

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32323/2022

In the matter between:

HELEN SUZMAN FOUNDATION

First Applicant

**CONSORTIUM FOR REFUGEES AND
MIGRANTS IN SOUTH AFRICA**

Second Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR GENERAL OF HOME AFFAIRS

Second Respondent

**ALL TRUCK DRIVERS FORUM AND ALLIED
SOUTH AFRICA**

Third Respondent

FILING SHEET

PRESENTED FOR SERVICE AND FILING:

1. The HSF's consolidated response:

1.1 in reply to the Third Respondent's supplementary answering affidavit in the main HSF application; and

1.2 in answer to the Third Respondent's counter-application.

DATED at SANDTON on this the 13th day of MARCH 2023.



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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 32323/22

In the matter between:

HELEN SUZMAN FOUNDATION First Applicant

**CONSORTIUM FOR REFUGEES AND
MIGRANTS IN SOUTH AFRICA** Second Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR-GENERAL OF HOME AFFAIRS Second Respondent

**ALL TRUCK DRIVERS FORUM AND
ALLIED SOUTH AFRICA** Third Respondent

**HSF'S ANSWERING AFFIDAVIT:
(COUNTER-APPLICATION AND SUPPLEMENTARY AFFIDAVIT)**

I, the undersigned,

NICOLE FRITZ

do hereby make oath and state that:

- 1 I am the Executive Director of the Helen Suzman Foundation ("**HSF**"), the first applicant in the main application in this matter, under the above case number ("**main application**"). I was the deponent to the founding affidavit in main application.

- 2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are both true and correct.
- 3 Where I make legal submissions, I do so on the advice of the HSF's legal representatives. I will use the same abbreviations and terms as used in the HSF's previous affidavits in the main application.

INTRODUCTION AND OVERVIEW

- 4 On 10 February 2023, this Court (per Davis J) made an order, *inter alia*, admitting the All Truck Drivers Forum and Allied South Africa ("**Truck Drivers Forum**") as the third respondent in the main application.
- 5 In the judgment, Davis J emphasised that this intervention should not derail the hearing of the main application,¹ set down for 11 to 14 April 2023. For this purpose, counsel for the Truck Drivers Forum committed his client to delivering a supplementary affidavit in the main application within 10 days from date of the judgment. As a result, the Court made an order directing the Truck Drivers Forum to deliver any supplementary or answering affidavit within 10 days from date of the order; which was due on 24 February 2023. It was accepted that any further delays would be prejudicial to ZEP-holders.
- 6 The Truck Drivers Forum did not comply with this order and the assurances provided to the Court. Their affidavit was filed late on 28 February 2023.

¹ Judgment (per Davis J): p 046 - 14 para 25.

Moreover, the Truck Drivers Forum has not merely filed a supplementary affidavit, but it has also attempted to launch a counter-application, seeking a review of the entire exemption regime and all of the Minister's decisions related to this regime, dating back to 2009.

- 7 In its application for intervention and at the hearing before Davis J, the Truck Drivers Forum gave no indication of any intention to launch a counter-application. Had they done so, the intervention application would almost certainly have been refused, given Davis J's concern not to interfere with the timetable for the hearing of the main application. This is an abuse of process.
- 8 I confirm that I have read the founding affidavit (in support of the counterapplication) and the supplementary affidavit both deposed to by Mario Khumalo ("**Mr Khumalo**") on behalf of the Truck Drivers Forum.
- 9 The two affidavits are identical in content. As a result, I will reply to both affidavits in this answering affidavit. The affidavits largely consist of legal submissions which will be addressed in argument at the hearing of the main application.
- 10 The HSF opposes the counter-application on two main grounds:

10.1 First, the Truck Drivers Forum's attempt at a review application is unreasonably delayed and there is no condonation application before the Court.

10.2 Second, the HSF strongly denies the Truck Drivers Forum's contention that the exemption regime is unlawful, which is a question of law that will be addressed in argument.

11 In what follows, I will address the question of delay before providing responses to individual paragraphs in the counterapplication and the supplementary affidavit.

DELAY AND THE ABSENCE OF ANY CONDONATION APPLICATION

12 In its counter-application, the Truck Drivers Forum seeks to invalidate all decisions relating to the creation and extension of the ZEP regime, dating back to the creation of the Dispensation of Zimbabweans Project in September 2009.

13 The Truck Drivers Forum's application is manifestly out of time and it has not sought condonation for its delays. Its counter-application falls to be dismissed on this basis alone.

- 14 First, all parties accept that the Minister's decisions are administrative action, reviewable under PAJA.² Thus PAJA applies to the review application brought by the Truck Drivers Forum.
- 15 Section 7(1) of PAJA provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.
- 16 I am advised that it is settled law that after the 180-day period the issue of unreasonableness is pre-determined by the Legislature; it is unreasonable *per se*. Absent a condonation application, a court has no authority to entertain a review application at all.
- 17 The Truck Drivers Forum has failed to bring any condonation application, let alone an explanation for its delays. Its counter-application falls to be disregarded.
- 18 Second, even if the 180-day time limit in PAJA does not apply, judicial review proceedings must be instituted without unreasonable delay.

² Main HSF application (founding affidavit): p 001-58 para 112 (not denied, at p 010-107 para 381)

- 19 The impugned exemption regime for Zimbabwean nationals has been in existence since September 2009. Its latest incarnation, the ZEP, has been in existence since 2017. There is no question that this attempt to review the Minister's decisions is unreasonably delayed.
- 20 On its own version, the Truck Drivers Forum was established and incorporated on 17 November 2020³ with its mission and vision as aiming *"to make sure that no undocumented workers are involved in the trucking industry"*⁴.
- 21 The Truck Drivers Forum has further claimed that the issue of foreign nationals being employed in the trucking industry was a point of discussion as early as 2018.⁵ It is plain from the Truck Drivers Forum's founding affidavit in the intervention application that there were continuous engagements with stakeholders about the issue of the ZEPs. In the result, the Truck Drivers Forum must be taken to have known about the exemption regime by 2020 at the very latest.
- 22 The unreasonable delay is compounded by the Truck Drivers Forum's conduct in this matter. It was granted leave to intervene on the assurance that it would not take any actions to further delay or hinder the hearing of the main application, which has been set down for hearing in the week of

³ FA (intervention application) deposed to by Mario Khumalo on behalf of the All Truck Drivers Forum and Allies South Africa on 27 September 2022 ("**FA intervention application**"): p 026-38.

⁴ FA (intervention application) p 026-7 para 6. The memorandum at p 026-40 says: *"To make only citizens of South Africa to get jobs, own business, and properties."*

⁵ FA (intervention application): p 026-11 para 17.

11 April 2023. Throughout the intervention application, it gave no indication of any intention to launch this counter-application and merely indicated that it wished to file a brief supplementary affidavit. No explanation is provided for its change in stance, which goes against the assurances that it provided to this Court. As I have already noted, this is an abuse which, in itself, provides grounds to dismiss the counter-application.

- 23 The prejudice to the parties, ZEP-holders, and the Court is manifest. The main application raises considerable, complex issues of public importance. Four days have been set aside for the hearing and all parties accept that the matter must be heard and decided well before the 30 June 2023 deadline, to protect the interests of ZEP-holders. Specially allocated hearing dates and a timetable were provided for that purpose. The parties and the Court are now burdened with extraneous counter-application that seeks to challenge decisions dating back more than 14-years, which only serves to distract from the important issues in the main application.

AD SERIATIM RESPONSES

- 24 I now turn to address individual allegations in the founding affidavit to the counter-application and the supplementary affidavit, to the extent necessary.
- 25 The two affidavits are identical in all respects. As a result, I will only provide one set of responses.

26 These responses must be read together with what is set out above and HSF's previous affidavits in this application. Any allegation which is not addressed and which is inconsistent with the HSF's previous affidavits must be taken to be denied.

AD PARAGRAPHS 1.2 – 1.4

27 Save to deny that the contents of the affidavits are true and correct in all respects, the content of these paragraphs is noted.

Ad paragraph 1.5

28 The Truck Drivers Forum has filed this affidavit as a founding affidavit in support of its counter-application. It is not the supplementary affidavit contemplated in the order of Davis J.

Ad the overview and the purpose of this Affidavit

Ad paragraph 2.1 (including subparagraphs)

29 The HSF seeks to review and set aside the Minister's decision to terminate the ZEP programme and to refuse further extensions beyond 30 June 2023.

30 The content of these paragraphs is noted to the extent that they accurately record what is stated in the HSF's amended notice of motion.

Ad paragraph 2.2 (including subparagraphs)

31 To the extent that these paragraphs accurately record the HSF's contentions, they are noted.

Ad paragraph 2.5 and 2.6 (including subparagraphs)

32 The HSF strongly denies the legal arguments and conclusions set out in these paragraphs. These are matters for argument. In brief, the HSF maintains that:

32.1 The Minister is empowered under section 31(2)(b) to create exemption programmes and to extend existing exemptions;

32.2 ZEPs are lawful and valid; and

32.3 The only relevant question is whether the Minister's decision to terminate the ZEP programme and to refuse further extensions is lawful and consistent with the constitutional rights of ZEP-holders.

Ad paragraph 2.8 - 2.10

33 For the reasons set out above, I deny that the counter-application and founding affidavit are consistent with this Court's order. The order entitling the Truck Drivers Forum to file a brief supplementary affidavit did not entitle it to launch a substantive counter-application.

34 The challenge brought by the Truck Drivers Forum is completely different to the challenge in the Main HSF application and is long out of time.

AD: FURTHER GROUNDS OF CHALLENGE TO THE SCHEME

Ad paragraph 3.1 – 3.9

35 The HSF denies the legal arguments and conclusions in these paragraphs, which will be addressed in argument.

36 I further deny the unsubstantiated allegation that ZEPs could not be extended as they had lapsed by effluxion of time. There is no evidence to support this contention, which is inconsistent with the facts on record.

AD CONCLUSION AND APPROPRIATE RELIEF

Ad paragraph 4

37 The Truck Drivers Forum has failed to make out a case for the relief sought.


38 Moreover, it could never be just and equitable to set aside the entire exemption regime, which would cause manifest prejudice to ZEP-holders.

39 In the premises, the counter- application ought to be dismissed with costs.



 NICOLE FRITZ

SIGNED and SWORN to before me at JHB on this the 13th day
 of March 2023, by the deponent who has acknowledged that she knows
 and understands the contents of this affidavit; that she has no objection to taking
 to the prescribed oath and that she considers the prescribed oath to be binding
 on her conscience.



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