IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32323/2022

In the matter between:

THE MINISTER OF HOME AFFAIRS	First Applicant
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Second Applicant

and

THE HELEN SUZMAN FOUNDATION	First Respondent
THE CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	Second Respondent
ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA	Third Respondent

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APPLICANTS' HEADS OF ARGUMENT IN THE APPLICATION FOR LEAVE TO APPEAL

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Introduction

1. The applicants, the Minister of Home Affairs and the Director-General of the Department of Home Affairs seek leave to appeal against the entire judgement and orders of the full court dated 28 June 2023. The court granted the following order against the applicants:

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

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 (first applicant) 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 (first applicant's) decision referred to in paragraph 147 is reviewed and set aside.

147.3 The matter is remitted back to the First Respondent (first applicant) 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).

147.4 Pending the conclusion of a fair process and the First Respondent's (first applicant) 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 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 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 the requirements for entry into and departure from the Republic, save for the reasons of not having a valid permit indicated in his or her passport; and

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

(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 visa's, including temporary residence visa."

147.5 *First Respondent (first applicant), 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 2 counsel, where so employed."*

2. For the sake of convenience, we refer to the parties by their names.

Summary of the applicants' argument

3. In these written submissions we first identify the principles applicable to applications for leave to appeal and identify the basis on which this application is brought. We outline the contextual background to the matter before the Court. We then deal in some detail with the grounds upon which the present application is brought and why we contend that it should succeed.

Principles relating to leave to appeal

4. Judges considering applications for leave to appeal are now bound to consider the provisions of section 17 of the Superior Courts Act, 10 of 2013. In terms of section 17(1), the Court may only grant leave to appeal if it is of the opinion that the appeal would have reasonable prospects of success on appeal or if there is some other compelling reason why the appeal should be heard.

5. We submit that the appeal would have reasonable prospects of success and that there is another compelling reason why the appeal should be heard.

6. In *Mont Chevaux Trust v. Tina Goosen*,[1] the Land Claims Court held that the wording under the new Act raises the bar above that contemplated in the previous test.[2] The Court held that:

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[1] Unreported judgment of the Land Claims Court, case number LCC14R/2014 delivered on 3 November 2014

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."[3]

7. In *S v Smith*[4] the SCA noted:

"*What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.*"

8. We consider the Judgment in the context of these principles.

Contextual background

9. The genesis of the exemptions in terms of section 31(2)(b) of the Immigration Act is fully set out in the answering affidavit filed in the African Amity matter

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[2] At para 6

[3] See also *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489 (24 June 2016); *Notshokovu* v *S* [2016] ZASCA 112 (7 September 2016) Para 2

[4] 2012 (1) SACR 567 (SCA)

and deposed to by the Director-General. It is annexed to the HSF replying affidavit as annexure **"RA4"**.[5]

10. Since 2009, successive ministers of Home Affairs granted exemptions in terms of section 31(2)(b) of the Immigration Act to Zimbabwean nationals.

11. The current exemptions were introduced *"due to an influx of asylum seekers from the Southern Africa Development, Community ("SADC"). The majority of them were Zimbabwean nationals. The Department of Home Affairs Asylum Seeker Management Unit ("ASMU") was unable to cope with the numbers. It had neither the staff compliment and financial resources to deal influx".*[6]

12. This led to the Department of Home Affairs approaching the National Treasury requesting financial assistance to start the process of granting exemption to the SADC nationals, including Zimbabwean nationals.[7]

13. Significantly the Department of Home Affairs requested the National Treasury to make available an amount of R 145,803,928 available to start a special project of granting exemptions by the Minister of Home Affairs. The National Treasury decided only to approve an amount of R 15 million to deal with the exemption process for the SADC nationals.[8] The special project was financially unsustainable.[9]

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5 Case lines: 018 –100 - 107
6 Annexure **"RA4"**, para 40: case lines: 018 – 109
7 ibid, para 41
8 Annexure **"RA4"**, para 42 and 43: case lines: 018 – 109 – 110
9 Annexure **"RA4"**, para 42: case lines:018-110

14. When the exemptions were granted, including renewals thereof to the affected Zimbabwean nationals, no consultations were undertaken as contemplated in sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

15. The Director-General initiated a discussion within all the affected units and made a recommendation/submission to the Minister. The reasons for the Director-General's recommendations were, amongst others, that:

15.1 the exemptions granted to the Zimbabwean nationals were and always had been a temporary measure pending improvement of the economic situation in Zimbabwe;

15.2 the increased number of asylum applications by Zimbabwean nationals between 2008 – 2009 overwhelmed the administrative capacity of the department's Asylum Seeker Management Unit and resources were overstretched;

15.3 the Department of Home Affairs had encountered limited capacity to respond to such challenges by virtue of its constrained budget which was more pronounced in 2020 with the outbreak of Covid 19 and other economic factors in South Africa;

15.4 some of the Zimbabwean exemption permit holders were violating the conditions in that about 1900 were somehow able to apply for waivers in terms of the Immigration Act which applications were rejected;

15.5 some of the Zimbabwean nationals had already migrated to one or other visas provided for in the Immigration Act;

15.6 there was already an outcry from the citizens that the exemption regime granted to Zimbabwean nationals continued to strain the already shrinking budget of the Department of Home Affairs and the country;

15.7 the staff complement of the Department of Home Affairs will be unable to cope with the exemption applications should the exemption regime be extended again;

15.8 some of the Zimbabwean nationals have been deported and/or charged with obtaining fraudulent identity documents;

15.9 other nationals from other countries were already demanding to be granted similar status as that of the Zimbabwean nationals and the Department of Home Affairs and the country cannot afford to entertain such demands; and

15.10 the political and economic situation has improved in Zimbabwe since 2009 and the contribution of the Zimbabwean nationals (exemptions holders) is required in the building of a new and prosperous Zimbabwe.[10]

16. On 20 September 2021 the Minister approved the recommendation not to extend the exemption regime. He also accepted the recommendation to extend the validity of the then-existing permits for a period of 12 months. The directive to that effect was issued on 29 December 2021 and published in the Government Gazette on 7 January 2022.

Grounds for leave to appeal

17. In paragraph 37.4 of the judgement the Court found as follows:

> *"37.4 The Minister approve these submissions, with the handwritten addition that he chose an extension of only 12 months, without providing reasons for doing so."*

18. The reasons for the Minister to accept and/or approve the submissions by the Director-General were contained in the submissions from the director-general dated 20 September 2021. This Court accepted the Minister's reasons in paragraph 37 of the judgement where the Court said the following:

> *"37. … The reasons for the decision by the Minister were revealed to the public some months later and set out to be following: …"*

[10] Annexure "**FA8**": case lines:001-103

19. However, in paragraph 37.4 of the judgement the Court finds that the decision for the extension of the validity of the permits by a 12-month period was made without providing reasons for doing so.

20. This finding not only is contradictory but also fails to take into consideration the fact that the Minister accepted the recommendation and the reasons contained in the submissions by the Director-General to the Minister, that *"the Minister should consider imposing a condition extending the validity of the exemption for a period of three years, alternatively, a period of 12 months and any other period which the Minister deems appropriate. The condition to include allowing the holders of exemptions to apply for one or other visas provided for in the Immigration Act while in South Africa".*

21. The exemption permits were going to expire in any event on 31 December 2021 despite the Minister's decision not to extend. The extension related to the validity of the exemption permits and we submit that this decision by the Minister does not constitute administrative action. <u>There was never any withdrawal of the ZEP permits.</u>

22. In the judgement between ***Magadzire another v Minister of Home Affairs*** which matter was heard by this Court and judgement was delivered on 28 June 2023 where there was contestation about the nature of the decision by the Minister, this court concluded as follows in paragraph 66:

> *"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 comply with the Constitution. …"*

23. However, in paragraph 67 of the same judgement the Court said that it did not have to adjudicate that issue and left it for debate when Part B of that application would be heard.

24. In the HSF application which is the subject of this application for leave to appeal the same Court in a debate pertaining to the same decision concluded that the said decision constituted administrative action.

25. We submit that the Court ought to have ruled that the exercise of the powers by the Minister and the decision subject to scrutiny was not administrative action.

26. The Court failed to have regard to the fact 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. It also failed to have regard for the fact that the determination as to the circumstances in which it is permissible to exercise that power is quintessentially a policy-laden and poly-centric one.

27. The Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[11] held that:

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[11] 2012 (4) SA 618 (CC) at para [195]

"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 the 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."

28. The Court ignored that the Minister's decisions were predicated upon, amongst other things, the fact that the ZEP achieved limited success in easing pressure on the Asylum Management System, as well as decisions relating to the allocation of resources, financial and otherwise, so as to better address the Department of Home Affairs statutory and constitutional obligations.

29. These reasons were contained in the submission by the Director-General dated 20 September 2021. Further reasons for not extending the exemption were fully set out in the press statement issued by the Minister on 7 January 2022. The Court failed to have regard to these reasons by the Minister.

30. Regard being had to *Du Plessis v De Klerk*[12] where the Constitutional Court held that:

"The judicial function simply does not lend itself to the kinds of factual enquiries cost benefit analysis, political compromises, investigations of administrative enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision making on social, economic, and political questions requires … How best to achieve the realisation of the values articulated by the Constitution is something far better

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[12] 1996 (3) SA 850 (CC) at para [180]

left in the hands of those elected by and accountable to the general public and plays in the lap of Courts."

31. It is clear that the reasons for the Minister to extend the validity of the ZEPs for a limited duration entailed a weighing up of issues of significant political and economic importance which called for judicial deference and unwarranted interference only in the clearest of cases, which was not the case in this instant.

Procedural fairness and irrationality

32. In paragraph 70 of the judgement the Court found as follows:

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

33. In paragraphs 40 – 44 of the judgement the Court sets out steps taken by the Department of Home Affairs in affording the ZEP holders a hearing albeit after the decision was taken. The Court's criticism of the steps taken by the department in affording the exemption holders hearings and/or representations is on the basis that this was done after the fact.

34. This finding by the Court ignored authorities to the effect that fairness depends on the circumstances of each case and in particular the nature of the decision.[13] We submit that the fundamental issue is not when the call for representations is made, but whether the call for representations allows affected parties a meaningful opportunity to deal with how the decision does or will affect them.

35. We submit that in any event, even if the Minister had said that no further extensions would be granted, he is bound by law to consider them if such applications are indeed made in terms of section 31(2)(b) of the Immigration Act.

36. It also ignored and/or failed to appreciate what was in issue, which was the decision to confer same rights for a combined period of 18 months.

37. The Minister called for representations on the issue. This was through various means such as various newspapers, the Government Gazette, by way of individual letters to each ZEP holder and letters to civil society organisations.

38. The Court furthermore failed to consider the evidence on behalf of the Minister and the Director-General to the effect that approximately 6000 representations were made and received, the majority of them responded to before the Minister's decision took effect.

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13 *AB v Pridwin Preparatory* 2020 (5) SA 327 (CC) at para 205; *Mamabolo v Rustenburg Regional Council* 2001 (1) SA 135 SCA paras 20-24

Public participation

39. In paragraph 75 of the judgement the Court found that:

> *"75. Throughout the Answering Affidavit, there is a notable disdain for the value of public participation. Indeed, it is presumed that ZEP holders are capable only of making representations on why the Minister's decision should not apply to them personally and not on the merits of the decision itself. While the views of civil society and the public are deemed unnecessary altogether."*

40. Section 4 of PAJA applies whenever administrative action materially and adversely affects the rights of the public. In this instance, the withdrawal of the exemption granted to a specific close group, or category of persons, does not, without more require consultation with the public at large. Moreover, PAJA is not engaged.

41. The persons directly affected by the Minister's decisions are the ZEP holders. The Court failed to have regard to the fact that the decision affected only the ZEP holders and it also ignored or failed to take into consideration the fact that Scalabrini, African Amity, Freedoms Advocate and Zimbabwe Diaspora Association were also consulted albeit after the decision was taken.

Impact on ZEP holders

42. The Court concluded in paragraph 96 of the judgement that *"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 ZEP holders, their families and their children."

43. The impact on the ZEP holders and their families was considered by both the Minister and the Director-General. This is evident from the first directive that was issued as recommended by the Director-General which provided for, amongst other things, that:

43.1 protections such as freedom of movement, the right to work and other constitutional rights were guaranteed;

43.2 the ZEP holders would continue with their normal day-to-day lives as though there was no decision not to extend the exemption regime;

43.3 the ZEP holders were not to pay for new permits; and

43.4 they were free to apply for one or other visas while in South Africa.

44. A further demonstration of the consideration of the impact of the decision on ZEP holders was the fact that the Departmental Advisory Committee was set up in order to fast-track the ZEP holders of these applications, outside lawyers were appointed to advise the Minister on waiver applications.

<u>Rights of Children</u>

45. The Court found the Minister's decision to be unreasonable on the basis that it failed to consider the impact on ZEP holders, their families and their children.[14]

46. What the Court lost sight of is that because of the potential effect of a termination of the ZEP the Minister called for representations. He could do no more than call for ZEP holders to make representations concerning the effect of any subsequent decision on their children. It was open to ZEP-holder parents of minor children to make representations or apply for waivers based on their children's particular circumstances.

47. The Court ought to have accepted the Director-General's evidence under oath that the rights of the children were considered. This evidence was met by a bare denial from the HSF. The HSF waived its right to a rule 53 record and thus it could have not been expected of the Minister and director-general to have such evidence of a consideration of the rights of children to appear in the record.

48. The Court failed to appreciate that in the immigration context, the starting point of the enquiry should be the position of the parent and not the rights of the children. The rights of the children were adequately protected by affording them an opportunity to make representations either through their parents or of their own accord.

[14] Judgement: paras 96 – 98

49. In *S v M*[15] the Court held that:

"The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned."

50. It further held in *Pridwin* that in *S v M* it held:

"Accordingly, the fact that the best interests of the child are paramount doesn't mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship with other rights which might require that their ambit be limited."

51. In this matter the Court erred by elevating the enquiry on the regulation of the immigration status of parents to that of the rights of children without balancing the competing interests and rights as set out in *Fitzpatrick*.[16]

Limitation of rights

52. In paragraph 126 of the judgement the Court concluded that:

"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 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 of policy on the other ."

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15 2008 (3) SA 232 (CC), para 42

16 *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC), para 17

53. It went on to conclude as follows in paragraph 127:

> *"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."*

54. In reaching this conclusion, the Court failed to have regard to the budgetary constraints set out by the Director-General in great detail.[17] It also failed to have regard to the Minister's explanation that the conditions in Zimbabwe had improved to a sufficient degree to render it reasonable for ZEP holders to return home[18] and that there was no basis for the contention that the change to the exemption regime would overburden the asylum system.

55. Had the Court had regard to the Director-General's evidence as set out above it ought to have come to the conclusion that if there was any limitation of rights, such limitation was justifiable.

<u>Substitution</u>

56. The decision to extend the ZEP after the lapsing date of 30 June 2023 is a decision for the Minister to make if circumstances so require. The Court erred in substituting the decision of the Minister for that of the Court in circumstances where the Minister had already issued 3 directives with the most recent one extending the validity of the permits to 31 December 2023.

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[17] AA para 235-243

[18] The Director-General put up evidence that demonstrates an economic and political improvement in Zimbabwe: AA para 257-262; SAA para 166-170

The Government Gazette to this effect was made available to the Court before judgement was delivered.

57. The Court in substituting the Minister's decision for that of the Court amounted to judicial overreach in circumstances where the Court was ill-equipped to make such a decision and there was no urgent need for it to do so.

Costs

58. The Court erred in ordering costs against the Minister and the Director General when in fact the Court mainly decided the matter on the Constitutional rights of ZEP holders, including their minor children. The Court ought to have found that the *Biowatch*[19] principle applied and therefore not make an order as to costs.

Conclusion

59. We submit that there are reasonable prospects of success based on the above grounds of leave to appeal. The Supreme Court of Appeal is likely to reach a different conclusion than that of this Court.

60. We accordingly ask that leave to appeal be granted against the whole judgement and orders of this Court and that costs in this application be costs in the appeal.

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19 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), paras 56-58

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4 September 2023

LIST OF AUTHORITIES

1. *Mont Chevaux Trust v. Tina Goosen* Unreported judgment of the Land Claims Court, case number LCC14R/2014 delivered on 3 November 2014

2. *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489 (24 June 2016

3. *Notshokovu* v *S* [2016] ZASCA 112 (7 September 2016)

4. *S v Smith* 2012 (1) SACR 567 (SCA)

5. *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC)

6. *Du Plessis v De Klerk* 1996 (3) SA 850 (CC)

7. *AB v Pridwin Preparatory* 2020 (5) SA 327 (CC)

8. *Mamabolo v Rustenburg Regional Council* 2001 (1) SA 135 SCA

9. *S v M* 2008 (3) SA 232 (CC)

10. *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC)

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