

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 First Applicant's Heads of Argument in relation to the Third Respondent's Counter-application.

DATED at **SANDTON** on this the 5th day of **APRIL 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 HEADS OF ARGUMENT:

(ALL TRUCK DRIVERS FORUM COUNTER-APPLICATION)

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INTRODUCTION

- 1 The All Truck Drivers Forum and Allied South Africa (Truck Drivers Forum) has filed a counter-application seeking to review and set aside all decisions relating to the creation and extension of the ZEP regime, dating back to 2009.

- 2 This counter-application can be swiftly dismissed, as it is fatally flawed on two grounds:
 - 2.1 First, it is unreasonably delayed and there is no condonation application before the Court; and

 - 2.2 Second, there is no merit to the Truck Drivers Forum's review application.

- 3 At the time of filing these heads of argument, the Truck Drivers Forum had failed to file its own heads of argument. With the hearing less than a week away, the HSF has filed these heads of argument in the interests of avoiding any further delays.

DELAY AND THE ABSENCE OF A CONDONATION APPLICATION

- 4 The Truck Drivers Forum's application is brought many years out of time and it has failed to seek condonation for its delays.

- 5 The impugned exemption regime for Zimbabwean nationals has been in existence since the Dispensation for Zimbabweans Project (DZP), created in September 2009. The latest incarnation, the ZEP, has been in existence since 2017.

- 6 All parties accept that the relevant decisions to create and extend this exemption regime are administrative acts that are reviewable under the Promotion of Administration Justice Act¹ (PAJA).² The Truck Drivers Forum's review application is therefore subject to the strict time limits in section 7(1) of PAJA, which provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than the 180-day deadline.
- 7 Even if PAJA somehow does not apply, the Truck Drivers Forum's review had to be launched without unreasonable delay.³
- 8 On either calculation, the Truck Drivers Forum's review falls far outside of the 180-day time limit and is otherwise unreasonably delayed.
- 9 The Truck Drivers Forum has failed to bring any application to condone its delays or to extend the 180-day time period under section 9 of PAJA. And in the absence of a properly motivated application for an extension, this Court "*has no authority to entertain the review application at all*".⁴
- 10 That ought to be the end of the matter.

¹ The Promotion of Administration Justice Act, 3 of 2000.

² Main HSF application FA p 001-58 para 112; Not denied, AA p 010-107 para 381.

³ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC) at para 48.

⁴ *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) at para 26; see also *Associated Institutions Pension Fund and other v Van Zyl* at para 46.

- 11 The unreasonable delay is compounded by the Truck Drivers Forum's conduct in this matter. It applied for and was granted leave to intervene in this matter on the explicit assurance that it would not take any actions to hinder the hearing of the main application.⁵ In his judgment granting leave to intervene, Davis J was at pains to emphasise that this intervention should not derail the hearing of the main application.⁶
- 12 Throughout the intervention application, the Truck Drivers Forum gave no indication of any intention to launch a counter-application. It 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. This is an abuse which, in itself, provides grounds to dismiss the counter-application.⁷
- 13 The prejudice to the parties, ZEP-holders, and the Court is manifest. The main application raises considerable, complex issues of public importance. 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 an 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.⁸

⁵ HSF answering affidavit (counter-application): p 050-14 para 22.

⁶ Judgment (per Davis J): para 25.

⁷ HSF AA (counter-application): p 050-14 para 22.

⁸ HSF AA (counter-application): p 050-15 para 23.

14 Moreover, 178 000 ZEP-holders have, for more than 14 years, relied on the validity of the exemption regime in building lives, families and careers in South Africa. It would not be in the interest of justice to entertain the belated counter-application in these circumstances.

NO MERIT TO THE COUNTER-APPLICATION

15 The Truck Drivers Forum's attack on the exemption regime relies on a flawed and unsustainable reading of section 31(2)(b) of the Immigration Act.⁹ It advances four primary arguments, which we will address in turn:

15.1 First, that the ZEP and its predecessors are unlawful because exemptions cannot be granted to specific nationalities or to "illegal foreigners".¹⁰

15.2 Second, that these exemption regimes are unlawful in the absence of an application.¹¹

15.3 Third, that the Minister had no power to extend exemptions that allegedly lapsed by effluxion of time.¹²

15.4 Fourth, that no special circumstances exist which warranted exemptions.¹³

⁹Section 31(2)(b) to (d) of the Immigration Act, 13 of 2002 provide that:

"(2) Upon application, the Minister may under terms and conditions determined by him or her-

...

(b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may-

(i) exclude one or more identified foreigners from such categories; and

(ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;

(c) for good cause, waive any prescribed requirement or form; and

(d) for good cause, withdraw an exemption granted by him or her in terms of this section."

¹⁰ Truck Drivers Forum FA p 026-23 para 52.

¹¹ Truck Drivers Forum FA p 026-26 para 60.

¹² Truck Drivers Forum SFA p 047-17 paras 3.6 - 3.9.

¹³ Truck Drivers Forum FA p 026-29 – 30 para 69.

- 16 First, there is no basis in the text or purpose of section 31(2)(b) for the attempt to prohibit the Minister from granting exemptions to Zimbabwean nationals, including those who may have been “illegal foreigners” in the past.
- 17 The text of section 31(2)(b) is clear: the Minister may grant exemptions to “a *foreigner or a category of foreigners*”, with no restriction as to the categories of foreigners who may benefit.
- 18 As contended by the Minister, section 31(2)(b) does not expressly or by necessary implication preclude the Minister from granting exemptions to illegal foreigners; provided special circumstances exist to warrant the exemption.¹⁴
- 19 In any event, none of the ZEP-holders were illegal foreigners at the time that they received ZEPs, as all ZEP-holders held exemption permits under the DZP and ZSP.¹⁵
- 20 This exemption provision serves an important protective purpose. For more than a century, similar powers have been used to come to the aid of categories of foreigners who may have fallen foul of immigration rules or who do not otherwise qualify for other visas and permits.¹⁶ The Truck Drivers Forum impermissibly seeks to eradicate that protective function.
- 21 Second, there is no basis to the Truck Drivers Forum’s further argument that the ZEP and its predecessors fall foul of the requirement that there be an application.

¹⁴ Minister’s AA (intervention application) p 032-18 para 45.

¹⁵ See Minister’s AA p 010-49 para 140.

¹⁶ Minister’s AA (intervention application) p 032-9 para 13ff.

- 22 The uncontested facts are that each of the successive exemption regimes, including the ZEP, required Zimbabwean nationals to submit applications for exemptions, on the terms and conditions prescribed by the Minister.¹⁷
- 23 The temporary extensions to existing ZEPs, granted in December 2021 and September 2022, were adjustments to the period of exemption permits, which would not require any further application. This power to adjust the period of existing permits flows naturally from the Minister's express powers to determine the terms, conditions and period of exemption permits. Even if this Court were to find that the power of extension was not an express power, it is certainly an implied power, that is necessary to achieve the protective purpose of these provisions.¹⁸
- 24 Third, the uncontested facts are that the extensions to the ZEPs in December 2021 and September 2022 were granted while the ZEPs remained valid.¹⁹ On the common cause facts, there was no expiration of these permits by effluxion of time.
- 25 Finally, there can be no question that special circumstances existed to justify the Minister invoking section 31(2)(b) in creating the DZP, ZSP and ZEP. The Minister has never sought to deny the existence of these special circumstances and all contemporaneous records reflect those special circumstances.

¹⁷ See, for example, the Minister's account of the history of these permits in Minister's AA p 010-44 para 105 to p 010-51 para 149.

¹⁸ See *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* 2021 (3) SA 246 (CC) at paras 63ff on the typology of implied powers.

¹⁹ See joint chronology filed by the parties in the HSF / CORMSA matter, p 027-43 – 45.

- 26 The only relevant question is whether the Minister has demonstrated that there are no longer special circumstances, warranting the termination of the ZEP and the refusal to grant any further extensions. That is the subject of the main application.

CONCLUSION AND COSTS

- 27 The Truck Drivers Forum's counter-application is an abuse, which has prejudiced all parties and the Court. The Truck Drivers Forum's manifestly unreasonable conduct warrants an adverse costs order, including the costs of three counsel.

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5 April 2023**

LIST OF AUTHORITIES

1. Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited 2019 (4) SA 331 (CC)
2. Opposition to Urban Tolling Alliance v South African National Roads Agency Limited [2013] 4 All SA 639 (SCA)
3. Associated Institutions Pension Fund and other v Van Zyl 2005(2) SA 302 (SCA)
4. AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others 2021 (3) SA 246 (CC)