IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

On the roll: Thursday 26 October 2023

Before: The Honourable Collis and Malindi JJ and Motha AJ

Case No: **32323/22**

In the matter between:

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

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INTERVENING PARTY'S HEADS OF ARGUMENT:
APPLICATION FOR INTERIM ENFORCEMENT

INTRODUCTION

1. These short heads of argument advance four propositions:

   1.1. First, that the order made by this Court in paragraph 147.4 of its judgment dated 28 June 2023 ("***the Judgment***") is an interlocutory order not having

the effect of a final judgment, as contemplated in section 18(2) of the *Superior Courts Act* 10 of 2013 ("***the Courts Act***");

1.2. Secondly, that notwithstanding the above, the First Respondent ("***the Minister***") has publicly expressed the view that paragraph 147.4 is, in fact, final and is thus suspended pending any appeal;

1.3. Thirdly, that the Minister's unjustifiable stance creates widespread uncertainty about when the Zimbabwean Exemption Permit ("***ZEP***") will, *de facto* or *de lege*, terminate, which uncertainty is deeply prejudicial to the many thousands of ZEP holders, their children and the general public; and

1.4. Fourthly, that in order to remedy such uncertainty and prejudice, this Court should grant the interim enforcement application brought by the Applicant ("***HSF***").

2. Each of these points is dealt with in turn. The Intervening Party ("***CORMSA***") also supports the application for a personal costs order against the Minister.

THE TEMPORARY NATURE OF THE INTERIM ORDER

3. It is submitted that there can be no doubt that paragraph 147.4 of the Judgment (hereinafter referred to as "*the interim order*")[1] is interlocutory and does not have the effect of a final judgment:

[1] Caselines 000-64.

3.1. It is explicitly phrased and designed to operate in the interim only: "*Pending the conclusion of a fair process and the First Respondent's further decision within 12 months*";

3.2. The Court itself clarifies that its order is "*simply to preserve the* status quo *pending the outcome of a fair process*", operates "*until such a time as the Minister has made a fresh decision*", and is no more than "*temporary relief*";[2]

3.3. The statutory power under which the interim order was made was section 8(1)(e) of the *Promotion of Administrative Justice Act* 3 of 2000 ("*PAJA*"), namely to grant "*a temporary interdict or other temporary relief*";[3]

3.4. Whatever wording is used, the nature of the order is inherently not final in effect. It does no more than regulate the position and the parties' rights for a fixed, interim period until the Minister makes a new decision. The interim order will not have any effect once the Minister's decision is made, nor – save as precedent, like any other judgment – on the nature of the decision which the Minister may elect to make.

3.5. The Court even stated, in the judgment dismissing the applications for leave to appeal ("***the Appeals Judgment***") that:

[2] Paragraph 145 of the Judgment [Caselines 000-61].
[3] Paragraph 145.3 of the Judgment [Caselines 000-61].

"*It is enough to conclude by pointing out that the court was at pains to explain that its order under section 8(1)(e) of PAJA was temporary relief which is distinct from a substitution order under section 8(1)(c)(ii)(aa) of PAJA, and is just and equitable remedy in terms of section 172(1)(b) of the Constitution. The submission by the Minister to the contrary in this regard is flawed. The Minister's powers under section 31(2)(b) of the Immigration Act have not been interfered with through the temporary orders granted against him.*"[4]

4. There accordingly can be no doubt that the interim order is <u>not</u> final in effect. This is CORMSA's primary submission. Above all, this Court should ensure that there is no doubt whatsoever as to the nature of its order.

5. Consequently, per section 18(2) of the Courts Act,[5] the interim order is not suspended pending any appeal.

6. Yet – without any justifiable basis whatsoever – the First and Second Respondents (hereinafter referred to as "***the Department***") take a different view.

THE STANCE OF THE DEPARTMENT

7. The Department initially seemed confused and/or conflicted itself about whether the interim order was to be regarded as interim.[6]

[4] Paragraph 19 of the Appeal Judgment [Caselines 001-11].
[5] Section 18(2) of the Courts Act provides:
"Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal."
[6] Notably, in its initial answering affidavit, the Department repeatedly confirmed that it regarded the interim order as "*interim"*. See for example paragraph 27 where the Second Respondent stated that

8. However, the Department has now settled on the view that it regards the interim order as final. A further affidavit to this effect was filed,[7] and the heading to paragraphs 9-19 of its heads of argument states unequivocally that "*Paragraph 147.4 of the Order is final*".[8]

9. However, throughout its affidavits and its heads of argument, the Department fails to provide any rational basis for such a view:

   9.1. First, the Department argues by bringing its application for enforcement, HSF conceded that the interim order is final.[9] This is untenable: HSF has clearly expressed its view that the interim order is temporary in effect, but that its application is brought "*out of an abundance of all caution . . . to cover all eventualities*".[10]

   9.2. Second, it is asserted that merely because the interim order is "*pending*" future conduct does not mean it cannot be final. Yet, even at its strongest, this is not an argument for why the interim order <u>is in fact final</u>. It is no more than a hypothetical claim: Some time-limited orders may be regarded as final in effect.

"*the order granted by the court in paragraph 147.4 is interim in nature and does not have the effect of a final order*" [Caselines 066-170], or paragraph 47 where it is claimed that " *HSF seeks interim enforcement of an interim order and not a final order*" [Caselines 066-175].

[7] Caselines 066-420 *et seq*.

[8] Department's heads of argument [Caselines 066-449].

[9] Paragraph 10 of the Department's heads of argument [Caselines 066-450].

[10] Paragraph 36 of HSF's founding affidavit [Caselines 066-23].

Third, the Department suggests that an interim order becomes final if it is pending "*the occurrence of an event that is not within the judicial control of the court*".[11] Yet no authority is provided for this novel and incorrect proposition,[12] and no explanation is provided for why "*judicial control*" is determinative of whether an order is final in effect.

9.3. Fourth, the Department claims that an order cannot be interim if it "*is limited to a fixed duration and lapses automatically on the expiry of that period"*.[13] This begs the question: On such an interpretation, what order could ever qualify as interim? The Department seeks – without any reference to authority or to fact – to render the distinction between interim and final orders meaningless.

10. The Department fails to explain why, <u>on the facts of this matter</u>, the interim order is not interim. There is no attempt to illustrate, for example, how the interim order impacts or restricts any future decision by the Minister, or even how it would survive for more than twelve months.

THE IRREPARABLE PREJUDICE TO ZEP HOLDERS AND THE PUBLIC

11. Yet the damage caused by the Department's contentions is immense, on-going and irreparable. It has by now been emphasised to the Court many times that the rights, homes, careers, schools and lives of approximately 178 000 people are at stake in this matter. These people – the vulnerable migrants on whose behalf

[11] Paragraph 11 of the Department's heads of argument [Caselines 066-450].
[12] Courts often granted interim orders pending future administrative action, including against the Department itself. See for example *Dorcasse v Minister of Home Affairs and Others* [2012] 4 All SA 659 (GSJ) at para 1.
[13] Paragraph 12 of the Department's heads of argument [Caselines 066-450].

CORMSA advocates – require and deserve a degree of certainty about their status in South Africa.

12. The Department's public stance that it will not comply with the interim order, *de facto* if not *de lege*, destroys this certainty. As CORMSA has emphasised:

> *"I stress that this is not simply an academic argument. If the Court does not safeguard the integrity and enforceability of its judgment, come 31 December 2023, any ZEP holder who has not obtained an alternative visa would, in the eyes of the Department of Home Affairs, become an illegal immigrant and subject to immediate deportation. This would impact not only the thousands of ZEP holders themselves, but on the rights of others within the South Africa economy".*[14]

13. The Department suggests that fears of irreparable harm to ZEP holders are overblown because immigration officials have a discretion to arrest them,[15] because the Minister may yet extend the ZEP for a further period,[16] and because some ZEP holders have applied for and/or been granted waivers.[17]

14. None of these suggestions ameliorate the prejudice caused to ZEP holders by the Department's public stance of non-compliance with the interim order. In place of the clear, comprehensive and predictable protection granted by the Court to all ZEP holders, the Department proposes unreliable, partial and non-binding measures. The Department would have ZEP holders hope that they may not be

[14] Paragraph 15 of CORMSA's supporting affidavit [Caselines 066-13].
[15] Paragraph 27.2 of the Department's heads of argument [Caselines 066-455].
[16] Paragraph 30 of the Department's heads of argument [Caselines 066-456].
[17] Paragraph 83 of the Department's answering affidavit [Caselines 066-181].

arrested, hope that they may be granted waivers, and hope that the Minister may extend the ZEP himself. ZEP holders are entitled to more than hope: They are entitled to the protections granted by the Court in its interim order.

15. The Department further argues that ZEP holders knew from the outset that the ZEP would terminate some day,[18] and that "only" 178 000 people are affected and not the broader public.[19] In other words, the Department submits that the harm caused to ZEP holders is not significant. This too is untenable. As the Court held:

> "*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*".[20]

16. On the version publicly proclaimed by the Department, the ZEP terminates on 31 December 2023 – less than 3 months away. Already, ZEP holders are having to make exceedingly difficult, unfair and unwarranted decisions about whether to remain in South Africa in 2024. Homes, careers, schools, and countries, once left, cannot be lightly returned to.

17. Even the *dicta* of this Court in its Judgment and/or the Appeal Judgment concerning the temporary nature of the interim order do not assist. Most ZEP holders (as well as their employers, schools, banks and other service providers) are not familiar with section 18 of the Courts Act. Such persons cannot be

[18] Paragraphs 27.3 and 29 of the Department's heads of argument [Caselines 066-455 and 066-456].
[19] Paragraph 27.5 of the Department's heads of argument [Caselines 066-455].
[20] Paragraph 8 of the Judgment [Caselines 000-4].

expected to assume, in the face of pronouncements of the Department to the contrary, that this Court's interim order remains in effect pending any appeal.

18. It is submitted that this is why an order in terms of section 18(3) of the Courts Act is not only appropriate, but necessary to grant.

THE APPROPRIATE REMEDY

19. The test for the grant of an order in terms of section 18 of the Courts Act is:[21]

    19.1. Whether or not exceptional circumstances exist;

    19.2. Whether there would be irreparable harm to the applicant; and

    19.3. Whether there is an absence of irreparable harm to the respondent.

20. It is submitted that the exceptional nature of this matter is undisputable. As the Court said, "*This is thus a case of considerable public significance, not only to all [178 000] ZEP holders but to the Department of Home Affairs as well*".[22]

21. For the reasons given above, there will be irreparable harm to ZEP holders if any uncertainty remains about the operation of the interim order.

22. It is submitted that there is no irreparable harm to the Department. The Department asserts vaguely that it would be left unable to exercise the statutory powers

[21] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 36, referring to *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) at para 16.
[22] Paragraph 2 of the Judgment [Caselines 000-3].

bestowed upon it.[23] This needs only to be stated to be dismissed. The very purpose of the interim order is to preserve the *status quo* so that the Minister may lawfully exercise his powers to determine the future of the ZEP. One can only repeat the Court's own reasoning: that the interim order does no more than "*keep the Minister's existing directives in place until such time as the Minister has made a fresh decision*".[24]

23. For these reasons, CORMSA supports the granting of the relief sought by HSF.

24. Lastly there is the question of costs. The Department claims that the Minister has not shown disdain for the Court's orders but merely criticised them.[25] That is not correct. The Minister has done more than criticise the Court: He has indicated an intention not to comply with the interim order pending appeal.

25. The sole justification for this conduct is the assertion that the interim order is, in fact, final. Yet the Court's pronouncements and reasoning on this issue (as quoted above) are unambiguous.

26. In the face of this Court's repeated emphasis that its interim order is only temporary, the Minister's contentions as to why it is final are so patently lacking in merit that it is difficult to avoid the inference that he makes these claims solely in order to excuse his refusal to comply with the interim order pending appeal.

[23] Paragraph 33.2 of the Department's heads of argument [Caselines 066-457].
[24] Paragraph 145.2 of the Judgment [Caselines 000-61].
[25] Paragraph 36.3 of the Department's heads of argument [Caselines 066-459].

27. In such circumstances, CORMSA supports the application for a personal costs order against the Minister.

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19 October 2023

LIST OF AUTHORITIES

1. Promotion of Administrative Justice Act 3 of 2000
2. Superior Courts Act 10 of 2013
3. *Dorcasse v Minister of Home Affairs and Others* [2012] 4 All SA 659 (GSJ)
4. *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ)
5. *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA)