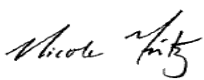


Re: Zimbabwean Exemption Permit Holder Applying for Motor Vehicle Licence Disc

To whom it may concern

1. The Helen Suzan Foundation ("HSF") is a non-governmental organisation that promotes constitutional democracy and human rights in South Africa.
2. We write to you out of concern for Zimbabwean Exemption Permit ("ZEP") holders, whom we understand are being prevented from renewing and/or applying for a motor vehicle licence disc.
3. This, despite the Minister of Home Affairs ("Minister") recently extending the ZEP's lifespan to 31 December 2023 in Immigration Directive No 2 of 2023, attached hereto as **Annexure A**.
4. Further, on 28 June 2023, HSF received judgment in its favour from the Pretoria High Court that set aside the Minister's decision to terminate the ZEP in the first place, pending a fair and rational process that properly assesses the impact of that decision. The court's order extends the ZEP for twelve months and is attached hereto as **Annexure B**.
5. What's more, the Minister's application to appeal the Pretoria High Court's 28 June 2023 judgment was dismissed on 16 October 2023. That order is attached hereto as **Annexure C**.
6. As such, we are advised that the ZEP is completely valid and that there is no reason in law to deny ZEP holders an opportunity renew and/or apply for a motor vehicle licence disc.
7. If after considering this letter you remain of the opinion that ZEP holders should not be allowed to renew and/or apply for a motor vehicle licence disc, please provide us with written reasons.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nicole Fritz', is written over a horizontal line.

Nicole Fritz
Executive Director
Helen Suzman Foundation

Executive Director: Nicole Fritz
Trustees: Max du Plessis · Cora Hoexter · Nick Jonsson · Daniel Jowell · Palesa Morudu · Kalim Rajab · Gary Ralfe · Phila Zulu
Patrons: Prof. Thuli Madonsela · Lord Robin Renwick

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF HOME AFFAIRS

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
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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

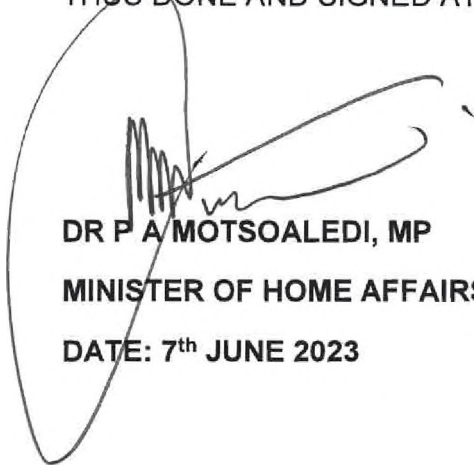
other visas and waivers provided for in the Immigration Act, (read with Immigration Regulations, 2014) that they may qualify for, hereby direct that this decision should be implemented as follows, during the further 6 months' period, starting from 30 June 2023 and ending 31 December 2023:

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

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:

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).

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.

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

Date of Hearing:

11 and 12 April 2023

Date of Judgment:

28 June 2023

Immigration Act.¹³ TDF's challenge is anchored on the review of the grant of ZEPs under section 31(2)(b).

[17] First, the criticism that the court did not consider the delay in terms of the legality test is not borne out by what is said in paragraph [18] of the judgment. The delay was considered in terms of PAJA and then it was stated:

"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*."

Reference to *Khumalo & Another v MEC for Education, KwaZulu-Natal*¹⁴ is to the test on legality review and condonation thereunder. The court's discretion was properly and judicially exercised in refusing condonation even under the *Khumalo* test.

[18] TDF has referred to the *Buffalo City Metropolitan Municipality v ASLA Construction*¹⁵ case which considered *Khumalo, State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*¹⁶ and other cases regarding condonation applications under PAJA and the legality test. One of the most crucial guidance that *Buffalo City Metropolitan Municipality* gives to the courts is that:

"[51] The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two-step *Khumalo* test to ascertain whether the delay is undue and, if so, whether it should be overlooked."

Conclusion

¹³ Ibid: 047-17, paras 3.8 and 3.9.

¹⁴ 2014 (5) SA 579 (CC) at [49].

¹⁵ 2019 (4) SA 331 (CC).

¹⁶ 2015 (2) SA 23 (CC).

[19] The rest of the Minister's grounds for leave to appeal are not necessary to traverse. 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.

[20] For the reasons stated above, the Minister's application for leave to appeal falls to be dismissed.

[21] The TDF contends that the court misdirected itself by considering its application in terms of section 7(1) of PAJA. The court did not err in this regard. The conduct or impugned decision was taken in terms of empowering legislation and was therefore characterised as administrative action. Although the decision was taken by a member of the executive, he did so in terms of legislation. He took that decision when exercising a public power or performing a public function in terms of legislation.¹⁷

[22] As to the costs, there is no reason to depart from the principle that led the court to award a costs order against the Minister. The *Biowatch* principle is clear that a successful litigant in the vindication of constitutional rights must usually have a costs order awarded against the state. There is no prospect of success in appealing such a discretionary order. The principle did not work in favour of TDF because its counter application was dismissed and therefore there was no ventilation of the merits of its application. In this application

¹⁷ Section 1(a)(ii) of PAJA.

too, the same principle shall apply and the Minister must pay the costs of the application, including costs of two counsel where employed.

[23] The *Bio Watch* rule was properly applied.

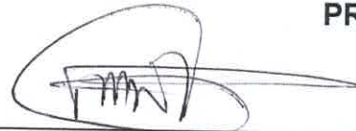
[24] Consequently, the following order is made:

1. The first and second applicants' application for leave to appeal is dismissed with costs, including costs of two counsel where employed.
2. The third respondent's (All Truck Drivers Forum and Allied South Africa) application for leave to appeal is dismissed with costs.

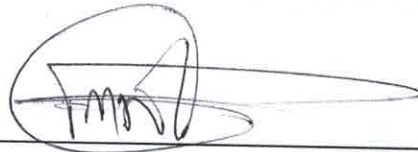


C. COLLIS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

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