IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**CC CASE NO: CCT55/24**
**SCA CASE NO: 1144/23**
**COURT A QUO CASE NO: 32323/22**

In the application for leave to appeal between:

| | |
|---|---|
| **THE MINISTER OF HOME AFFAIRS** | **First Applicant** |
| **THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS** | **Second Applicant** |



and

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

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**FILING SHEET**

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PRESENTED FOR SERVICE AND FILING:

1. The First Respondent's Answering Affidavit deposed to by Naseema Fakir.

**DATED** at **JOHANNESBURG** on this the **14th** day of **MARCH 2024.**

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: CCT 55/24
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COURT *A QUO* CASE NO: 32323/2022

In the application for leave to appeal between:

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



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THE HSF'S ANSWERING AFFIDAVIT
(APPLICATION FOR LEAVE TO APPEAL)

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I, the undersigned,

NASEEMA FAKIR

T.A.M

state under oath as follows:

1 I am the Acting Executive Director of the Helen Suzman Foundation (**HSF**), the first respondent in this application for leave to appeal.

2 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 knowledge and belief.

3 Where I make submissions on the applicable law, I do so on the advice of the HSF's legal representatives.

4 In what follows, I will refer to the Minister of Home Affairs and the Director-General of Home Affairs collectively as the "applicants".

## INTRODUCTION AND OVERVIEW

5 This case concerns the Minister of Home Affairs' decision in 2021 to terminate the Zimbabwean Exemption Permit (**ZEP**) programme. Since 2009, that programme has granted over 178,000 Zimbabweans and their children legal permission to live, work and study in South Africa.

6 Relying on these permits, ZEP-holders have established lives, families and careers in South Africa. The Minister's abrupt decision to terminate the ZEP programme, without any prior consultation, placed all of that in jeopardy.

7 In a persuasive and comprehensive judgment, the Full Court upheld the HSF and CORMSA's[1] application to review and set aside the Minister's decision on numerous grounds, including that it was procedurally irrational and unfair, and

[1] The second respondent in these proceedings, the Consortium for Refugees and Migrants in South Africa.

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unjustifiably limited the constitutional right of dignity and the rights of children.[2] It remitted the matter to the Minister to make a fresh decision, following a fair process. I refer to this application as the ***HSF / CORMSA* application**.

8 Both the Full Court and the Supreme Court of Appeal refused the Minister leave to appeal.

9 In its judgment, the Full Court made findings of fact that are entirely dispositive of the applicants' appeal to this Court:

9.1 First, on the common cause facts, the Minister decided to terminate the ZEP programme without any prior consultation with the ZEP-holders, civil society, or the wider public.

9.2 Second, the Minister inexplicably failed to depose to any affidavit in the proceedings. This meant that there was no admissible evidence before the court that the Minister had applied his mind to the staggering impact that his decision would have on the rights of ZEP-holders and the best interests of their children.

10 The consequence of these two facts is that the Minister's decision, whether reviewable under the principle of legality, the Promotion of Administrative Justice Act (**PAJA**),[3] or the Bill of Rights, was patently unlawful.

11 Unless this Court finds that these common cause factual findings are wrong, the unlawfulness of the Minister's decision is undisputable. And since this Court has repeatedly made it clear that it does not hear appeals that turn purely on factual findings of lower courts, this means that any appeal by the Minister in this Court

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[2] *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 490; 32323/2022 (28 June 2023) (***Full Court judgment***).
[3] 3 of 2000.

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is fatally defective. I am advised that in *Bliss Brands*,[4] this Court reaffirmed the point as follows, citing its earlier judgment in *Makate*:[5]

> *"Ordinarily, this Court does not grapple with contested factual issues. It goes by factual findings made by the courts below. Jafta J puts it thus in Makate:*
>
> *"[T]his being the highest Court in the Republic which is charged with upholding the Constitution, and deciding points of law of general public importance, this Court must not be saddled with the responsibility of resolving factual disputes where disputes of that kind have been determined by lower courts. Deciding factual disputes is ordinarily not the role of apex courts. Ordinarily, an apex court declares the law that must be followed and applied by the other courts. Factual disputes must be determined by the lower courts and when cases come to this Court on appeal, they are adjudicated on the facts as found by the lower courts."* (Emphasis added)

12 Given these unassailable factual findings, the Full Court correctly characterised this case as one "*of great importance and of striking ordinariness*".[6] Its importance is that it concerns the rights of the lives of over 178,000 ZEP holders, their families, and children. It is, however, entirely ordinary, in the sense that it involves the application of settled legal principles to undisputed facts. This is a further reason, in addition to the absence of any prospects of success, why it would not be in the interests of justice for this Court to hear the appeal.

13 In this affidavit, I address the following topics:

13.1 First, a brief overview of the factual background and litigation history;

13.2 Second, jurisdiction and the reasons why it would not be in the interests of justice for this Court to grant leave to appeal.

13.3 Third, the fatal obstacles to any appeal.

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[4] *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others* [2023] ZACC 19; 2023 (10) BCLR 1153 (CC) at paras 21 – 22.
[5] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 39.
[6] Full Court judgment para 1.

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13.4 Fourth, the Minister's ill-conceived grounds of appeal.

13.5 Finally, a paragraph-by-paragraph response to the applicants' founding affidavit.

## BACKGROUND AND LITIGATION HISTORY

### *The ZEP programme*

14 Successive Ministers have granted exemptions to qualifying Zimbabwean nationals under section 31(2)(b) of the Immigration Act, 2002 (**Immigration Act**), affording them the rights to live and work in South Africa.

14.1 In 2009, the Minister introduced the Dispensation of Zimbabweans Project (DZP) to give legal status to over 250,000 Zimbabweans who had fled the economic and political instability in their country.

14.2 In 2014, the DZP was renamed the Zimbabwean Special Permit (ZSP).

14.3 In December 2017, the ZSP was then replaced with the ZEP, which was initially due to expire on 31 December 2021.

15 These exemption programmes provided Zimbabwean nationals with a streamlined application process to obtain permits, if they satisfied the requirements and paid the necessary fees.

16 Critically, ZEPs were only available to those who held the original DZP in 2009. This means that all 178,412 ZEP-holders have been lawfully resident in South Africa for more than 15 years. They have followed the rules, submitted their applications timeously, and paid substantial fees. On the basis of these exemptions, they built families, lives and businesses in South Africa.

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17 The importance of exemption programmes, such as the ZEP, was fully articulated in the Department of Home Affairs' 2017 White Paper on International Migration Policy (White Paper):

> *"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."*

18 The current Minister has inexplicably turned his face against this settled government policy in deciding to terminate the ZEP programme and refuse any further exemptions.

19 The Minister took this decision behind closed doors, in September 2021, when he approved a memorandum from the Director General headed "*WITHDRAWAL AND/ OR NON-EXTENSION*" of ZEPs.[7]

20 Despite the Minister having made up his mind in September 2021, his decision was not disclosed to ZEP-holders and the public for several months. The Department made its first public statement on the fate of the ZEP programme on 19 November 2021 – just over a month before ZEPs were due to expire, which was prominently headed "*No decision has been made on the Zimbabwean Exemption Permit*".[8]

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[7] The memorandum from the Director General was attached to the HSF founding affidavit in the High Court ("HC FA") as Annexure "FA8".
[8] HSF's HC FA para 35, Annexure "FA7". The next Cabinet sitting was scheduled for the following week from the date of the statement, on19 November 2021.

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21 The Minister's decision to terminate the ZEP programme was later communicated in a flurry of directives and press statements at the end of 2021 and early 2022. A 5 January 2023 notice, published in newspapers and emailed to ZEP-holders, announced 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*".[9] This notice stated that ZEP-holders were afforded a 12-month grace period, solely for purposes of obtaining alternative visas.

22 It is common cause that these decisions were made without prior notice to affected individuals or an opportunity to make representations. The Minister's decision was not preceded by calls for representations from affected ZEP-holders, public inquiries, notice and comment processes, or any meaningful engagement with civil society.

23 While the Minister subsequently extended the "*grace period*", first until 30 June 2023, and now to 29 November 2025, his decision to end the ZEP programme and to refuse all further exemptions remains unchanged.

***The HSF / CORMSA challenge***

24 In the High Court, the HSF and CORMSA challenged the Minister's decision in terms of PAJA, the principle of legality, and the Bill of Rights.

25 The HSF relied on three primary grounds of review:

[9] Id, Annexure "FA13".

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25.1 First, the Minister's decision was procedurally unfair and procedurally irrational, as it is common cause that there was no prior consultation process with affected ZEP-holders, civil society and the public at large.

25.1 Second, the Minister's decision was taken without any regard to the impact on ZEP-holders and their children.

25.2 Third, it is a breach of the constitutional rights of ZEP-holders and their children.

26 Contrary to what the Minister now contends, the HSF never requested the High Court to find that the Minister may never terminate the ZEP programme. Its case is that, because any termination of the ZEP programme will have profound consequences, in order to be valid, it must, at minimum:

26.1 follow a fair and procedurally rational consultation process;

26.2 be consistent with fundamental constitutional rights; and

26.3 be based on lawful, rational and reasonable grounds.

27 In the High Court, the HSF described in detail the impact that the Minister's decision would have on tens of thousands of ZEP-holders and their children, who would be left undocumented due to the legal and practical barriers to securing alternative visas and permits. The HSF substantiated these claims by relying on:

27.1 the supporting affidavits of individual ZEP-holders, who describe the devastating impact that a termination of the ZEP will have on them personally, and on their children;

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27.2 the SCA's judgment in *De Saude*, which recognised the Department of Home Affairs "*prolonged and enduring . . . dysfunction*" and "*sloth on a grand scale*";[10]

27.3 circulars issued by the Department of Home Affairs itself, reflecting ongoing backlogs and delays in processing alternative visas and permits;[11]

27.4 the applicants' admission that, by September 2022, the Minister had not yet decided any of the approximately 4000 waiver applications submitted by ZEP-holders;[12] and

27.5 the Departmental Advisory Committee's memorandum of 2 September 2022, acknowledging the "*mammoth task*" of issuing visas and permits to ZEP-holders before the deadline.[13]

28 These facts were met with bald denials and evasions from the Director-General. He did not provide any information on the status of the backlogs, the steps they intended to take to address those delays, or the timelines for doing so.

29 Rather than confronting the arguments and evidence squarely, the Director-General adopted a slippery and entirely inconsistent stance. In his answering affidavit, he initially claimed that there was "*no decision taken to terminate all ZEPs*"[14] and that "*no decision has been taken not to grant further exemptions to ZEP-holders*"[15].

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[10] *Department of Home Affairs and Others v De Saude Attorneys and Another* [2019] ZASCA 46; [2019] 2 All SA 665 (SCA).
[11] HSF's HC FA para 76, Annexure "FA25".
[12] Applicants' response to Rule 35(12) request in the High Court para 6.2.
[13] Applicants' supplementary affidavit in the High Court ("**HC SA**"), Annexure "SA4".
[14] Applicants' answering affidavit in the HSF / CORMSA application deposed to by Mr Makhode on 15 August 2022 ("**HC AA**") paras 17 and 274.
[15] Id para 18.

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30 The Full Court correctly, with respect, rejected this contention and found that a clear and final decision had been made to terminate the ZEP programme, as reflected in the contemporaneous statements and documents.[16]

31 The applicants' case has now changed fundamentally in their application for leave to appeal, as they now accept that the Minister had, in fact, made a decision. The about-turn remains unexplained.

***The High Court judgment***

32 Between 11 and 14 April 2023, the Full Court heard the main *HSF / CORMSA* application for final relief alongside the parallel application for interim relief in *Magadzire and Another v Minister of Home Affairs and Others* Case No. 2022/006 386 (**Magadzire**).

33 The Full Court handed down judgment in the *HSF / CORMSA* and *Magadzire*[17] matters on the same day, on 28 June 2023.

34 In *HSF / CORMSA*, the Full Court granted two categories of relief:

34.1 First, in paragraphs 147.1 – 147.3 of the order, the Full 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).

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

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[16] Full Court judgment para 66.
[17] *Magadzire and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 491 (28 June 2023).

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35 In upholding the review, and granting the relief above, the Full Court held that:

35.1 The Minister's decision meets the criteria for an administrative action in terms of PAJA and was thus required to be procedurally fair in terms of section 3 thereof. But even if PAJA does not apply, the Minister was also obliged to take a decision that was procedurally rational.[18]

35.2 The Minister's decision was both procedurally unfair and procedurally irrational, due to the failure to consult ZEP-holders, civil society or the public before taking the decision.[19]

35.3 Given the Minister's failure to depose to an affidavit, there was no admissible evidence that showed that the Minister applied his mind to the impact of his decision on ZEP-holders and their children.[20]

35.4 Moreover, the Minister's decision unjustifiably limited the rights of ZEP-holders, their families and children, including their rights to dignity and the best interests of the child.

36 In the *Magadzire* judgment, the Full Court granted the applicants an interim interdict, pending the outcome of the review application in Part B. In terms of that interim order, this Court interdicted the arrest, deportation or detention of ZEP-holders.

37 The Full Court dismissed the applicants' application for leave to appeal, finding, *inter alia*, that the Minister's failure to depose to an affidavit in the main proceedings was fatal to any appeal. Only the Minister, as the decision-maker,

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[18] Full Court judgment paras 52 – 58.
[19] Id paras 80 – 81.
[20] Id para 95.

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could give evidence as to what passed through his mind when making the decision.[21]

38 Contrary to what the applicants now claim,[22] the HSF squarely raised the Minister's failure to depose to an affidavit and the Full Court's judgment of 28 June 2023 referenced the HSF's contentions in this regard numerous times.[23] The HSF in its replying affidavit pointed out that "*there no required confirmatory affidavit from the Minister*".[24] Both the HSF and CORMSA then took the point in their heads of argument and at the hearing.

39 The applicants' suggestion that this was a new ground, raised by the High Court for the first time in dismissing the application for leave to appeal, is therefore untrue.

## JURISDICTION, THE INTERESTS OF JUSTICE, AND LEAVE TO APPEAL

40 This appeal concerns the judicial review of an exercise of public power, which would ordinarily fall within this Court's jurisdiction, but for the fact that it turns on dispositive factual findings and the application of accepted legal principles. As I have explained above, it is impossible for this Court to uphold the applicants' appeal without overturning these findings.

41 But even if this Court does have jurisdiction, it would not be in the interests of justice to grant leave to appeal:

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[21] Full Court judgment on leave to appeal para 12.
[22] Applicants' founding affidavit in this Court ("**CC FA**") para 55.
[23] Full Court judgment para 66.
[24] HSF's replying affidavit in the High Court ("**HC RA**") para 15.

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41.1 First, on the strength of *Bliss Brands* and *Makate*, addressed above, it is not in the interests of justice for this Court to be burdened with mere factual disputes that have already been decided by the High Court.

41.2 Second, the appeal turns on the application of settled legal principles. These include clear dicta from this Court and the SCA regarding reviews based on procedural fairness; a line of cases confirming that the Minister's decisions under section 31(2)(b) of the Immigration Act constitutes administrative action subject to PAJA; and settled law confirming that the norm of before-the-fact consultation may only be departed from in exceptional cases.

41.3 Third, and relatedly, it does not raise any novel questions of law.

41.4 Fourth, the Full Court's judgment is unassailable and the applicants' grounds of appeal all lack any prospects of success, for the reasons I will now address.

THE FATAL OBSTACLES TO ANY APPEAL

42 The applicants face five unalterable facts and settled legal principles which are entirely destructive of any prospects of success on appeal.

43 First, it is common cause that the Minister, as the decision-maker, failed to depose to any affidavit in the review proceedings. Only the Minister, as the decision-maker, could give evidence as to what passed through his mind when making the decision. In particular, only the Minister could confirm that he had applied his mind to the considerable impact of his decision on the rights of ZEP-holders and their children.

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44 It was impermissible (and inadmissible) for another official, who was not the decision-maker, to speculate on these matters.[25] The courts have repeatedly confirmed this point,[26] most recently in the SCA's judgment in *Freedom Under Law v Judicial Services Commission*.[27]

45 No amount of argument in this Court could possibly erase the Minister's failure to depose to an affidavit, or the settled law on this point. The applicants' attempt to distinguish *Freedom Under Law* is unconvincing.

46 Second, it was always common cause that the Minister made his decision to terminate the ZEP programme in September 2021 without any prior consultation with ZEP-holders, civil society, or the wider public. Instead, the applicants relied on a call for representations issued exclusively to ZEP-holders after the Minister had already communicated his decision.[28]

46.1 On these undisputed facts, the Full Court unanimously found that, *"[g]iven 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"*[29].

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[25] Full Court judgment paras 90 – 93.
[26] *Director-General: The Department of Home Affairs and Others v Dekoba* [2014] ZASCA 71; 2014 (5) SA 206 (SCA); [2014] 3 All SA 529 (SCA) at paras 6 – 8; *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at para 70; *Gerhart v State President* 1989 (2) SA 499 (T) at 504G.
[27] See *Freedom Under Law v Judicial Service Commission and Another* [2023] ZASCA 103 (22 June 2023) at para 27.
[28] Applicants' HC AA para 173.
[29] Full Court judgment para 59.

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46.2 That reasoning is unassailable. I note that, contrary to the Director-General's submissions before this Court, the Full Bench found that the decision was both procedurally unfair in terms of PAJA and procedurally irrational in terms of the principle of legality.[30]

47 Third, in the High Court, the Minister's counsel properly conceded that such after-the-fact consultations would be meaningless, "*when an administrator has already made a decision and then contends that any participation process would have made no difference to the ultimate outcome.*"[31] Likewise, in this Court, the applicants accept that a fair procedure requires that "*an opportunity is given to have the decision changed or modified*".[32] But that is precisely what the undisputed evidence showed did not occur in this case.

47.1 In correspondence and statements made in late 2021 and early 2022, both the Minister[33] and his lawyers[34] told the world that his decision was final and not open to change.

47.2 In December 2021, the Minister declared in a radio interview that, "*nothing has changed and nothing is going to change*" regarding his decision to terminate the ZEP.

47.3 In correspondence, he further advised the Scalabrini Centre of Cape Town that he would not entertain any further exemptions for ZEP-holders.

47.4 In January 2022, the Minister's attorneys advised a ZEP-holder that the Minister was "*unable to reverse the decision*".

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[30] Id para 81.
[31] Applicants' Heads of Argument in the High Court ("**HC HOA**")para 172.
[32] Applicants' CC FA para 37.
[33] Scalabrini Centre's Supporting Affidavit in the High Court para 10.
[34] HSF's HC RA, Annexure "RA7".

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47.5 In another public statement, the Minister made it clear that he regarded the HSF's review application as creating the "*false hope*" that he would reverse his decision.

48 Fourth, there was not a shred of evidence on record showing that the Minister applied his mind to the impact of his decision on ZEP-holders and their families, nor was there any evidence that he considered the impact of his decision on the children's rights. This was in circumstances where the HSF invited the Minister to disclose all relevant documents showing his deliberations, including his assessment of these impacts. When none were provided, the HSF issued a Rule 35(12) request to obtain these documents. But no documents were ever forthcoming, despite several follow-ups. Yet again, no amount of argument on appeal can change the facts on the record.

49 Fifth, the Full Court exercised its just and equitable remedial powers under section 172(1)(b) of the Constitution in granting temporary relief. Such powers involve the exercise of a "*true discretion*", which means that the remedy is immune from appellate interference unless a clear misdirection is established.[35] The applicants have failed to identify any misdirection.

50 In the face of these obstacles, the applicants' nit-picking at parts of the Full Court's judgment does not establish real grounds of appeal or any reasonable prospects of success. An appeal, after all, lies against the order and not against specific reasons set out in the judgment.

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[35] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 82 to 92

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51 While these points are dispositive of this application, I now turn to address the applicants' grounds of appeal, in turn.

## THE GROUNDS OF APPEAL

### *The application of PAJA*

52 The applicants take issue with the Full Court's finding that the Minister's decision was administrative action, reviewable under PAJA. But the applicants make no effort to engage with the Full Court's reasoning on this score.[36]

53 The applicants also fail to acknowledge that previous judgments,[37] including the SCA's judgment in *De Saude*,[38] have accepted that the Minister's decisions under section 31(2)(b) of the Immigration Act are administrative action that are subject to review under PAJA.

54 There is no reason for this Court to depart from those decisions as the Minister's decisions on section 31(2)(b) exemptions are plainly administrative in nature:

54.1 They involve the implementation of legislation, not abstract policy formulation;[39]

54.2 The Minister's powers are not unfettered, but are subject to the statutory jurisdictional requirement that there be "*special circumstances*"; and

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[36] Full Court judgment paras 47 - 48.
[37] *Tima and Others v Minister of Home Affairs* (34392/2014) [2015] ZAGPPHC 763 (9 July 2015); *Kuhudzai and Another v Minister of Home Affairs* [2018] ZAWCHC 103 (24 August 2018).
[38] *Director-General of the Department of Home Affairs and Others v De Saude Attorneys and Another* [2019] 2 All SA 665 (SCA).
[39] *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc* [2000] ZACC 23; 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) at para 18.

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54.3 The Minister's statutory powers serve to give effect to existing national policy on exemption regimes – specifically, the 2017 White Paper on International Migration Policy – rather than creating new policy.

55 In any event, all of the relevant grounds of review also fell squarely under the principle of legality. That means that even if this Court were to hold that PAJA does not apply, it would have no bearing on the ultimate outcome.

*Procedural unfairness and irrationality*

56 The HSF squarely pleaded and argued that the Minister's decision was both procedurally unfair, in terms of PAJA, and procedurally irrational, under the principle of legality.

57 This Court and the SCA have repeatedly held that it is procedurally irrational to take a decision without affording affected parties an opportunity to provide their views on the matter where:

57.1 the decision being contemplated has a drastic effect on their rights, lives and livelihoods;[40]

57.2 there are persons or organisations with special expertise that would have a bearing on the decision under consideration.[41]

58 This aptly describes the Minister's decision to terminate the ZEP-holders.

59 The Minister's treatment of ZEP-holders was procedurally irrational under the principle of legality and procedurally unfair under PAJA for three primary reasons:

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[40] *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 and *Esau v Minister of Co-Operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA) at para 103.
[41] *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) at paras 70 - 72

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59.1 First, a call for representations was only made after the Minister communicated his decision to terminate the ZEP programme;

59.2 Second, the call for representations was meaningless in the circumstances because it did not indicate the nature and purpose of the representations; and

59.3 Third, the Minister repeatedly told ZEP-holders and the world that his mind was made up on the termination of the ZEP programme and would not change, making any after-the-fact call for representations a meaningless exercise.

60 Before the Full Court, the Director-General did not dispute that the Minister failed to consult with affected ZEP-holders, civil society, and the public at large before taking the decision to terminate the ZEP programme and to refuse further extensions. Instead, the Director-General relied, as he does before this Court,[42] on a call for representations made after the Minister's decision was communicated, contending that this constituted a fair process.

61 The Full Court devoted more than 10 pages of its judgment to the relevant law and evidence on this unlawful after-the-fact consultation process. In sum:

61.1 The Full Court set out the settled case law, which holds that consultations prior to decisions are the norm and that this fair process may only be departed from in exceptional cases.[43]

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[42] Applicants' CC FA para 35.
[43] Full Court judgment paras 82 – 84.

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61.2 The Full Court further demonstrated, point-for-point, why the limited after-the-fact consultations were woefully unfair and procedurally irrational, finding, *inter alia*, that:[44]

61.2.1 The Minister had already made a final decision and told the world that it was not open to change, as reflected in his communications with the Scalabrini Centre and the letters sent to ZEP-holders.[45] This means that, applying the standard for adequate consultation articulated by the Director-General himself in the applicants' founding affidavit in this Court, the Minister's call for representations was inadequate because it did not provide "*an opportunity . . . to have the decision changed or modified*".[46]

61.2.2 The call for representations from ZEP-holders was meaningless, as it failed to provide any indication of the purpose of these representations or what was required of ZEP-holders.[47]

61.2.3 In support of this finding, I note that the applicants' affidavits before the Full Court and in this Court provided no coherent account of what their call for representations was attempting to elicit from ZEP holders. Before the Full Court, it was suggested, in one breath, that ZEP-holders were asked to address the termination of the ZEP programme. In another, it was claimed that ZEP-holders were invited to apply for individual exemptions under

[44] Id paras 59 – 84.
[45] Id paras 70 – 74.
[46] Applicants' CC FA para 37.
[47] Full Court judgment para 72.

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section 31(2)(b).[48] In this Court, the applicants provide no explanation whatsoever.

61.2.4 There was no genuine attempt made to consult with civil society organisations representing the interests of ZEP-holders, beyond letters sent to two organisations. There was no call for comment from the general public whatsoever. This is despite the fact that, as the Full Court noted, the Minister himself "*has acknowledged the profound consequences for . . . the broader society including an impact on national security, international relations, political, economic and financial matters*".[49]

61.3 The Full Court correctly held that were no exceptional circumstances that warranted a departure from the norm of prior consultation. Instead, the applicants demonstrated *"a notable disdain for the value of public participation."*[50]

62 The Full Court's findings are beyond reproach and are not seriously challenged in this Court. The applicants provide no explanation as to why it was not necessary for the Minister to consult the public or civil society, and provide no hint as to the purpose of the Minister's after-the-fact call for representations.

63 There is accordingly no reasonable prospect of this Court reaching a different conclusion. This ground of appeal has no prospect of success.

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[48] Applicants' HC AA paras 162 – 163 and para 54.
[49] Full Court judgment para 8.
[50] Id para 75.

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*Failure to consider the impact on ZEP-holders and their children*

64 A decision of this magnitude required the Minister to apply his mind to its impact on the more than 178,000 ZEP-holders and their children. That required, at minimum, that the Minister should have had proper information before him on who would be affected, to what degree, and what measures were in place to ameliorate the harm.

65 The applicants have provided no evidence at all that this impact was considered.

66 I again repeat that no affidavit – confirmatory or otherwise – was filed by the Minister in the review application. In the absence of any such affidavit, the Full Court correctly held that, "*there is simply no admissible evidence from the Minister on whether he took these considerations [of impact] into account and how*".[51]

67 The Full Court went on to set out additional facts which illustrate that the Minister could not, as a matter of fact, have considered the impact of his decision on ZEP holders.

67.1 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.[52]

67.2 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.[53]

[51] Full Court judgment paras 95 and 119.
[52] Full Court judgment para 95.1.
[53] Id para 95.2.

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67.3 In addition, the Minister's 7 January 2022 press statement, which sought to explain his decision, was entirely silent on this.[54]

67.4 In its founding affidavit, the HSF expressly invited the applicants to attach to their answering affidavit all relevant documents and records which were relevant to the Minister's decision, in *lieu* of a Rule 53 record.[55] No documents or information were forthcoming.

67.5 In the answering affidavit, the Director-General was content to make the bald allegation that "*the question of the impact on children and families weighed heavily in the deliberations of the Department and the Minister*", without any substantiation.[56] No details were provided as to what information was considered, by whom, and when.

68 The HSF's Rule 35(12) notice afforded the applicants yet another opportunity to provide relevant evidence, as it called for any documents, including minutes to meetings, showing that the impact on ZEP holders, their children and their families was considered. This was met with a blanket refusal.[57]

69 Thus, the Full Court correctly found that there is simply no evidence that the Minister applied his mind to this critical issue. And even if the Minister somehow gave it passing thought, there were no documents or information before him on which he could have formed a reasonable and rational assessment of the impact of his decision. The fact that the Minister failed to call for representations from

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[54] Id para 95.3.
[55] HSF FA (main application): para 20.
[56] Full Court judgment para 95.4.
[57] HSF's HC RA para 8.

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affected ZEP-holders and civil society before taking a decision compounds the error. This ground of appeal must also fail.

*Unjustifiable limitation of rights*

70 The Full Court held that the Minister's decision limits both the right to dignity and children's rights, including the section 28(2) right and principle that the best interests of children must be afforded paramount importance.

71 For ZEP-holders, documentation is essential to a life of dignity, which this Court has defined as including "*the enjoyment of employment opportunities; access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person*".[58]

72 The termination of the ZEP programme limits the right to dignity in at least four key respects:

72.1 First, the risk of being left undocumented is itself a threat to the right to dignity.[59]

72.2 Second, the loss of working rights further compounds this limitation. This is because productive employment is linked to "*self-esteem and the sense of self-worth*", which are "*most often bound up with being accepted as socially useful*".[60]

72.3 Third, the risk of family separation and further disruption to family life is a further threat to a life of dignity. Many Zimbabwean ZEP-holders have

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[58] *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC) at para 18.
[59] Id.
[60] *Minister of Home Affairs and Others v Watchenuka and Others* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA); 2004 (2) BCLR 120 (SCA); 2004 (4) SA 326 (SCA) at para 27.

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started families in South Africa and are now at risk of being separated from their South African partners and children.

72.4 Fourth, an abrupt termination of the ZEP programme threatens to strip ZEP-holders of their agency and autonomy.

72.4.1 As the supporting affidavits filed by the HSF in the High Court illustrate, ZEP-holders have forged lives here in South Africa over more than a decade. They have invested in businesses, started families and made plans on the basis that they would be permitted to stay.

72.4.2 The granting of a limited extension of ZEPs, without due warning, and without a proper process, devalues and casts aside the lives and life choices that ZEP-holders have made since they arrived in South Africa.

73 The decision limits the rights of the children of ZEP-holders in that:

73.1 It exposes them to the risk of family separation.

73.2 It will render many of them undocumented, which would threaten their access to basic services, including education and healthcare.

73.3 It was taken without proper consideration of the impact on children.

74 The Full Court held that the HSF had established both limitations and concluded that the "*putative justifications*"[61] put forward by the applicants did not render those limitations reasonable and justifiable.

[61] Full Court judgment para 115.

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75 The applicants appear to criticise the Full Court for holding that they had failed to establish that the limitation of ZEP-holders' rights was reasonable and justifiable under section 36 of the Constitution. But this criticism is misplaced:

75.1 First, the applicants cannot deny that the onus fell on them to prove that the limitations were reasonable and justifiable. This Court's judgments in *NICRO*[62] and *Teddy Bear Clinic*[63] make clear that the Minister was required to produce evidence and cogent objective factors which justify his decision; failing which he has failed to establish that the limitation is reasonable and justifiable.[64]

75.2 The Full Court correctly held that in determining the limitation to any such rights, one would have to look at what justifications have been "*offered by the Minister under oath*"[65]. There was no justification under oath by the Minister. This ought to be the end of the matter.

75.3 Second, the Full Court considered and correctly dismissed the applicants' "*putative justifications*", which fell short of the required standard under section 36 of the Constitution. These justifications were (a) the alleged budgetary constraints; (b) alleged improvement of the conditions in Zimbabwe; and (c) the allegation that exemptions somehow contributed to backlogs in the asylum systems. But these justifications were mere assertions without any supporting evidence whatsoever.

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[62] *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.
[63] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 84.
[64] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 84.
[65] Id para 113.

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75.4 In this regard, the Full Court made the following findings:

75.4.1 In relying on unsubstantiated budgetary constraints, the Director-General and Minister should have taken the Court into their confidence and placed the details of the precise character of the resource constraints before the Court, which they failed to do.[66]

75.4.2 The applicants failed to disclose any information or documents that the Minister consulted on the conditions in Zimbabwe before reaching his decision. Neither had the Minister deposed to an affidavit explaining his decision-making process and what information he considered.[67]

75.4.3 In considering systemic backlogs in the asylum system, the Full Court correctly considered the Director-General's concessions that the asylum system is plagued by systemic backlogs and delays, and that there is no basis to contend that the changes effected to the exemption regime will significantly increase pressure on the asylum system.[68] If anything, the undisputed evidence demonstrated that the termination of the ZEP programme would exacerbate the backlogs.[69]

75.5 It is unclear what more the Full Court could have done with the paltry evidence that the applicants presented. As an illustration, the Full Court noted, the applicants were content to rely on "*unspecified budgetary*

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[66] Id para 125.
[67] Id para 119.
[68] Id paras 121 and 122.
[69] HSF's HC RA para 105.

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*constraints within the DHA*"[70] and in the answering affidavit "*the Director-General further [made] bold allegations 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*"[71].

76 The Full Court's findings on this ground are, with respect, beyond reproach. There is no reasonable prospect of this Court reaching a different conclusion.

77 Moreover, the applicants' own evidence in the High Court showed that, far from facing budgetary constraints, the government had in fact profited from the ZEP programme and its predecessors.

77.1 The Minister's press statements claimed that the total cost of exemption programmes to the state was over R188,7 million, between 2010 and 2020, suggesting that the Department could not afford to extend the programme.

77.2 But the applicants' own evidence showed that the ZSP and ZEP-holders had paid approximately R366 million in application fees, more than double the alleged cost.

77.3 On the undisputed facts, these exemption programmes more than paid for themselves.[72]

[70] Full Court judgment para 123.
[71] Full Court judgment para 123, see also applicants' HC AA paras 234 - 240.
[72] HSF's HC RA para 109.

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*The just and equitable remedy and separation of powers*

78 Finally, the applicants take issue with the temporary relief which the Full Court granted to protect the rights of ZEP holders while the Minister conducts a fair process.

79 The applicants wrongly characterise this temporary remedy as a form of substitution order, replacing the Minister's decision with a decision of the Court's own.[73] This, they contend, violates the doctrine of separation of powers.[74]

80 The just and equitable remedy granted by the Full Court involved a true discretion, which may not be overturned unless some clear misdirection is established. The applicants fail to identify any misdirection.

81 Furthermore, the Full Court has repeatedly made clear that its order was temporary in nature, and does not constitute a substitution order:

81.1 First, the effect of this temporary order is simply to preserve the status *quo* pending the outcome of a fair process and the Minister's further decision.[75]

81.2 Second, 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.[76]

81.3 Third, 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

[73] Applicants' CC FA para 141.
[74] Id para 142.
[75] Full Court judgment para 145.1
[76] Full Court judgment para 145.2.

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relief is plainly "*just and equitable*" in terms of section 172(1)(b) of the Constitution.

82 The applicants' bald appeals to the separation of powers are simply without merit.

82.1 As this Court has held, where invalid and unconstitutional action has been identified, "*the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility*" to grant just and equitable remedies.[77]

82.2 The HSF has not asked the court to fashion a novel regime for ZEP-holders. It merely seeks a temporary extension of existing protections afforded by the Minister's directives.

82.3 In any event, this Court has repeatedly made it clear that courts can fashion wide-ranging temporary orders to protect vulnerable groups, pending further decisions and processes.[78]

## RESPONSES TO INDIVIDUAL PARAGRAPHS IN THE FOUNDING AFFIDAVIT

83 I now turn to address individual allegations in the founding affidavit to the extent necessary. Any allegation which is not addressed, and which is inconsistent with what is stated in this affidavit, must be taken to be denied.

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[77] *Mwelase and Others v Director-General, Department Of Rural Development And Land Reform And Another* 2019 (6) SA 597 (CC) at para 51.
[78] See, for example, *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South AfricanSocial Security Agency and Others* 2014 (4) SA 179 (CC); *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* 2017(3) SA 335 (CC).

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*Ad paragraphs 1 - 3*

84 Save to deny that all facts in the affidavit are true and correct and fall within the Director-General's personal knowledge, the content of these paragraphs is noted.

*The parties*

*Ad paragraphs 4 – 7*

85 These paragraphs are noted.

*Introduction*

*Ad paragraphs 8*

86 This paragraph is noted. The applicants are not entitled to the relief sought, this application has no prospect of success and, as a result, not in the interest of justice for leave to be granted.

*Ad paragraphs 9 - 10*

87 For reasons already stated above, this paragraph is denied. The Minister's failure to depose to an affidavit was raised on the papers, in argument, and in the main judgment. The Full Court held that only the Minister, as the decision-maker, could give evidence as to what passed through his mind when making the decision.

*Ad paragraph 11*

88 For reasons already mentioned, the content of this paragraph is denied. Each of the issues raised in this paragraph are in the Full Court's judgment and outlined above. For example, the Full Court plainly considered whether public participation was required and the weight to give to children's rights.

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*The order of the Full Court*

*Ad paragraph 12*

89 I note the contents of this paragraph to the extent that they are consistent with the wording of paragraph 147 of the HSF/CORMSA Judgment.

*Background*

*Ad paragraphs 13 - 18*

90 I note the contents of these paragraphs only to the extent that they are consistent with the history of the DZP, ZSP and ZEP set out the HSF's founding affidavit in the High Court and the Full Court's judgment. The 15-year history of exemption permits show that the exemption regime cannot be characterised as being merely "*temporary*".

*Ad paragraph 19*

91 The Minister did not merely approve the Director-General's recommendations, but made a clear decision of his own. 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*". 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.

92 The true nature of the Minister's decision was adequately addressed by the Full Court.[79]

[79] Full Court judgment paras 37 – 45.

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*Ad paragraphs 20 - 27*

93 The accurate chronology of events is recorded in the Full Court's judgment at paragraphs 20 to 54.

*The main judgment of the Full Court and its findings*

*Ad paras 28 – 30*

94 Save to admit that this matter and the *Magadzire* matter were heard together by the Full Court, and that the Full Court's judgment is annexed to the founding affidavit as "HA5", I deny the allegations contained in these paragraphs.

95 The Full Court's decisions in these matters are not contradictory or conflicting.

96 The Full Court in *Magadzire* was concerned with the requirements of an interim interdict and left open the question of reviewability for determination in the review application in Part B. *Magadzire* Part B is still pending. Accordingly, there is no conflict between the *Magadzire* and HSF/CoRMSA judgments requiring clarification by this Court.

97 The Full Court dealt with this issue extensively in paragraphs 6 to 14 in the judgment handed down in the leave to appeal proceedings in the *Magadzire* matter. A copy of this leave to appeal judgment is attached hereto as annexure "HSF1".

*The first ground*

*Ad paragraphs 31 – 39, excluding paragraph 35*

98 For reasons already stated above, I deny the contents of these paragraphs and have dealt with this ground extensively above.

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99 I note that the Full Court correctly found that PAJA applied but, for good measure, also held that in any event, applying either standard of review, the Minister's decision fell short.[80]

*Ad paragraph 35*

100 For reasons already stated above, I deny the content of this paragraph.

101 In their application for leave to appeal to the SCA, the applicants were adamant that "*as a matter of law, there was no obligation for the Minister to consult prior to the taking of the decision*".

***The second ground***

***Ad paragraphs 40 – 48***

102 I deny the content of these paragraphs. The Full Court did not hold that the Minister can never lawfully decide to end the ZEP. It instead held that the Minister was duty-bound, at minimum, to apply his mind to the serious impact of his decision on the rights of children and ZEP-holders before making a decision. There was no evidence that the Minister had applied his mind.

103 The HSF does not contend, and the Full Court did not find, that the fundamental rights of children "*trump all other fundamental rights*". I also note that the applicants do not identify which "*other fundamental rights*" were ignored or overridden by the Full Court. The applicants refer to "*balancing the competing interests and rights as set out in Fitzpatrick*" without any elaboration, or any indication of what "*rights and interests*" have allegedly been ignored by the Full Court.

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[80] Full Court judgment paras 95 and 119.

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*The third ground*

*Ad paragraphs 49 – 50*

104 For reasons already stated, I deny the contents of these paragraphs. The applicant's persistent misrepresentation of what is expressly stated in the Full Court's judgment is regrettable. Again, the Full Court stated in its judgment that there was "*simply no admissible evidence from the Minister*" as to what he took into account when he made his decision.[81]

*Ad paragraphs 51 – 54*

105 I deny the allegations contained in these paragraphs.

106 The Full Court correctly considered and dismissed the attempted justifications, which fell short of the required standard under section 36 of the Constitution.

107 The applicants faintly raised a handful of justifications based on factual claims – including alleged improvements in the Zimbabwean economy – but none of those justifications were supported by evidence, to the standard required by this Court in *NICRO*[82] and *Teddy Bear Clinic:*[83]

107.1 Contrary to what the applicants claim, the "*budgetary constraints*" invoked by the Minister were unspecified and unsubstantiated.[84] There is also no answer to the HSF's demonstration that, on the respondents' own evidence, the ZEP-programme has more than paid for itself and that the termination of the ZEP only adds to the burden on the Department.

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[81] Id paras 95 and 119.
[82] *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.
[83] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 84.
[84] Full Court judgment paras 123 – 125.

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107.2 The Full Court correctly concluded that the applicants' claim that conditions in Zimbabwe have improved was unsubstantiated and undermined by the undisputed evidence that the Zimbabwean economy remained weak and that the rate of inflation continues to spiral.[85]

*The judgment dismissing leave to appeal*

*Ad paragraph 55 - 60*

108 For the reasons set out above, I deny the contents of these paragraphs. I reiterate that the applicant's complaint regarding the finding of inadmissibility is meritless and based on a misreading of *Freedom Under Law*.

109 The absence of an affidavit deposed to by the Minister is not cured by the fact that the Minister approved the recommendation of the Director-General, who has deposed to an affidavit.

109.1 If the Director-General is suggesting that the Minister did not apply his mind to the matter and merely rubber-stamped the Director-General's recommendation, without exercising his discretion, then the Minister's decision is reviewable on a further basis, namely, that he failed to apply his mind.

109.2 This argument also misses the point, which is that the Full Court was required to inquire into what passed through the Minister's mind when he took the decision – what facts, circumstances and representations he in fact took into account. The Director-General cannot possibly speak to this.

[85] Id paras 117 and 118.

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*Ad paragraph 61*

110 For reasons already discussed, I deny the content of this paragraph. There is no conflict between the *Magadzire* and *HSF / CORMSA* judgments that would warrant the granting of leave to appeal to this Court.

*Separation of powers doctrine*

*Ad paragraph 62 – 63*

111 For reasons already stated, I deny the contents of these paragraphs. The Full Court has repeatedly emphasised that paragraph 147.4 of its orders is temporary and not final in nature.

*Jurisdiction and leave to appeal*

*Ad paragraph 65*

112 For the reasons set out above, I deny that this matter engages this Court's jurisdiction and contend that, even if it does, it would not be in the interests of justice to hear the appeal.

*Mootness of the appeal*

*Ad paragraphs 68 - 70*

113 In December 2023, after the Full Court's judgment, the Minister decided to extend the grace period to 29 November 2025. It appears from the description set out in this affidavit that the Minister's decision ultimately to terminate the ZEP programme remains unchanged. All that has changed is the date of termination.

114 The Minister's December 2023 decision was again taken without any fair process – there was no consultation with affected ZEP-holders, the public at large, or relevant civil society organisations.

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115 The HSF therefore agrees that there remains a live dispute, given the Minister's persistent refusal to acknowledge his constitutional and public law obligations to conduct a fair and procedurally rational process.

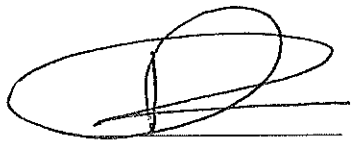
116 Nevertheless, the applicants have failed to make out any proper case for leave to appeal, for all the reasons set out above.

*Ad paragraph 71.4*

117 I cannot comment on the accuracy of these statistics. I further note that the Director-General fails to disclose how many ZEP-holders' applications have actually been processed, how many are awaiting a decision, and when decisions will be made. The Department's failure to provide a full and frank account of the backlogs, and the timeline for addressing them, has been a consistent feature of this litigation.

**CONCLUSION**

118 For these reasons, the application for leave to appeal must fail with costs, including costs of three counsel.



**NASEEMA FAKIR**

Signed and sworn before me at Johannesburg on this the 14th day of March 2024, the deponent having acknowledged that she knows and understands the contents of the affidavit, that she has no objection to taking the prescribed oath and that she considers such oath to be binding on her conscience.

T.A.M

COMMISSIONER OF OATHS

TITLE / OFFICE:
FULL NAMES:
ADDRESS:

**THANDEKA ANNE MASHONGANYIKA**
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REPUBLIC OF SOUTH AFRICA
DATE: 14 | 03 | 2024

"HSF 1"

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 006386/2022

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 02 November 2023 Signature: _____

In the matter between:

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|---|---|
| THE MINISTER OF HOME AFFAIRS | FIRST APPLICANT |
| THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS | SECOND APPLICANT |

and

| | |
|---|---|
| VINDIREN MAGADZIRE | FIRST RESPONDENT |
| ZIMBABWE IMMIGRATION FEDERATION | SECOND RESPONDENT |
| THE MINISTER OF POLICE | THIRD RESPONDENT |
| THE NATIONAL COMISSIONER OF THE SOUTH AFRICAN POLICE | FOURTH RESPONDENT |
| THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA | FIFTH RESPONDENT |



T.A.M

THE BOARDER MANAGEMENT AUTHORITY — SIXTH RESPONDENT

THE SOUTH AFRICAN NATIONAL DEFENCE FORCE — SEVENTH RESPONDENT

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LEAVE TO APPEAL JUDGMENT

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THE COURT

*Introduction*

[1] This is an application for leave to appeal an interim order made by this court on 28 June 2023. This order lapses within twelve months from 28 June 2023. Perhaps, it is telling that in his opening prologue the applicants' counsel, Mr Mokhare, stated that common sense dictated what the outcome of this application should be in view of the court's dismissal of the leave to appeal in the *Helen Suzman Foundation (HSF)* matter.[1] He submitted that his duty was to persuade the court to keep an open mind.

*Legal Framework*

[2] Foremost in a court's mind when dealing with an application for leave to appeal is section 17(1) of the Superior Courts Act 10 of 2013 (the Act). Dealing with this section, the court in *Khathide v State*[2] stated the following:

> "Section 17(1) of the Superior Courts Act 10 of 2013 (the Act) provides that:
>
> 'Leave to appeal may only be given where the judge or judges concerned are of the opinion that–
> (a) (i) the appeal would have a reasonable prospect of success; or
> (ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
> (b) The decision sought on appeal does not fall within the ambit of section 16(2) (a); and
> (c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.' (My emphasis)

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[1] *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 490.
[2] [2022] ZASCA 17 (14 February 2022).



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In considering an application for leave to appeal, a court must be alive to the provisions of s 17(1) of the Act as quoted above."[3]

[3] Since the introduction of the Act, the use of the word "would" in subsection 17 (1) (a) (i) has been seen by our courts as imposing a more stringent threshold. In the matter of *Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*[4] the court held that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act.[5]

[4] Looking at sections 17(1) (a)(i) and 17(1) (a)(ii), the court in *Fusion Properties 233 CC v Stellenbosch Municipality*[6] held the following:

"Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss 17(1)*(a)*(i) and 17(1)*(a)*(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted 'where the judge or judges concerned are of the opinion that-

'*(a)* (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard. . . .'

It is manifest from the text of s 17(1)*(a)* that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that 'there is some compelling reason why an appeal should be heard'. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave. I shall revert to this aspect later."[7]

*Grounds of appeal*

[5] As a point of departure, it must be stated that the applicants' counsel took the court and the respondents by surprise. He made submissions which are neither in their application for leave to appeal nor in their heads of argument. Only in reply did he ask

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[3] Supra para 4.
[4] 2014 JDR 2325 (LCC).
[5] Supra para 6.
[6] [2021] ZASCA 10.
[7] Supra para 18.



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to supplement their papers from the bar. Since the court must consider objectively and dispassionately whether the appeal would have a reasonable prospect of success, it permitted them to supplement their papers. This court will address four topics, namely: the unpleaded grounds, pleaded grounds, appealability and costs.

*The unpleaded grounds*

[6] The applicants' *coup de grace* is the submission that there are two conflicting judgments made by this court. Counsel for the applicants submitted that in terms of section 17(1)(a)(ii) of the Act there is a compelling reason why the appeal should be heard. The kernel of the applicants' submission is that, on the one hand, in the *HSF* case, the court found that the Minister's decision was administrative action in nature and, therefore, relied on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). On the other hand, the argument goes, in the *Magadzire* matter,[6] the court found that the Minister's decision was an executive decision; therefore, reviewable under the principle of legality.

[7] This submission is misconceived. From paragraph 54 to 58 the court in the *HSF* judgment canvassed the review under section 1(c) of the Constitution. Under the rubric **Review Under the Principle of Legality,** the court could not have been clearer as to what it was dealing with. During the hearing of the leave to appeal the *HSF* matter, the applicants' counsel criticized the court for reviewing the Minister's decision using both the principle of legality and PAJA.

[8] He further submitted that the orders granted in *HSF* are dispositive of Part B in this matter. In substantiation of this submission, he referred the court to the notice of motion in particular the prayers under Part B. His submission was that the prayers in *HSF* and *Magadzire* under Part B are the same. Therefore, the granting of the HSF prayers disposed of the need to hear Part B of the *Magadzire* matter. He contended that the order in HSF is tantamount to a final order in *Magadzire*.

[9] This submission too is without merit. As stated in paragraph 74 of the *Magadzire* judgment, the applicants in *Magadzire* rely on the *ultra vires* argument. None of the

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



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parties, both in the *HSF* and CORMSA, argued this point. To simply look at the orders the parties seek, as the applicants' counsel does, and conclude that the HSF has disposed of Part B in the *Magadzire* matter is to miss the point. The HSF argument is procedural in that the Minister can still consult and correct the failure to consult. The *ultra vires* point makes the Minister's decision completely incompetent. Therefore, it is dispositive of the matter. Consequently, this submission must be fail.

[10] Having totally disregarded paragraph 3 of the judgment, which indicates that the court was taking a judicial peek into the grounds of review, Mr Mokhare submitted that this court made findings which rendered Part B moot. This submission is at variance with what transpired in court. Paragraphs 11, 12 and 13 succinctly captures the essence of the applicants' submission in this regard. In short, the applicants contended that they would be prejudiced if Part B was heard, because they wanted time to supplement their papers. Furthermore, the court made a ruling, at paragraph 16, that it was only proceeding with Part A, an interim interdict. Thus, this submission must be stated to be rejected.

[11] Mr Mokhare further submitted that the court made findings relating to *ultra vires* and good cause. To prove that the court made these findings, he referred to paragraphs 34 and 44, which posed two questions, namely: whether the Minister acted *ultra vires* and whether the Minister's action was informed by good cause.

[12] In the same way he referred to paragraph 16 of the judgment and ignored it, the applicants' counsel referred to paragraph 33, which deals with section 31(2)(b) and reads:

> "It is this that is the *raison dêtre* of this case. However, the main battle is reserved for the Part B hearing."

[13] He disregarded the import of this paragraph and submitted that it is not clear which issue was reserved for the Part B hearing. As if that was not enough, he again disregarded the heading Prima Facie Right and, more importantly, paragraph 40 thereof.



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[14] Paragraph 40 dovetails with paragraph 3 and is indispensable to a comprehensive conceptual exposition of the facts and law in this judgment. Referring to the court's discussion on the two questions posed under paragraph 44, he submitted that the court did not answer these two questions on a prima facie basis. It answered them as definitive answers coming from the court. Therefore, he continued, this court made findings which can only be dealt with on appeal. This is incorrect. Paragraph 40 and the heading makes it clear that the court was dealing with prima facie views. He referred to paragraph 45 and elevated the court's view therein to a finding and maintained that the *Magadzire* matter had become moot. The applicants' erstwhile counsel submitted during the main hearing that they needed time to supplement their papers for Part B. It begs the question how this court could make final findings, let alone dispose of Part B, without those papers.

[15] Dealing with the second question of good cause, Mr Mokhare submitted that the issue of good cause was intertwined with the issue of separation of powers. After accepting that good cause is measured objectively, he referred to paragraph 60 in which the court said it did not share the view of the applicants because of the polycentric nature of the argument. At paragraph 66 the court amplified its position by stating that because of high policy content, the court (referring to the court in Part B) might view it as an executive decision. Again, he ignored the use of the word might. He maintained that the court had made a finding. He totally avoided the discussion on this topic encapsulated in paragraphs 64, 65, 66 and 67. Paragraph 67 concludes that the Court does not have to adjudicate the issue as it is "better left for the correct forum, which is Part B."

[16] Lastly, paragraph 68, under the rubric Prima Facie Right, is dispositive of the applicants' submissions. It states that: "...the applicants have established facts on a prima facie basis, if proven finally, will entitle them to a relief sought in the main application." Consequently, the applicants cannot find refuge in section 17(1)(a)(ii) of the Act.

*'Pleaded grounds*

[17] In its application for leave to appeal, the applicants submitted that the first respondent failed to make a case for an interim interdict. It is noteworthy that the first



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respondent's main argument of *ultra vires* is not attacked. This is the main subject of the interim interdict. Therefore, if it is not challenged the court is left wondering what the applicants are appealing against.

[18] Mr Mokhare submitted that all the requirements of an interim interdict were not met. This submission is misplaced in the light of erstwhile applicants' counsel's concession that the ZEP holders were holders of rights such as the right to equality, human dignity and life under sections 9, 10 and 11, respectively, of the Constitution, to mention but a few. Therefore, the existence of a prima facie right is unassailable. Upon being pressed by the court to mention the interim interdict requirements which were not met, he mentioned two, namely: the balance of convenience and irreparable harm.

[19] Looking at irreparable harm, the court in its judgment pointed out to the harm that will be visited to the children of ZEP holders who stood to be denied education. By terminating ZEP in June, the ZEP holders' children face a bleak prospect of being uprooted from their schools in South Africa and face a struggle to find schools in the middle of the year in Zimbabwe. Without rewriting the judgment, paragraph 78 captures the essence of irreparable harm.

[20] In dealing with the balance of convenience the court referred at great length to *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (OUTA).[9] By granting a further extension to 31 December 2023, the Minister was inadvertently confirming the correctness of paragraphs 86 and 87 of the judgment. In their answering affidavit in the *HSF* matter, the applicants record that "(a)s indicated above, the Minister is not closed off to any future Directive(s) being issued should the circumstances dictate."[10] This court is left wondering as to the purpose of this application for leave to appeal, since the Minister has not been prejudiced by the six (6) months covered by this judgment as displayed by the extension to 31 December 2023. Furthermore, the Minister will not be prejudiced by the next six (6) months between January 2024 and June 2024 even if they are not contemplating another extension.

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[9] 2012 (6) SA 223 (CC).
[10] Answering affidavit in HSF matter Caseline 066-168 para 14.



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[21] There can be no harm endured by the applicants from June 2023 to December 2023. Hence, the extension. This is in sharp contrast to the chilling effect of the potential harm that will be suffered by the ZEP holders and their children if they were uprooted. There cannot be any clearest of cases than this one. The first respondent's counsel referred to the matter of *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others.*[11] Dealing with the issue of balance of convenience, the court said:

> *"OUTA* must be read in the context of the fact that what was at issue there was a highly policy laden decision by a member of the Executive arm of government *and* violations of fundamental rights protected in the Bill of Rights were not at issue. In the main, it is those two considerations that informed the Court's final conclusion... But courts must never lose sight of the fact that this remains a balancing exercise. Affected fundamental rights must always play a critical role in that balance. And in some cases the affected rights may be of such a nature and their breach so grievous that they may influence the decision in favour of the victim of the rights violation even in the face of a highly policy laden and polycentric executive decision. The ultimate question is: what is the outcome dictated by the balancing exercise?"[12]

[22] In *casu*, the court is dealing frontally with the Bill of Rights which is a cornerstone of the democracy in South Africa and enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[13] With this background in mind, this court concluded that the balance of convenience scale was tilted in favour of the first respondent.

[23] On the absence of an alternative adequate remedy element, the applicants did not advance any meaningful argument save to restate what is dealt with in the judgment. The fact that the functionaries must interpret the law in *favourem liberatis* does not amount to an alternative relief. It would be idle to regurgitate what is dealt with in paragraph 79 of the judgment. There is no adequate alternative relief open to

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[11] 2023 (4) SA 325 (CC).
[12] Supra para 303.
[13] Section 7 of the Constitution.



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the first respondent other than to approach this court for relief. Accordingly, the applicants have failed to meet requirements of section 17(1)(a)(i) and (ii) of the Act.

*Appealability*

[24] In dealing with appealability, the court examined the matter of *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others.*[14] This case largely resonates with this court because of its resuscitation of the *Zweni* test. However, there are a number of judgments that enthrone the supremacy of the interest of justice as a determining factor for appealability. Despite this court gravitating towards *TWK Agriculture Holdings* matter and in view of the presence of constitutional issues, it must look at the test ordained by the constitutional courts in dealing with appealability. Looking at interim orders, the court in *OUTA* held:

> "This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is "the interests of justice."[15]

[25] As mentioned earlier, the applicants sought to be afforded an opportunity to file their supplementary papers for Part B. It would not be in the interest of justice to hear this matter in a piece meal fashion, as was stated in the matter of *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others,*[16] when the court said;

> "It would not be in the interests of justice that the issues in this matter are determined in a piecemeal fashion. Moreover, the issues in this matter are of such a nature that the

[14] 2023 (5) SA 163 (SCA) para 25: "[25] I recognise that there is thought to be a compelling basis to render this Court's approach to appealability consistent with that of the Constitutional Court. And hence to recognise the interests of justice as the ultimate criterion by reference to which appealability is decided. I consider this to be a misreading of the Constitution. Section 167 of the Constitution constituted the Constitutional Court as the highest court. Section 167(3) sets out matters that the Constitutional Court may, and is thus competent, to decide. The Constitutional Court may decide constitutional matters. This competence was extended, by constitutional amendment, to any other matter, but under the qualification that the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court. The Constitution thereby states a principle of appealability in respect of the Constitutional Court. The Constitution does so also to allow a person to bring a matter directly to the Constitutional Court or by way of direct appeal (s 167(6) of the Constitution). National legislation or the rules of the Constitutional Court must allow a person to do so in the interests of justice and with the leave of Constitutional Court."

[15] Supra note 10 para 25.

[16] 2023 (1) SA 353 (CC).



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decision sought will have a practical effect if the application for leave to appeal is granted."[17]

[26] In essence, the effect of this judgment was to maintain a status *quo ante*. By extending the period until 31 December 2023, the applicants implicitly confirmed that they experienced no harm and status *quo ante* can be maintained. The first respondent submitted that they are still waiting for the record in terms of rule 53. The applicants must file their supplementary papers. In short, the parties must get on with Part B. With the matter still in a state of flux, it would not be in the interest of justice to grant leave to appeal. Accordingly this matter is not appealable.

*Costs*

[27] The court canvased the views of both counsel on the role of *Ubuntu*[18] on costs. The appellants' counsel submitted that *Ubuntu* played no role and urged the court to apply the principle of *Biowatch Trust v Registrar Genetic Resources and Others.*[19] The first respondent's counsel submitted that *Ubuntu* was critical even in the issue of costs. He submitted that his clients were disadvantaged by race, because they are black, by nationality, because they are foreigners and by poverty. It was his submission that he could not think of any better case than this one to apply the principle of *Ubuntu*. This court is convinced that *Ubuntu* plays a critical role under the issue of costs as one of the principles of *Ubuntu* is fairness. Having said that, this court will apply the *Biowatch* principle.

[28] The established *Biowatch* principle is: "a private party seeking to assert a constitutional right ... ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs."[20] In the result the court makes the following order:

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[17] Supra para 36.
[18] *S v Makwanyane and Another 1995* (3) SA 391.
[19] 2009 (6) SA 232 (CC) para 22: "Although Ngcobo J in substance rejected the appeal by the medical practitioners on the merits, he overturned the order on costs made by the High Court against them, and held that both in the High Court and in this Court each party should bear its own costs. In litigation between the government and a private party seeking to assert a constitutional right, Affordable Medicines established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs."
[20] Supra.



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