IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

On the roll: 18 September 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 IN THE APPLICATIONS FOR LEAVE TO APPEAL

INTRODUCTION

1. In these heads of argument, the Intervening Party ("*CORMSA*")[1] submits that:

   1.1. The First and Second Respondents' ("*the Department*") application for leave to appeal should be dismissed with costs; and

   1.2. The Third Respondent's ("*ATDFASA*") application for leave to appeal should be dismissed with costs.

2. At the outset, it appears necessary to stress the trite proposition that appeals lie against orders, not against reasoning.

3. Accordingly, for the Respondents to succeed in their applications, they must do more than identify any error(s) in the Court's judgment ("*the Judgment*"). They must identify error(s) which have a reasonable prospect of changing the ultimate conclusions of the Court.

4. In this task, the Respondents singularly fail. Their grounds of appeal (even if correct, which they are not) amount to little more than superficial criticisms. Strikingly, for example, the Respondents fail to explain why, <u>even if</u> the Court's conclusions about the applicability of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*") are incorrect, the same relief would not fall to be granted under

[1] For convenience and bearing in mind that there are two applications for leave to appeal before the Court, the parties are referred to as they were in the main application.

the principle of legality. After all, as this Court noted at paragraph 58 of the Judgment:

"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 stake", it is not procedurally rational to take a decision without notice to affected parties to obtain their views on the matter."[2]

5. Yet it is common cause that no prior notice was given to the affected parties. This renders the Minister's decision not merely unfair under PAJA but irrational and unconstitutional – a conclusion which the Department fails to address or rebut. This is but one of the omissions which renders the Department's application for leave to appeal fatally defective.

6. In furtherance of the above, these heads of argument deal first with the application for leave to appeal of the Department, and thereafter with that of ATDFASA. The facts of this matter were set out in detail in the Judgment,[3] have not been materially contested, and do not require repetition.

7. CORMSA has further had sight of the application in terms of section 18 of the Superior Courts Act 10 of 2013 ("*the s18 application*") brought by the Applicant ("*HSF*") and submits that it falls to be granted at the appropriate juncture.

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[2] Judgment at para 58 [Caselines 000-27], referring to *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) ("*e.tv*") at para 52.
[3] Judgment at paras 21-44 [Caselines 000-10].

THE DEPARTMENT'S APPLICATION FOR LEAVE TO APPEAL

8. The Department lists its substantive grounds of appeal under seven headings, each of which is dealt with in turn below.

9. The first complaint of the Department, however, appears to be that the Minister's decision "*does not constitute administrative action*".[4]

10. In making this complaint, the Department fails to grapple at all with this Court's comprehensive reasoning and reliance upon the Constitutional Court's judgment in *Motau* concerning why the Minister's decision amounts to administrative action.[5] Instead, they refer to cautions in *SCAW*[6] and *Du Plessis*[7] about the separation of powers. Yet neither of these judgments are applicable to the question before the Court:

    10.1. *SCAW* concerned an interim interdict application; and

    10.2. *Du Plessis* concerned the development of the common law of defamation in light of the Constitution.[8] It was also decided prior to the promulgation of PAJA, and therefore can say nothing regarding PAJA's definition of "*administrative action*".

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[4] Department's heads of argument at para 21 [Caselines 067-11].
[5] Judgment at paras 46-48 [Caselines 000-23], with reference to *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) ("*Motau*") at para 33.
[6] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) ("*SCAW*") at para 95. The heads of argument of the Department incorrectly refer to paragraph 195 of this judgment.
[7] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at para 180.
[8] The Constitution of the Republic of South Africa, 1996 ("*the Constitution*").

11. On this material question, therefore, the Department does not even refer the Court to relevant authorities, let alone take issue with any specific finding by the Court.

Procedural fairness and irrationality

12. Despite referring to "*irrationality*" in the heading to this ground of review, the Department does not once refer to or engage with whether the Minister's decision is compliant with the principle of rationality inherent in the Constitution.

13. The gravamen of the Department's argument is the submission that what matters 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*".[9]

14. The Judgment considered this question at some length with reference to, *inter alia*, academic authorities and *dicta* from the Supreme Court of Appeal.[10] It is submitted that the Court's reasoning cannot be faulted.

15. Yet <u>even if</u> the Department had reasonable prospects of success on this point, there remains the insuperable difficulty that the Minister indicated that he did not intend to grant further individual exemptions to ZEP holders.[11] In such

[9] Department's heads of argument at para 34 [Caselines 067-15].
[10] Judgment at paras 75-84 [Caselines 000-34].
[11] See for example the Judgment at para 74 [Caselines 000-34].

circumstances, *ex post facto* representations would have been and/or were meaningless.

16. The Department then submits that "*even if the Minister had said that no further extensions would be granted, he is bound by law to consider them*".[12] But contending that the Minister should consider representations (a question of law) is in no way proof that he would consider them (a question of fact). If anything, this illustrates the illegality of the refusal of the Minister to consider representations and requests by, *inter alia*, the Scalabrini Centre. In other words, it is supportive of the Applicants' case, not the Departments'.

17. And even if the Court were to be convinced that the Minister retained an open mind, it could only be on the basis of an affidavit from the Minister himself. Yet the Department, throughout these proceedings and without explanation, failed to file an affidavit from the Minister. As the Judgment noted, the DG cannot make claims on behalf of the Minister.[13]

Public participation

18. Under this heading, the Department appears to argue that there was no need to comply with the requirements for consultation with the public at large.

19. But:

[12] Department's heads of argument at para 35 [Caselines 067-15].
[13] Judgment at paras 92-94 [Caselines 000-40].

19.1. This is still no answer for why ZEP holders themselves were only consulted after the decision in question was taken;

19.2. In contradiction to their own argument, the Department places reliance on the fact that bodies such as the Scalabrini Centre or the Zimbabwe Diaspora Association were also consulted;[14] yet

19.3. It is not in dispute that interested and expert bodies such as CORMSA were never provided any rights or representations at all – which by itself is a procedural irrationality;[15] and

19.4. It is also not reasonably open to dispute that this matter – where the rights of some 178 000 people are at issue – is one in which the general public is affected and should be entitled to make comments.

Impact on ZEP holders

20. The Department claims that the impact on ZEP holders and their families was considered by the Minister. Yet there is no affidavit from the Minister to this effect, and the "evidence" pointed to by the Department is limited to:

20.1. A directive issued by the DG.[16] Not only is this irrelevant, but the content of that directive concerned how to bring the ZEP to an end. It did not consider whether the ZEP should be terminated at all, which is one of the key decisions under review.

[14] Department's heads of argument at para 41 [Caselines 067-16].
[15] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) ("*Scalabrini*") at para 70.
[16] Department's heads of argument at para 43 [Caselines 067-17].

20.2. The appointment of the Departmental Advisory Committee.[17] But on the Department's own version, this Committee was appointed to "*assess the visa applications lodged by the affected Zimbabwean nationals*".[18] It had nothing to do with considering the rights of ZEP holders to remain within the ZEP system.

The rights of children

21. The Department essentially argues that:

21.1. "*The Court ought to have accepted the Director-General's evidence under oath*"; and

21.2. The rights of children were adequately protected because their parents were afforded a right to make representations.

22. Yet both of these claims are defective and have been dealt with above. The Court could not and should not have accepted the evidence of the DG about what the Minister did or did not consider.

23. And <u>even if</u> the rights of children could have been protected via their parents, this is of no assistance to the Department given that the parents were also not afforded a fair prior opportunity to make representations.

[17] Department's heads of argument at para 44 [Caselines 067-17].
[18] Annexure SRA1 to HSF's supplementary replying affidavit [Caselines 022-12].

Limitation of rights

24. The Department asserts that the Court "*failed to have regard*" to evidence provided by the DG which might justify the limitations of rights caused by the withdrawal of the ZEP.[19]

25. Yet not only was the Court correct to dismiss evidence by the DG (for the reasons already given), but the Department simply fails to acknowledge that the Court did have regard to this evidence. Multiple pages and paragraphs of the Judgment are dedicated to the assessment and rejection of the evidential claims made by the Department.[20]

26. The Department fails to explain what, precisely, was so flawed in the Court's logic in this regard that another court might reasonably come to a different conclusion.

Substitution

27. The Department asserts that the Court was wrong to grant a substitution order (in terms of section 8(1)(c)(ii)(aa) of PAJA).

28. The simple answer to this concern is that the Court did not grant a substitution order. It made an order granting a temporary interdict or other temporary relief in terms of section 8(1)(e) of PAJA. This is a remedy which is distinct from

[19] Department's heads of argument at para 54 [Caselines 067-20].
[20] Judgment at paras 113-127 [Caselines 000-49].

substitution orders, and, critically, need not only be granted in exceptional circumstances.

29. The concerns thus raised by the Department are without merit. It is still within the Minister's power to re-take his decision and, if appropriate, to terminate the ZEP provided he follows a lawful process in doing so.

Costs

30. The Department claims that the Court mainly decided the matter with reference to constitutional rights, and thus should have applied *Biowatch*[21] and made no order as to costs.

31. But this is the precise opposite of what *Biowatch* dictates. Where litigation against the State in a constitutional matter is successful, *Biowatch* stipulates that costs should be granted against the State.[22]

ATDFASA'S APPLICATION FOR LEAVE TO APPEAL

32. ATDFASA argues, in sum, that the Court was wrong to find that it had unduly delayed in bringing its review application.

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[21] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) ("*Biowatch*").
[22] *Biowatch* at para 24:
> *"Similarly, particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it".*

33. The condonation of delays is a matter within the particular discretion of the Court, and so may only be overturned on appeal in limited circumstances. In *Notyawa*,[23] the Constitutional Court described these circumstances:

> *"Our law vests in the court of first instance the discretion to condone a delay by an applicant in instituting review proceedings. The exercise of this discretion may not be interfered with on appeal on the basis that the decision was incorrect. Whether the appeal court would have exercised that discretion differently is irrelevant. The intervention of the appeal court may be justified only on narrow specified grounds.*
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> *The test is whether the court whose decision is challenged on appeal has exercised its discretion judicially. The exercise of the discretion will not be judicial if it is based on incorrect facts or wrong principles of law. If none of these two grounds is established, it cannot be said that the exercise of discretion was not judicial. In those circumstances the claim for interference on appeal must fail".*[24]

34. It is submitted that ATDFASA fails this test.

35. On the facts, it does no more than disagree with the conclusion that there was a reasonable explanation for the delay.[25] It identifies no specific facts which were overlooked or materially misconstrued by the Court.

[23] *Notyawa v Makana Municipality and Others* 2020 (2) BCLR 136 (CC) ("*Notyawa*").
[24] *Notyawa* at paras 40-41.
[25] ATDFASA's application for leave to appeal at para 2.3 [Caselines 065-3].

36. On the law, it asserts that the Court failed to apply the two-stage test set out in the *Gijima*[26] and *Asla*[27] judgments of the Constitutional Court.[28]

37. Yet such assertion is without merit. A comparison of the test applied by the Court (relying on *Khumalo*)[29] and the *Asla/Gijima* test cited by ATDFASA[30] reveals that they are one and the same.

38. It is submitted that correctly understood, ATDFASA's complaint is not that the Court materially erred on either the law or the facts, but rather that on the totality of both, the Court exercised its discretion against ATDFASA. However, there are no reasonable prospects that another court will or should come to a different conclusion on this issue.

39. For all of these reasons, both of the applications for leave to appeal fall to be dismissed with costs.

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11 September 2023

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[26] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) ("*Gijima*").
[27] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ("*Asla*").
[28] ATDFASA's application for leave to appeal at para 2.2 [Caselines 065-2].
[29] Judgment at para 18 [Caselines 000-9], referring to *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para 49.
[30] ATDFASA's application for leave to appeal at para 2.2 [Caselines 065-2].