) in 2019."[32]

[32] The Minister's powers under Section 31(2) (b) of the Immigration Act of 13 of 2002 are as follows:

> **"31. Exemptions**
>
> ....
>
> (2) Upon application, the Minister may under terms and conditions determined by him or her–
>
> ....

[30] Answering Affidavit at para 144.1, Annexure AA5 (CaseLines at 003-92).
[31] Id at para 144.3, Annexure AA6 (CaseLines at 003-93).
[32] Id at para 144.4, Annexure AA7 (CaseLines at 003-96).

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(b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may–

(i) exclude one or more identified foreigners from such categories; and

(ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;

(c) for good cause, waive any prescribed requirement of form; and

(d) for good cause, withdraw an exemption granted by him or her in terms of this section"

[33] It is this decision that is the *raison dêtre* of this case. However, the main battle is reserved for the Part B hearing.

Legal Framework

[34] When dealing with an interim interdict, it is trite that one focuses on the four requirements, namely:

(a) *prima facie* right, albeit open to some doubt;
(b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;
(c) the balance of convenience must favour the granting of the interdict and
(d) the applicant must have no alternative satisfactory remedy.[33]

[35] Examining these four requisites, the Court in the matter of *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*[34] stated:

> "An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a

[33] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*National Treasury v OUTA*) at para 41.
[34] [2008] ZASCA 78; 2008 (5) SA 339 (SCA).

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continuing nature or there must be a reasonable apprehension that it will be repeated. The requisites for the right to claim an interim interdict are:

(a) A *prima facie* right. What is required is proof of facts that establish the existence of a right in terms of substantive law;

(b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) The balance of convenience favours the granting of an interim interdict;

(d) The applicant has no other satisfactory remedy.

The test in regard to the second requirement is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of 'reasonable apprehension' was quoted with approval in *Minister of Law and Order and Others v Nordien and Another*:

> 'A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.'

If the infringement complained of is one that *prima facie* appears to have occurred once and for all, and is finished and done with, then the applicant should allege facts justifying a reasonable apprehension that the harm is likely to be repeated."[35]

[36] An interim interdict is concerned with the preservation or restoration of the *status quo* pending the final determination of litigants' rights. To this end we refer to the matter of *National Gambling Board* in which it was held:

> "An interim interdict is by definition

[35] Id at paras 20-2.

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> 'a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.'

The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has the jurisdiction to decide the main dispute"[36]

[37] It bears mentioning that in a proper exercise of one's discretion the four elements must be considered in conjunction with one another, not in isolation.[37]

[38] Having examined the *Setlogelo* test, the Court in *National Treasury v OUTA*[38] held the following:

> "It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."[39]

[39] When considering an interim interdict, it is also prudent to be mindful of what was stated in *Pikoli v President and Others*. The Court said:

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[36] *National Gambling Board* above n12 at para 49.
[37] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1967 (2) SA 382 (D) at 383E – F.
[38] *National Treasury v OUTA* above n 33 at para 41. The High Court relied on the well-known requirements for the grant of an interim interdict set out in *Setlogelo* and refined, 34 years later, in *Webster*. The test requires that an applicant that claims an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy.
[39] Id at para 45.

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"When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief."[40]

Prima Facie Right

[40] Firstly, the applicants need to show that there is a *prima facie* right, albeit open to some doubt, to the relief they seek in the main application. As already hinted this Court will sneak a glance at the main action.

[41] Counsel for the applicants submitted that his clients challenged the Minister's decision primarily on *ultra vires*. He submitted that the Minister's decision is inconsistent with Section 31(2)(b) of the Act.

[42] He relied on the matter of *Minister of Education v Harris*[41] in which the Court said:

"In this case, there is no suggestion in the affidavits filed by the Minister of an administrative error. On the contrary, the notice in the present matter not only cites section 3(4)(i) of the National Policy Act three times as the source of its authority, it identifies itself with the Act by means of its heading 'Draft Age Requirements For Admission to an Independent School *Policy*' (my italics). There can be little question then that the provision was deliberately chosen. It might well be that those responsible for drafting the notice had doubts about whether the powers under section 5(4) of the Schools Act could be used in respect of independent schools, a matter which I have expressly left open. They might have had other reasons for choosing to issue the notice under section 3(4) of the National Policy Act. It is not necessary to speculate. What is clear is that they consciously opted to locate the notice in the framework of section 3(4) of the National Policy Act. The result is that it is not now open to the Minister to rely on section 5(4) of the Schools Act to validate what was invalidly done under section 3(4) of the National Policy Act. The otherwise invalid notice issued under the

[40] [2009] ZAGPPHC 99; 2010 (1) SA 400 (GNP) at para 6.
[41] [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).

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National Policy Act can therefore not be rescued by reference to powers which the Minister might possibly have had but failed to exercise under the Schools Act".[42]

[43] He further referred to *Langa v Premier, Limpopo and Others*.[43] In this case the Court reiterated the principle as follows:

> "In this matter, the Premier could therefore have derived the power to implement the decision of the Kgatla Commission from sections 13(1)(c) and 30 of the Limpopo Act, read with sections 25 and 26 of the Framework Act. Instead, the Premier purported to issue the withdrawal notice in terms of section 13(3)(b) of the Limpopo Act. This is significant. In *Harris*, the Minister of Education issued a notice in terms of section 3(4) of the National Education Policy Act, which purported to require independent schools to enforce an age requirement for admission of learners to grade 1. This Court concluded that section 3(4) did not give him the power to do this. The Minister attempted to argue that even if the notice was not valid under section 3(4), it was valid under section 5(4) of the South African Schools Act (Schools Act), and therefore that the mistaken reference to section 3(4) did not render the notice *ultra vires*. This Court rejected that argument and held that it was not open to the Minister to rely on section 5(4) of the Schools Act 'to validated what was invalidly done under section 3(4) of the National Education Policy Act.' Thus the decision of the Minister could 'not be rescued by reference to powers which the Minister might possibly have had but failed to exercise under the Schools Act.'
>
> Thus, if a functionary purports to exercise under one Act a power that that Act does not confer upon him or her, that exercise of power is unlawful even if there is another Act that confers such power on the functionary. In this case, the Premier published a notice in the Provincial Gazette in which he purported to remove the applicant 'in terms of section 13(3)(b)' of the Limpopo Act. There is no suggestion of an administrative error in the affidavits filed by the Minister. When this apparent misquote in the Premier's notice was raised at the hearing of this matter, counsel for the fifth respondent attempted to argue that the Premier had exercised his power in terms of section 30 of the Limpopo Act and only had 'regard to'

[42] Id at para 18.
[43] [2021] ZACC 38; 2022 (3) BCLR 367 (CC); 2021 JDR 3152 (CC).

section 13. Following this Court's approach in *Harris*, it is not open to the Premier to now place reliance on section 30."[44]

Ultra Vires Challenge

[44] In a nutshell, counsel for the applicants submitted that the Minister relied on Section 31(2)(b) to not extend the ZEP. The ineluctable question is: does this section grant the Minister the right not to extend? If the answer is no he acted *ultra vires*, because he acted outside the provisions that he purported to be relying upon. However, if one equates the Minister's action to a withdrawal, the inescapable question is: was his action informed by good cause, as required by the section?

[45] On a proper reading of section 31(2)(b), the Minister is, when special circumstances exist which justify his decision, afforded powers to grant a foreigner or a category of foreigners the right of permanent residence for a specified or unspecified period. Using this section, this court is of the view that the Minister cannot terminate, extend or not extend the exemptions.

[46] However, in terms of section 31(2)(b)(i) the Minister is empowered to exclude one or more identified foreigner from such categories. In terms of section 31(2) (b)(ii) for good cause, the Minister is empowered to withdraw such rights from a foreigner or a category of foreigners. To arrive at a conclusion that there is good cause a court must evaluate the evidence objectively.

[47] In rebuttal, respondents' counsel submitted that before 31 December 2021 there was no intention or consideration to withdraw any rights or terminate the permits, because that would be a pre-mature termination before they lapse. He further submitted that when there was reference to a decision to terminate the permits, his *ipsissima verba* was: "one must recognise that as being perhaps loose talk or talk that is not anchored in the provisions in this context of section 31(2)." This Court does not share these sentiments. In matters of national importance and of

[44] Id at paras 45-6.

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life and death for over 178 000 souls, if one includes the children, there is no room for loose talk. Loose lips sink ships.

[48] He urged the Court to conclude based on objective evidence, no matter what the Director-General said. In fact, he said it may not matter what the Minister might have said at any time. However, the objective evidence confirms that the Minister decided not to extend the exemptions. It is impossible to shut our eyes to the various statements, press releases and communications made by the Director-General and Minister.

[49] Respondents' counsel submitted two propositions to navigate what he called a difficult problem. Firstly, the Court must accept that there was no termination of ZEPs by any act of the Minister. There was no power exercised in terms of section 31(2). This Court views this proposition as being tantamount to rewriting the history of this case. The Minister did exercise powers in terms of section 31(2), he said so, whether he was empowered do so or not is another question.

[50] The second proposition is that on 20 September 2021 the Minister extended ZEPs by one year, the argument goes. He argued that "that is the first and in fact the only exercise in the context of this matter of a section 31(2)(b) power". He then urged the Court to bear in mind that there was no termination of the ZEP permits, not one single permit was terminated. Each of those permits was extended. This Court holds the view that, nothing could be further from the truth, the ZEP permits were terminated. ZEP permit holders were afforded an opportunity to regularise their stay in South Africa.

[51] On 20 September 2021, the argument further goes, the Minister was considering options that were placed before him. The respondents' counsel further submitted that one of those options could have been to extend the permits by 36 months (3 years) or by 48 months (4 years). He argued that this is a policy decision and could have been arrived at by means of a new ZEP scheme, setting in place a fresh exemption regime. Therefore, he submitted, with ZEP shortly to lapse, the Minister was faced with a decision whether to extend it and for how long.

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[52] He mentioned that in law, no matter how it is described, ZEP was extended for 12 (twelve) months and 6 (six) months. These are the two administrative acts which stand and there could have been no termination except by the effluxion of time, he submitted. He mentioned that the Minister was aware of the looming termination and the possible dislocation that would involve over 178 000 people. He made a decision on the length of the extension, he maintained.

[53] Indeed, this Court concurs, the Minister was confronted with a variety of options, but he opted not to extend ZEP on the recommendation of the Director-General, he stated so himself. Responding to a question from the Court about what happens post 30 June 2023, counsel for the respondents made common cause with the Minister's decision. Following the three regimes, the ZEP was now coming to an end, he argued. He further stated that when the permits come to an end "there is dislocation and there are arrangements to be made. Twelve months is granted on the basis that is considered a reasonable extension in the circumstances. The Minister said within that twelve months' parties are advised to make the necessary applications for mainstream visas, to make the necessary applications for exemptions, to make the necessary applications for any waivers and equally to make representations."

[54] In our view, counsel is engaged in an effort to rescue the Minister's decision, the fact of the matter is that ZEP has come to an end. However, we are in total agreement with respondents' counsel that the twelve (12) and subsequently six (6) month extensions conferred rights to ZEP holders. These rights are akin to the ones found under ZEP. Where we part company is on his insistence that the Minister did not make a decision in terms of section 31(2)(b).

[55] He submitted that the applicants' arguments are misconceived, because under the notice of motion they describe the decision as the decision not to extend and under the founding affidavit they describe it as the decision to terminate without good cause. According to him there was never any termination or withdrawal of the ZEP permits.

Lack of Rationality and Good Cause Challenges

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[56] Applicants' counsel submitted that the Minister failed to show good cause when exercising his decision. He submitted that good cause is not the same thing as reasonableness and rationality. Indeed, it is a much wider standard which invites the Court to make a value judgment based on the facts. In the matter of *eTV (Pty) Ltd and Others v Judicial Service Commission and Others*[45] the Court held:

> "[I]t is not sufficient that 'good cause' should exist purely in the mind of the decision-maker: the decision must, in addition, be objectively justifiable or survive objective scrutiny. Put differently, 'good cause' in the mind of the decision maker alone is simply not 'good enough. If questions such as the one in issue were to be interpreted purely against a subjective test, we might as well begin to put out the lights for any role for the courts as protectors and defenders of our constitutional order."[46]

[57] In his statement dated 7 January 2021, the Minister of Home Affairs stated his reasons for not extending ZEP, *inter alia*, they are:

> "It is documented that South Africa's unemployment rate increased by 1.8% bringing the overall rate to 34%. This rate is the largest since the start of Quarterly labour Force Survey in 2008.
>
> Approximately 1900 Zimbabwean nationals' exemptions holders applied for waivers in terms of the Immigration Act and their applications were rejected. These applications were in violation of the conditions of the exemption... ."[47]

[58] The applicants attacked these reasons and submitted that it is a "constellation or a random assemblage of justifications that have no bearing to the justification of introducing the scheme in the first place."

[59] Counsel for the applicants had argued that if the Minister was minded to terminate the ZEP scheme, he had to demonstrate the connection between the decision to terminate and the improvement in the economic and political situation

[45] [2009] ZAGPJHC 12; 2010 (1) SA 537 (GSJ).
[46] Id at 544H-I.
[47] Founding Affidavit at para 99, Annexure FA7 (CaseLines 001-174).

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in Zimbabwe. Therefore, the Minister's decision was worse than irrational in that it was arbitrary, he submitted. The primary justification for the introduction of the Dispensation Zimbabwean Project, later called ZEP, was the decline of the political and economic situation in Zimbabwe, he continued. Therefore, it means that this dispensation can only be withdrawn for reasons that are related to the political and economic stability of Zimbabwe, the argument goes.

[60] This Court does not share this view because of its polycentric nature. In the matter of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[48] the Court held:

> "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

Constitutional Rights

[61] Applicants' counsel submitted the Minister's decision adversely affected ZEP holders' rights. First to be implicated are the constitutional rights which exist whether there is ZEP or not, he argued. These are rights which flow from the Bill of Rights of the Constitution and protect any person who is in South Africa unless the Constitution specifically limits the protection only to citizens and these are the higher order rights of ZEP holders, he submitted.

[62] This Court concurs that the Minister's decision will implicate the following rights: the right to human dignity (section 10 of the Constitution); right to life (section 11 of the Constitution); right to equality (section 9 of the Constitution); right to freedom and security of the person (section 12 of the Constitution);

[48] [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 96.

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right to freedom of movement (section 21 of the Constitution); right to a basic education (section 29 of the Constitution); right to property (section 25 of the Constitution); and children's rights (section 28 of the Constitution).

[63] Continuing in the same vein, applicants' counsel maintained that there is a second order of rights. These are rights conferred to ZEP holders. In short, he submitted, ZEP transforms a person who would have been treated as an illegal immigrant into a person recognised by law as being in the country lawfully and the consequences that flow from being in the country lawfully are that one can work, study or conduct a business. The respondents' counsel conceded that the rights that will be implicated by the termination of ZEP include *inter alia* the rights to freedom of movement and residence. Both these rights are adversely impacted by the Minister's decision to terminate the ZEP.

[64] There was contestation about the nature of the decision. This decision was taken by a member of the executive, and it is also endorsed by Cabinet. The question is, does this decision fall under the exclusions mentioned in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")? Applicants' counsel submitted that it is an implementation of a legislative authority to an administrative fiat. Therefore, it is closer to the field of administration.

[65] This concept of policy can manifest itself in many ways, he argued. The policy may be in a statute, constitution or in an administrative decision, he continued. He submitted that the mere fact that an administrative decision is informed by policy consideration does not on its own transform the decision or take it out of the realm of administrative review. The only debate that we should entertain is whether the decision that has been taken fits the definition of an administrative decision under PAJA and if it does then it is vulnerable to challenge under PAJA, he submitted. The respondents view the decision as a policy decision.

[66] This Court is of the view that because of high policy content, the Court might view it as an executive decision. Even if policy is invoked, the decision still needs to

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comply with the Constitution. In *Affordable Medicines Trust and Others v Minister of Health and Another*[49] the Court held:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.' In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."[50]

[67] This Court does not have to adjudicate this issue. This debate is better left for the correct forum, which is Part B.

[68] As already stated, the applicants anchor their case on five grounds. This Court is convinced that the applicants have established facts on a *prima facie* basis, if proved finally, will entitle them to a relief sought in the main application. The applicants have put forward a serious question to be tried as constitutional issues are involved.[51]

Irreparable Harm

[69] Secondly, the applicants must establish that there is a well-grounded apprehension of irreparable and imminent harm. As already stated the test for a reasonable apprehension of irreparable and imminent harm is an objective one.

[70] Having lived in South Africa for years, ZEP permit-holders have built families and businesses. Referring to family life, the Court in *Nandutu and Others v Minister of Home Affairs and Others*[52] held:

> "The right to family life is not a coincidental consequence of human dignity, but rather a core ingredient of it. This judgment grapples with the intertwined

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[49] [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).
[50] Id at para 49.
[51] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell* NO and Others [1995] ZACC 13; 1995 (2) SA 813 (W); 1996 (1) BCLR 1 at 825C.
[52] [2019] ZACC 24; 2019 (5) SA 325; 2019 (8) BCLR 938 (CC).

relationship between human dignity and familial rights and how they function alongside notions of state security and legislative regimes that seek to protect persons within the borders of the Republic."[53]

[71] Some of the ZEP permit-holders have married South African nationals and have children who hold South African identification and travel documents. These children's entire livelihoods and existence have been in South Africa. These children will be uprooted in the middle of the academic year to begin afresh in a new education system. Any reasonable person confronted with these facts would apprehend the probability of irreparable and imminent harm to these children if their parents were to be uprooted and sent back home without proper engagements.

[72] The interest of a child is paramount and protected under section 28 of the Bill of Rights. The end of ZEP threatens to break up families. In the matter of *Centre for Child Law and Others v Media 24 Limited and Others*[54] the Court said:

> "The best interests of the child principle enshrined in section 28(2) of the Constitution is a right in and of itself and has been described as the 'benchmark for the treatment and protection of children'"[55]

[73] The respondents correctly conceded that ZEP permit-holders possess constitutional rights.[56] Even though they deny that there is a reasonable apprehension of breach of those rights. The respondents' main argument is that an interim interdict is not a viable relief in view of HSF and CORMSA review applications. They contend that at the heart of the litigation between *HSF/CORMSA v The Minister*,[57] on the one hand, and *ZIF v The Minister*, on the other hand, are the same issues.

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[53] Id at para 1.
[54] [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC).
[55] Id at para 37.
[56] Answering Affidavit at para 56.
[57] *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 75.

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[74] The Respondents submitted that the review relief sought by ZIF would be met by an objection of *res judicata* and issue estoppel. They referred to a matter of *Smith v Porritt and Others.*[58] In this matter the Court indicated that each case will depend on its own facts and any extension of the defence will be on a case-by-case basis.[59] Indeed, this Court is alive to the danger of the multiplicity of judgments which may be conflicting. However, *in casu*, the applicants rely mainly on *ultra vires*. None of the parties in both *HSF/CORMSA* and *African Amity* canvasses the issue of *ultra vires*. Moreover, these applicants do not seek the same relief. For instance, African Amity seeks permanent residency status. It is our view that members of ZIF are entitled to ventilate their *ultra vires* argument under their Part B.

[75] Most of the Zimbabwean Immigration Federation members are unlikely to qualify for mainstream visas under the Immigration Act, namely the general work visa, the critical skills visa and the business visas. This was one of the reasons the exemption permit was conceived. We pause to mention that this Court is sensitive to the separation of powers and understands the prerogative that the Minister enjoys in deciding to end ZEP, if he is so minded. However, he must still comply with the Constitution of the Republic.

[76] A proper engagement with ZEP holders involves, *inter alia*, adequate staff to deal with a sudden surge in visa applications. At paragraph 159 of the answering affidavit the following is stated: "the Department was thus required to prioritize its budget, as it was unable to employ more staff members in immigration

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[58] [2007] ZASCA 19; 2008 (6) SA 303 (SCA).

[59] Id at para 10. The court held:
"Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank BPK* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis. (*KBI v Absa Bank supra* at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others".

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services."[60] The Department does not deny that Zimbabwean Immigration Federation members have experienced severe delays in processing their applications for mainstream visas.

[77] We are told by no less a person than the Minister that "the DHA has now limited capacity to deal with the extension of the exemptions by virtue of its constrained budget. The outbreak of COVID-19 and other economic factors facing South Africa resulted in the budget of the DHA being cut twice in the amount of R1.8 billion in 2020/21 and 2020/2022 financial years.... This resulted in the insufficient funds to cover the existing staff compliment..."[61] Therefore, to expect over 178 000 people to be processed in the system before 30 June 2023 is both irrational and unreasonable.

[78] On their deportation, ZEP permit-holders stand to lose their homes, businesses and jobs. Furthermore, if the applicants go on to be victorious in the Part B application, it will be a hollow victory. Clearly, that is not only unjust but also threatens the rule of law and visits irreparable harm on the applicants.

[79] The respondents' submission that section 34(1) confers a discretion on the immigration officer whether or not to effect an arrest or detention of an illegal foreigner is cold comfort. Even though the immigration officer must approach the exercise of his or her discretion in *favourem libertatis* when deciding whether or not to arrest or detain a person, the applicants will be at the mercy of the officer's discretion. In *S v Zuma and Others*[62] the Court held:

> "Even if there is such a discretion and even if it could be exercised so as to overcome a statutory presumption (surely a doubtful proposition) that gives rise to no more than a possibility of an acquittal; the possibility of a conviction remains. The presumption of innocence cannot depend on the exercise of discretion."[63]

[60] Answering Affidavit at para 159.
[61] Founding Affidavit at para 99, Annexure AA7 (CaseLines 001-173).
[62] [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA).
[63] Id at para 28.

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[80] Moreover, Cabinet told the applicants that if they were not successful in their visa applications they should leave South Africa or be deported, as stated in paragraph 28 above.

[81] For all the reasons stated, we hold the view that there is a well-grounded reasonable apprehension that the applicants will suffer irreparable harm if the interim interdict is not granted.

The Balance of Convenience

[82] Thirdly, the balance of convenience must favour the granting of a temporary interdict to the applicants. Under this rubric, the Court in *National Treasury v OUTA* held that:

> "A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant if interim relief is not granted as against the harm a respondent will bear, if the interdict is granted. Thus a court must assess all relevant factors carefully in order to decide where the balance of convenience rests."[64]

[83] It goes without saying that the constitutional rights of ZEP permit-holders are under serious threat of infringement come 30 June 2023. In particular, the fundamental rights of ZEP holders such as the right to human dignity; right to life; right to equality; right to freedom and security; right to freedom of movement; rights to a basic education; right to not be deprived of property; and the best interest of the child as contained in the Bill of Rights stand to be violated.

[84] This Court is enjoined to uphold the Constitution and must ensure that laws promote the spirit, purport and objects of the Bill of Rights. Accordingly, the stronger the prospects of success, the less the need for a balance of convenience to favour the applicants and the opposite is true. The weaker the prospects of success, the greater the need for a balance of convenience to favour

[64] *National Treasury v OUTA* above n 33 at para 55.

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them. We are of the view that the applicants have made out a case with strong prospects of success because of the following.

[85] Firstly, section 31(2) (b)(ii) does not cater for what the Minister did. In our view his conduct is *ultra vires*. Secondly, he did not show good cause for his decision. In the matter of *National Credit Regulator v Opperman and Others*[65] the Court held:

> "But we know that no rights flow from or exist under an unlawful and void agreement. The provision would be 'inoperative, a patently regrettable result', ineffectual and in fact meaningless. It would be a patent 'drafting error'."[66]

[86] Finally, the constitutional rights of the applicants need to be protected from being trampled upon. We cannot conceive of any harm that will be visited on the Department if the interim interdict is granted. Especially, when counsel for the respondents told us that the extensions are not cast in stone. The Minister has not closed his mind to the possibility of a further extension. The Departmental Advisory Council advises him. It was argued that the "Minister did not exclude the possibility of granting a further extension(s) in the future, should the need arise and should this be appropriate."[67]

[87] The same cannot be said about ZEP holders. They stand to lose their assets, businesses, and jobs, to mention but a few. Moreover, in our view the two extensions of ZEP holders' rights are an indication that the respondents can accommodate the applicants while they exhaust all their legal rights as provided for in an open and democratic society based on human dignity, equality and freedom.

[88] This court is persuaded that this matter falls within the ambit of the clearest of cases as adumbrated in the judgment of DCJ Moseneke in *OUTA*[68]. As already

[65] [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC).
[66] Id at para 36.
[67] Respondents' Heads of Argument at para 14.3.
[68] *National Treasury v OUTA* above n 33.

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stated, we are mindful of the need to respect the separation of powers, as the court in *OUTA* cautioned when it said:

> "Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.
>
> The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases". However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case."[69]

[89] We are of the view that the balance of convenience favors the applicants, especially since the decision implicates the Bill of Rights as already ventilated above.

Alternative Remedy

[90] Lastly, the applicants must have no satisfactory alternative remedy. Firstly, both the twelve and six month extensions were designed to afford the ZEP holders an opportunity to regularise their stay in South Africa. This is in the face of a largely depleted and financially challenged Immigration Office. This much the respondents have conceded. Therefore, a submission that ZEP holders have other remedies cannot hold.

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[69] Id at paras 46-7.

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[91] Secondly, the decision to end ZEP is a *fait accompli*. There cannot be any form of consultation to talk of. The Court in *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others*[70] held that:

> "The learned judge said, with support from various cases decided mainly in the English courts, that seeking approval for a decision already made is not consultation. He said that consultation entails 'a genuine invitation to give advice and a genuine receipt of that advice', it is 'not to be treated perfunctorily or as a mere formality', and that engagement after the decision-maker has already reached his decision, or once his mind has already become 'unduly fixed', is not compatible with true consultation."[71]

[92] Rebutting this point, the respondents relied on *Mamabolo v Rustenburg Regional Local Council*[72] in which the Court stated:

> "The appellant's main complaint seems to be that when he was invited to make representations on 28 May 1996, a decision had already been taken to dismiss him. As a general proposition the expectation of procedural fairness gives rise to a duty upon the decision maker to afford the affected party an opportunity to be heard before a decision is taken which adversely affects his rights, interests or legitimate expectations and a failure to observe this rule would lead to invalidity - Baxter - Administrative Law 3rd ed at 587. This Court has said that a right to be heard after the event, when a decision has been taken, is seldom an adequate substitute for a right to be heard before the decision is taken *Attorney-General, Eastern Cape v Blom and Others* 1988(4) SA 645 (A) at 668D.
>
> I am entirely in agreement with the dictum in the *Blom* case (supra). However this case stands on a different footing. The decision taken on 14 May 1996 was in substance provisional and not final. This was made clear to the appellant and that is why he was invited to address the Council on 28 May 1996, if he so wished. Besides, the decision to consider the confirmation or termination of his appointment is not something that was suddenly sprung upon him; he knew that

[70] [2013] ZASCA 134; 2013 (6) SA 421 (SCA).
[71] Id at para 42.
[72] [2000] ZASCA 45; 2001 (1) SA 135 (SCA).

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at the end of his probationary period this issue would arise. He would have applied his mind to it and, if so advised, would have even sought legal assistance."[73]

[93] It is clear to us that the Minister has not given the extensions in order to engage in consultation with ZEP holders. The extension is simply for the ZEP holders to apply for visas. In the minutes of the meeting with the Scalabrini Centre it is recorded:

> "The Minister responded to indicate that there will be no further extension that will be given to ZEP holders. The Minister added that at a meeting with Freedom Advocates, he indicated that the ZEP holders have been given sufficient time to move to a main stream visa and if they do not they must leave SA by the 31 December 2022."[74]

[94] The Director-General sent two identical letters to the Zimbabweans Diaspora Association and African Amity. The letter stated the following:

> "Kindly note that the Minister of Home Affairs has exercised his powers in terms of section 31(2)(b) of the Immigration Act 13 of 2002 not to extend the exemption granted to Zimbabwe nationals in terms of section 31(2)(b) in 2019.
>
> In order to avoid unnecessary prejudice, the Minister has also imposed a condition giving you a period of 12 months in order to apply for one or more of the visas provided for in the Immigration Act.
>
> You are therefore acquired to make use of the 12 months period to apply for one or more of the visas set out in the Immigration Act."[75]

[95] The conspectus of evidence indicates with certainty that the applicants do not have an adequate alternative remedy. It is our view that an interim interdict pending the judgment in the main application under Part B is justified.

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[73] Id at paras 20-1.
[74] Answering Affidavit at para 152; Annexure AA11 (CaseLines 003-108).
[75] Applicant's Heads of Argument at para 96.

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Costs

[96] It is trite that the Court's discretion on costs is wide and unfettered but must be exercised judicially. I am mindful of the dictum in the matter of *Biowatch Trust v Registrar Genetic Resources and Others.*[76] However, we are of the opinion, and in exercising our discretion, that the costs should be cost in the main application. The main application should be proceeded with forthwith, especially since the applicants' counsel submitted that they already have the documents in terms of Rule 53. As mentioned under paragraph 15 above, the applicants' counsel relied on the *Jockey Club* case to jettison the benefits of Rule 53. It is safe to conclude that the matter will be finalised in less than twelve months.

Order

1. Pending the judgment of this Court in the main application under Part B, the respondents are:

   a) Interdicted and restrained from arresting, issuing an order for deportation or detaining any holder of the Zimbabwe Exemption Permit ("ZEP") for the purposes of deportation in terms of section 34 of the Immigration Act 13 of 2002 ("Immigration Act") for any reason related to him or her not having any valid exemption certificate in his or her passport;

   b) Directed that any holder of the ZEP may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act solely for the reasons that they are a holder of the ZEP; and

   c) Directed that the holder of the ZEP may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the

[76] [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

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2002 ("Immigration Act") for any reason related to him or her not having any valid exemption certificate in his or her passport;

b) Directed that any holder of the ZEP may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act solely for the reasons that they are a holder of the ZEP; and

c) Directed that the holder of the ZEP may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for reasons of not having a valid permit indicated in his or her passport.

2. The applicants are ordered to set down the main application within twelve months from date of this order, failing which this order will lapse.

3. The costs of this application (PART A) shall be costs in the main application. (PART B)

C. COLLIS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

G. MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

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MOTHA AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Date of hearing:	13 April 2023
Date of judgment:	28 June 2023

Appearances:

For the Applicants:	Adv. T. Ngcukaitobi SC
Instructed by:	Mabuaza Attorneys
For the Respondents:	Adv. S. Rosenberg SC
Instructed by:	Office of the State Attorneys

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DEPARTMENT OF HOME AFFAIRS

"HSF 4"

NO. 3533

8 June 2023

MINISTER OF
HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA

Private Bag X741, Pretoria, 0001, Tel: (012) 432 6635 Fax: (012) 432 6675
Private Bag X9102, Cape Town, 8000, Tel: (021) 469 6507, Fax: (021) 461 4191

DEPARTMENT OF HOME AFFAIRS: HEAD OFFICE

BORDER MANAGEMENT AUTHORITY

PROVINCIAL OFFICES

REGIONAL AND DISTRICT OFFICES

IMMIGRATION OFFICERS: PORT CONTROL

IMMIGRATION OFFICERS: INSPECTORATE

PERMITTING SECTIONS

CIVIC SERVICES

MINISTER'S IMMIGRATION DIRECTIVE NO 2 OF 2023

IMPLEMENTATION OF THE DECISION NOT TO EXTEND ZIMBABWEAN NATIONALS' EXEMPTIONS GRANTED IN TERMS OF SECTION 31(2)(b), READ WITH SECTION 31(2)(d) OF THE IMMIGRATION ACT 13 OF 2002

I, Dr PA Motsoaledi, MP, Minister of Home Affairs having, with the powers bestowed upon me in terms of section 31(2)*(b)*, read with section 31(2)(d) of the Immigration Act, decided to extend the validity of Zimbabwean exemption permits issued to Zimbabwean nationals for a further period of 6 months in order to allow the holders thereof to apply for one or

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other visas and waivers provided for in the Immigration Act, (read with Immigration Regulations, 2014) that they may qualify for, hereby direct that this decision should be implemented as follows, during the further 6 months' period, starting from 30 June 2023 and ending 31 December 2023:

1. No holder of a valid exemption permit may be arrested, ordered to depart or be detained for purposes of deportation or deported in terms of the section 34 of the Immigration Act for any reason related to him or her not having any valid exemption certificate (i.e. permit label / sticker) in his or her passport. The holder of a valid exemption permit may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act.

2. The holder of a valid exemption permit may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for the reason of having an expired exemption permit indicated in his or her passport; and

3. No holder of exemption should be required to produce—

   (a) a valid exemption certificate/permit;

(b) an authorisation letter to remain in the Republic contemplated in section 32(2) of the Immigration Act when making an application for any category of the visas, including temporary residence visa.

Any enquiry related to the contents of this Directive, should be directed to Mr Yusuf Simons at Yusuf. Simons@dha.gov.za or at 082 809 2142

THUS DONE AND SIGNED AT PRETORIA ON THIS THE 7th DAY JUNE 2023.

DR P A MOTSOALEDI, MP
MINISTER OF HOME AFFAIRS
DATE: 7th JUNE 2023

Home Affairs on extending the validity of the exemption permits issued to the Zimbabwean nationals

7 Jun 2023

Press statement on the issuing of Minister's Immigration Directive no: 2 of 2023, extending the validity of the exemption permits issued to the Zimbabwean nationals

1. As you are aware, the Minister of Home Affairs (Minister) issued a directive in September 2022, extending the validity of exemption permits issued to the Zimbabwean nationals to 30 June 2023. Since that time, significant developments took place.

2. The Minister has approved thousands of waiver applications of the affected Zimbabwean nationals. This has resulted in significant increase in the number of visa and waiver applications. The Departmental Advisory Committee (DAC) led by Dr Cassius Lubisi is now dealing with the increased number of visa applications.

The Minister is equally considering and approving waiver applications on a daily basis.

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3. Unlike before since May/beginning of June 2023, VFS Global is now receiving between 1 000 - 1 500 visa and waiver applications of the affected Zimbabwean nationals daily. For these reasons, the Director- General has deployed more officials to assist in the processing of the applications.

4. The Minister took into consideration the said factors, including (to a certain extent) submissions received from the affected Zimbabwean nationals, relevant officials of the Department of Home Affairs (DHA) and other interested parties and decided to issue another Immigration Directive, extending the validity of Zimbabwean exemption permits for a further period of 6 months, ending on 31 December 2023. A copy of the Directive is annexed hereto marked "A".

5. The Minister's Immigration Directive no: 2 of 2023, will be published in the Extraordinary Government Gazette tomorrow on Thursday, 8 June 2023 .

6. The Minister calls upon all interested parties to take into consideration the said Directive in their decision-making processes.

7. The Minister will be addressing a letter to the Minister of International Relations and Cooperation requesting her to issue a note verbale to bring the Directive to the attention of His Excellency, the Ambassador of the Republic of Zimbabwe.

Issued by: Department of Home Affairs
More from: Department of Home Affairs
More on: Home affairs

DLA PIPER

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"HSF 5"

Attention: Alpheus Denga
Denga Incorporated Attorneys
35 Pritchard Street
2001 Johannesburg - Joubert Park
Gauteng

Your reference
AM Denga
Our reference
CM/CM/442879/1W Makadam / C Mabila
UKM/121121803.1

21 August 2023

By Email: alpheus@dengainc.co.za

Dear Sir

HELEN SUZMAN FOUNDATION / MINISTER OF HOME AFFAIRS ("MINISTER") AND OTHERS - ZEP

1 We refer to the above matter and the orders granted by the Full Court of the Gauteng Division (Pretoria) on 28 June 2023 in respect of:

1.1 *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 490 (**HSF**); and

1.2 *Magadzire and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 491 (**Magadzire**).

2 As you know, we act for the first applicant, the Helen Suzman Foundation.

3 In HSF, the Full Court granted temporary relief which directs that pending the reconsideration by the Minister of Home Affairs ("**Minister**") of his decision to terminate the Zimbabwean Exemption Permit ("**ZEP**"):

3.1 existing ZEPs shall be deemed to remain valid for the next twelve months; and

3.2 ZEP-holders will continue to enjoy the protections afforded by Immigration Directive 1 of 2021, including protection from arrest and/or deportation and the right to enter into or depart from the Republic, provided he or she complies with all other requirements for such entry and departure, apart from possession of a valid permit in his or her passport. We attach a copy of the order as **Annexure A.**

4 The Full Court expressly stated in its judgment that it granted these orders, "*to preserve the* status quo" (para 145.1). Any steps taken which breach the protections afforded to ZEP-holders by those orders would subvert that intention.

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5 We therefore trust that the Minister will abide by the Full Court's order pending all appeals processes, including the application for leave to appeal filed by the Minister on 13 July 2023.

6 In *Magadzire*, the Full Court granted interim relief interdicting the arrest, deportation or detention of ZEP-holders for failing to produce a valid exemption certificate and allowing ZEP-holders to enter into or depart from the Republic provided he or she meets the requirements for such entry or departure. We attach a copy of that order as **Annexure B**.

7 As you are aware, in terms of section 18(2) of the Superior Courts Act, an application for leave to appeal does not suspend the operation of interim relief. Therefore, as a matter of law, the pending application for leave to appeal in *Magadzire* and any future appeals do not suspend the order. We trust that the Minister will respect that legal position.

8 In the interests of providing certainty to the thousands of ZEP holders whose rights are protected by the Full Court's orders in *HSF* and *Magadzire*, our client seeks an urgent undertaking from the Minister that he will respect both orders – the temporary relief granted in *HSF* and the interim interdict granted in *Magadzire* – pending any appeal processes in either matter.

9 If the Minister refuses to provide this undertaking, we request that he urgently provide his reasons for doing so.

10 We would be grateful for your urgent response, by no later than **Friday, 25 August 2023**.

Yours faithfully

DLA Piper South Africa (RF) Incorporated
(*sent electronically, without signature*)

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"HSF 6"

Denga Incorporated
Reg. No. 2003/021402/21
legal art

Your ref: CM/CM/442879/1W Makadam/
Our ref: A DENGA/nm/AM17/23
Date: 29 August 2023

DLA PIPER SOUTH AFRICA (RF) INCORPORATED

Attention: Ms C Mabila

Emails: Chigo.Mabila@dlapiper.com

Dear Madam

RE: HSF/MINISTER OF HOME AFFAIRS AND OTHERS: APPLICATION FOR LEAVE TO APPEAL

1. We acknowledge receipt of your letter dated 25 August 2023 in which certain undertakings were required from the Minister of Home Affairs ("Minister").

2. In the letter you purport to be now acting on behalf of Magadzire and Zimbabwe Immigration Federation ("ZIF"). As far as we are aware, the attorneys of record in respect of the Magadzire matter is Mabuza Attorneys. May you furnish us with the power of attorney proving that you now act on behalf of Magadzire and ZIF.

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3. We do not agree with your interpretation of section 18 (2) of the Superior Courts Act 10 of 2013 in relation to the judgements and orders made in the Helen Suzman Foundation ("HSF") and Magadzire matters:

3.1 First, the Full Court in the HSF's matter granted a temporary relief through the backdoor. In fact, the Full Court dealt with just and equitable order as contemplated in the Constitution. It is therefore not open to your client to contend that the order amounts to an "*interlocutory order not having the final effect*" as set out in section 18 (2) of the Superior Courts Act.

3.2 Second, we have set out as the grounds for leave to appeal that:

"*33.1. The Minister has issued directives (all in all three), the most recent extending the validity of the permits to 31 December 2023. The Government Gazette to this effect was made available to the Court before judgment was delivered on 28 June 2023.*

33.2 The test for substitution has not been met[1].

33.3 The order violates the doctrine of separation of powers and the just and equitable order issued by the Court was not appropriate.

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1 **International Trade Administration Commission v SCAW South Africa Pty Ltd Limited** 2012 (4) SA 618 (CC), para 195.

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33.4. *The factors taken into consideration by the Court in granting the substitution order are not exceptional at all[2]".*

3.3 Third, your client cannot take refuge in the order made in Magadzire simply because our clients contend in the application for leave to appeal in that matter that:

"*6.* *The interim interdict issued by this Court is appealable:*

6.1. *First, it is in the interests of justice to do so. The interim interdict encroaches on the exercise of statutory powers assigned to the first respondent ("Minister") and the order implicates the doctrine of separation of powers. The Minister has issued directives affording protections to the ZEP holders, their families and children. There is undisputed evidence tendered by the data analysist, Mr Warwick Meier to the effect that 81% of the ZEP holders, including the first applicant frequently freely travel to and from Zimbabwe[3].*

6.2 *Second, the harm is serious, immediate, ongoing and irreparable. The applicants[4] who have unsuccessfully applied for other visas and rejected cannot*

---

2 **Trencon Pty Limited v Industrial Development Corporation of South Africa** 2015 (3) SA 245 (CC), paras 46-55.

3 AA, para 188-192: Caselines: 003-53-003-54.

4 ZEP holders.

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be dealt with in terms of the relevant provisions of the Immigration Act 13 of 2002. This includes deportation after the internal appeal and due judicial process are exhausted.

6.3 *Third, the interim interdict cannot be allowed to stand as it disrupts the enforcement of immigration laws by the respondents.*

6.4 *Fourth, the judgment and orders issued in the* ***Helen Suzman Foundation*** *matter*[5] *are a subject of an application for leave to appeal. Whether successful or not, the appeal process will take long to conclude and thus making the interim interdict to have immediate and substantial effect on the overall administration of the matters relating to the ZEP holders*".

3.4 Fourth, you are aware that the Minister issued a directive published in the Government *Gazette* in June 2023. The directive extends the validity of the exemption permits to 31 December 2023. The directive extends the protections which are now part of the Full Court order to the affected Zimbabwean nationals. The Full Court was made aware of the directive before the judgments were issued. Indeed, the HSF has not challenged the directive and the Full Court has not set aside the said directive. A copy of the directive is annexed hereto marked "**A**".

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5 Case number:32323/2022.

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4. In view of the above circumstances, the Minister is not prepared to furnish any undertaking sought by yourselves. The above circumstances constitute adequate reasons for the Minister's decision not to give any undertaking now and in the future.

5. All our clients' rights remain reserved.

Sincerely

Alpheus Denga

DENGA INCORPORATED

CC:

Mabuza Attorneys

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zondiwe@mabuzas.co.za

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