IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

On the roll: 5-7 October 2022

Case No**: 32323/2022**

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	Intervening Party

And

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Second Respondent

---

RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. The applicant ('HSF') impermissibly seeks to secure a *de facto* permanent/indefinite right for holders of Zimbabwean Exemption Permits ('ZEPs') to remain in the country in the face of the express conditions on which the ZEPs were issued, and in breach of the provisions of the Immigration Act 13 of 2002 ('the Immigration Act') and the Immigration Regulations [1] ('the Regulations').

2. The decisions at issue in this application do not concern refugees. The decisions relate to whether ZEP holders, who are by and large economic migrants, are entitled to demand the continued existence and further indefinite extensions of the exemption regime started in 2009.

3. If, as HSF contends, it does not seek some form of permanent right for ZEP holders to remain in the country, the only matter in issue is the reasonableness, rationality and lawfulness of the 18-month extension granted to ZEP holders (as opposed to previous iterations of the exemption regime which were granted for periods of 3 to 4 years at a time).

4. HSF on the one hand says that it does not seek permanent rights of residence for ZEP holders and that in principle there is nothing objectionable about the ZEP terminating in due course, but on the other hand says that the rights afforded to ZEP holders are anything but temporary in nature[2] and that the withdrawal of such rights breaches the constitutional rights of ZEP holders.[3]

---

1 GNR.413 of 22 May 2014: Immigration Regulations, *Government Gazette* No. 37679.
2 FA para 146.1, rec. 001-69; RA para 78.1, rec. 018-37 and para 139, rec. 018-59.
3 FA para 133, rec. 001-65.

5. These heads of argument are structured as follows:

5.1. First, we address the true nature of the relief sought by HSF;

5.2. Second, we address the common cause facts and those which are in dispute;

5.3. Third, we address the alleged contradictions in the positions adopted by the first respondent ('the Minister') and the second respondent ('the DG');

5.4. Fourth, we address the alleged practical barriers to ZEP holders obtaining visas and permits;

5.5. Fifth, we address HSF's grounds of review;

5.6. Sixth, we address HSF's notice in terms of Rule 35(12) and (14).

5.7. Finally, we address the question of remedy.

THE TRUE NATURE OF THE RELIEF SOUGHT

The Minister's decisions

6. HSF's application is predicated on a fundamental misunderstanding of the nature and effect of the operative decisions taken by the Minister.

7. The Minister, as he was entitled to do, in 2009 exercised his powers in terms of s 31(2)(b) of the Immigration Act to grant a that a particular class of foreign persons, being Zimbabwean nationals, an exemption from the ordinary visa

processes in the Immigration Act, and to allow this class of persons to apply for special permits that would allow them to either work, study or start a business in South Africa.[4]

8. The Dispensation of Zimbabwe Project ('colloquially referred to as 'DZP'), was intended to grant the large number of undocumented Zimbabweans in South Africa at the time an opportunity to regularise their stay in the country.[5] Qualifying applicants were at all times made aware that the exemption regime was temporary; would not entitle them to apply for permanent residence and was not intended to be renewable or extendable.[6]

9. It was made clear in 2009 when the DZP was first implemented that it was a temporary permit expiring at the latest on 31 December 2014.[7]

10. Notwithstanding this clear statement, and the confirmation in August 2014 that all DZPs would terminate on 31 December 2014, the then Minister in 2014 made a decision to grant a new exemption regime (colloquially referred to as the Zimbabwean Special Permit ('ZSP')) which would terminate on 31 December 2017, whereafter all ZSP holders would have to leave South Africa in order to apply for mainstream visas.[8]

11. Despite the then Minister's statement that after 31 December 2017 all ZSP holders would have to leave South Africa in order to apply for mainstream visas, in September 2017 he confirmed the expiry of the ZSP but also announced the implementation of a further exemption regime referred to as the ZEP which was

---

4 AA para 8, rec. 010-10.
5 An estimated 1.5 million persons, AA para 10.1, rec. 010-11.
6 AA para 9, rec. 010-10. See also SAA para 42-46, rec. 010-283 – 010-285.
7 SAA para 44, rec 010-285.
8 SAA para 43.1 - 43.1.7, rec. 010-283 – 010-284 and para 45, rec. 010-285.

subject to the express conditions that the ZEP would not be renewable and that ZEP holders could not change the conditions of their permits while in South Africa.[9]

12. The DG on 20 September 2021 made a submission to the Minister in which he recommended that (a) the Minister exercise his powers in terms of s 31(2)(d) of the Immigration Act to withdraw or not extend the exemptions that had been granted to Zimbabwean nationals; (b) the Minister should extend the validity of the current ZEPs for a period of three years alternatively a period of 12 months or any other period deemed appropriate; and (c) and he should impose a condition allowing ZEP holders to apply for visas provided for in the Immigration Act while in South Africa.

13. The Minister on 21 September 2021 approved the DG's recommendations to withdraw or not extend the exemptions that had been granted to Zimbabwean nationals, including to extend the validity of the current ZEPs for a period of 12 months. The Minister imposed a condition to allow holders to apply for visas in terms of the Immigration Act while in South Africa.

14. On 29 December 2021 the Minister gave effect to the decision taken on 21 September 2021 by issuing Immigration Directive No. 1 of 2021 ('Directive 1'). Directive 1 extended the validity period of the current ZEPs to 31 December 2022 and imposed a condition to allow ZEP holders to apply for visas while in South Africa.[10]

---

[9] SAA para 43.2 - 43.2.5, rec. 010-284 – 010-285 and para 46, rec. 010-285.
[10] FA Annexure FA14, rec. 001-123.

15. This is clear from the express wording of Directive 1 which states that the Minister *'with the powers bestowed upon [him] in terms of section 31(2)(b), read with section 31(2)(d) of the Immigration Act, decided to extend the Zimbabwean exemptions granted to Zimbabwean nationals for a period of 12 months in order to allow the holders thereof to apply for one or other visas provided for in the Immigration Act that they may qualify for'.* [11]

16. All of the approximately 178 000 ZEPs which had been issued in 2017, were due to expire on 31 December 2021.[12] However, in terms of Directive 1 the conditions of the current ZEPs were amended, in that the validity period was extended to 31 December 2022 and ZEP holders were allowed to apply for visas while in South Africa whereas the ZEP originally contained conditions stipulating that the ZEP would not be renewable/extendable and ZEP holders could not change the conditions of their permits while in South Africa.[13]

17. The Minister on 2 September 2022 issued Directive 2 of 2022 ('Directive 2'), which recorded a decision of the Minister to extend the validity of the exemptions granted in terms of Directive 1, to 30 June 2023 and confirmed that the same protections afforded to ZEP holders by Directive 1 would continue to apply during this further period.[14]

18. Consequently, the validity of the ZEPs was initially extended for a 12-month period and has now been extended again for a further 6-month period.

---

[11] FA Annexure FA14, rec. 001-123.
[12] AA para 15, rec. 010-13.
[13] AA para 143.7, rec. 010-50.
[14] SRA Annexure SRA1, rec. 022-10 - 022-11.

19. HSF says that it does not contend that *'the Minister is obliged to extend exemptions in perpetuity or that ZEP holders may never have their permits withdrawn'* and that the application concerns only *'the manner in which the Minister reached his decision to terminate the ZEP and to refuse further extensions'*.[15]

20. However, when regard is had to the substance of the relief sought, it is clear that HSF in truth seeks a permanent/indefinite right for ZEP holders to remain in the country.

21. The Minister initially decided to extend the validity of the ZEPs for a period of 12 months, to allow ZEP holders to make representations as regards the non-extension of the exemption regime and the 12-month extension of the current ZEPs, and to give ZEP holders who wished to do so the opportunity to apply for visas as contemplated by the Immigration Act.[16]

22. As appears from the press statement which accompanied Directive 2,[17] the reasons for the extension were, *inter alia*, that comparatively few ZEP holders had applied for visas and/or waivers, and the Departmental Advisory Committee ('the DAC') was of the view that it would be prudent to extend the period for ZEP holders to apply for visas and/or waivers.

23. In light hereof, the only decisions that HSF can properly seek to challenge are the Minister's decisions not to extend and to extend the validity of the ZEPs for a period of 12 months and his decision to extend the ZEP's for a further 6 months.

---

[15] FA paras 14 -15, rec. 001-26.
[16] AA para 16, rec. 010-14.
[17] SRA Annexure SRA2, rec. 022-12 - 022-13.

24. The operative and relevant decisions for the purposes this application are:

    24.1. The decisions of the Minister not to extend and to extend the validity of exemptions for a further 12 months, and

    24.2. Thereafter the Minister's decision to extend the validity of exemptions for an additional 6 months.

25. In this context, there are certain aspects of the decision-making process which should be emphasised. First, the ZEPs which were granted in 2017 were due to expire on 31 December 2021. Second, in September 2021 the Minister decided that the exemption regime would no longer continue to operate as it had up to that point. Third, in doing so, the Minister did not exclude the possibility of granting a further extension(s) in the future, should the need arise and should this be appropriate.

26. Both HSF and CORMSA seek to obscure these essential features of the decisions of the Minister.

27. While it might be so that the anticipated consequence of this limited extension was to bring the ZEP programme to an end in due course, that is no reason to lose sight of the distinction between the nature of the decision, and the anticipated consequence of that decision.

28. At the same time both HSF and CORMSA claim that the respondents' answering affidavits seek to recast what was a decision to terminate as a decision to extend. That contention is unsustainable – the Minister's September 2021 decision as implemented in Directive 1 speaks for itself.

29. HSF's relief is flawed for a number of fundamental reasons:

29.1. HSF mischaracterises the nature of the Minister's decisions;

29.2. Despite its protestations to the contrary, HSF seeks relief that would preclude the Minister from terminating the ZEP;

29.3. In essence, it contends for relief arising from an alleged substantive legitimate expectation; and

29.4. The relief sought in effect amounts to this Court being asked to substitute its decision for that of the Minister in regard to the further renewals of ZEPs after 30 June 2023.

HSF mischaracterises the Minister's decisions

30. HSF seeks to characterise the Minister's decisions as constituting a deprivation of rights, when, in fact the Minister's decisions grant rights to ZEP holders.

31. For HSF to succeed in reviewing and setting aside the Minister's decisions not extend and (to extend the validity of the current ZEPs for 18 months as opposed to a period of 3 or 4 years) it must demonstrate that the Minister's decisions were unlawful, unreasonable or procedurally unfair. We submit that HSF has not discharged the onus resting on it in this regard.

HSF seeks *de facto* an indefinite exemption

32. If regard is had to the grounds of review, HSF contends that because ZEP holders have lived and worked in South Africa for approximately a decade, any

decision not to grant a further exemption to all ZEP holders would amount to an unjustifiable breach of the fundamental rights of ZEP holders.[18]

33. The true nature of HSF's case is revealed in the replying affidavit where HSF states that:

33.1. *'The fact that exemptions have been repeatedly extended by successive Ministers, over a period of more than 13 years, demonstrates that these exemptions were anything but temporary in nature and effect'*.[19]

33.2. The respondents' approach to HSF's dignity challenge is inappropriate because it is based on a *'formalistic focus on the alleged "temporary" nature of [ZEP holders'] permits'* and that *'substance must be placed over form'*.[20]

33.3. *'These ZEP holders have been in the country for over a decade, have invested in businesses and careers, built families, have children (some of whom were born and raised in the country) and have forged lives in South Africa for over a decade. They are far from temporary migrant workers.'*[21]

33.4. *'[T]he opportunity for individual exemptions which the Director General and Minister tout cannot cure the unfairness of the decision not to extend the ZEPs'.*[22]

33.5. '*[T]hese permits were repeatedly extended by successive Ministers over a period of more than 13 years. The lives careers, businesses and families that*

[18] FA para 137, rec. 001-66.
[19] RA para 78.1, rec. 018-37.
[20] RA para 78.2, rec. 018-37.
[21] RA para 81.1, rec. 018-39.
[22] RA para 55.3, rec. 018-30.

ZEP-holders have established in this country are neither transient nor temporary.'[23]

34. In particular, HSF contends that the decision(s) not to continue the exemption regime and to extend the validity of the current ZEPs for a 12 or 18 month period violates the fundamental rights of ZEP holders because the Minister's decision(s):

34.1. *'[W]ill strip thousands of Zimbabwean nationals of* [a life of human dignity]*, as it will render them undocumented'*.[24]

34.2. Will place ZEP holders at risk of being separated from their families as they will lose the right to work, and thus they will have to choose to *'remain with family and face impoverishment or break up the family unit'*.[25]

34.3. *'[C]asts aside the lives and life choices that ZEP-holders have made since they arrived in South Africa'* some 13 years ago and thus strip them of *'the agency to make life choices'*.[26]

34.4. Will breach the rights of the children of ZEP holders to be documented, not be separated from their parents, and to be consulted based on their individual circumstances.[27]

35. If the Court were to accept that the Minister's decisions are reviewable for these reasons, the Minister would in effect be precluded from ever deciding to terminate the exemption regime, because ZEP holders have lived and worked

[23] RA para 179, rec. 018-70.
[24] FA para 135, rec. 001-65.
[25] FA para 136, rec. 001-65 – 001-66.
[26] FA para 137 – 138, rec. 001-66.
[27] FA para 139 – 143, rec. 001-66 - 001-68.

in South Africa since 2010 alternatively 2014, and as a consequence any decision not to grant them an indefinite extension would be rendered unlawful by virtue of the fact that they have made lives for themselves and their families in the country for several years.

36. HSF is asking this Court to find, notwithstanding (a) the express time limitation of the ZEPs, and (b) the fact that ZEPs were issued with an express condition that holders were not eligible for permanent residence (irrespective of their length of stay in the country), that any decision not to grant them permanent/indefinite rights of residence, breaches their fundamental rights because of their length of stay in the country.

37. HSF, in the absence of a challenge to the Immigration Act and the Regulations, seeks to create a right of permanent residence not provided for in the legislative regime, through the back door.

38. In addition, HSF contends that until the political and economic situation in Zimbabwe improves to an acceptable degree, any decision not to grant a further exemption is irrational.[28] HSF does not attempt to delineate what would constitute a sufficient improvement in the political and economic situation in Zimbabwe to justify a decision not to grant a further exemption to ZEP holders.

39. HSF asks this Court to compel the Minister to grant further exemptions to ZEP holders until the Court is satisfied that the Zimbabwean economy and political environment have changed to an unspecified degree that would render it reasonable and rational for ZEP holders to be required to return home.

[28] FA para 46 - 56, rec. 001-39 - 001-42.

40. Moreover, if it is unconstitutional to deny further exemptions to ZEP holders until the Zimbabwean economy and political environment has recovered sufficiently (whatever that may mean), there would be no lawful basis to deny any undocumented Zimbabwean an exemption from the provisions of the Immigration Act for the very same reasons.

41. This in turn would establish a right to remain in the country for economic migrants who do not meet the requirements for asylum in terms of the Refugees Act 130 of 1998 ('the Refugees Act') and who do not meet the requirements to be granted a visa in terms of the Immigration Act.

42. Any such order would amount to a far-reaching breach of the separation of powers.

43. HSF seeks to characterise (albeit in the context of remedy) the reliance on the separation of powers as *'a bald appeal'*,[29] and contends that the '*bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility'* to grant just and equitable remedies.[30]

44. The power to grant and/or terminate a temporary exemption from the provisions of the Immigration Act is a power granted to the Minister alone. The determination as to the circumstances in which it is permissible to exercise that power is quintessentially a policy laden and polycentric one. It is well established that Courts should show due deference to the competent authority in disputes involving matters of a policy nature, to avoid violating the separation

[29] HSF HoA para 229, rec. 020-90.
[30] HSF HoA para 229, rec. 020-90, relying on *Mwelase v Director General, Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 at para [51].

of powers.[31] The Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Limited*,[32] stated:

> *'Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'*

45. The Minister's decisions are predicated upon, *inter alia*, the fact that the ZEP achieved limited success in easing pressure on the asylum management system, as well as decisions relating to the allocation of resources, financial and otherwise, so as to best address the Department of Home Affairs ('the Department') statutory and constitutional obligations, and the Minister's view that the conditions in Zimbabwe have improved to a degree that renders it appropriate that an 18 month extension of the validity of the current ZEPs be granted as opposed to a 3 or 4 year extension, as had been the case with the previous exemptions. The further reasons for not extending the exemption regime are fully canvassed in the press statement issued by the Minister on 7 January 2022.

---

[31] *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at paras [21]-[22].
[32] *International Trade Administration Commission v SCAW South Africa (Pty) Limited* 2012 (4) SA 618 (CC) at para [195].

46. The Minister's decisions entail a weighing up of issues of significant political and economic importance. In this regard, the Constitutional Court in *Du Plessis v De Klerk*[33] held as follows:

> *'The judicial function simply does not lend itself to the kinds of factual enquiries cost benefit analyses, political compromises, investigations of administrative enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision making-making on social, economic, and political questions requires… How best to achieve the realisation of the values articulated by the Constitution is something far better left in the hands of those elected by and accountable to the general public than placed in the lap of Courts*.'

47. The determination of the duration of an extension of a temporary dispensation that lies solely within the field of the executive, calls for judicial deference and warrants interference only in the clearest of cases.[34] Where there is a strong legal principle that admits of only rare exception, the proper standard is *'the clearest of cases'*. The high standard ensures courts only depart from these principles when it is *'substantially incontestable*' that departure is required. This is not such a case.

Substantive Legitimate Expectation

48. HSF's argument, in substance, is that ZEP holders have a right to substantive relief (i.e. the granting of further exemptions) based on a legitimate expectation that their ZEPs would be renewed, albeit that HSF disavows any reliance on a substantive legitimate expectation.

---

[33] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at para [180]. See also *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para [38].

[34] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para [65]. See also *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) at para [53].

49. Reliance on the doctrine of legitimate expectation for any purpose, presupposes that the expectation qualifies as legitimate.[35] HSF points to no representation made by the Minister or the DG in relation to the extension of the validity of the current ZEPs that could meet the four requirements for the legitimacy of any expectation. No factual basis is laid on which this Court may find that (a) a clear, unambiguous representation, devoid of any relevant qualifications was made which induced the expectation; (b) the expectation was induced by the Minister (being the decision-maker); (c) the expectation was reasonable; and (d) the representation was one which was competent and lawful for the Minister to make.

50. Consequently, HSF cannot rely on the granting of two previous iterations of the ZEP to found a legitimate expectation (even to found a right to procedural fairness), given that each of the Ministers when granting the ZEP and its prior iterations made it clear that the exemptions were time limited and that ZEP holders would be required to return home at the end of the validity period.

51. The Constitutional *Court in President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[36] stated, as regards the element of reasonableness in the context of legitimate expectation, that more is in issue than the factual question as to whether an expectation exists in the mind of a litigant. Even if such an expectation exists, the question remains whether, viewed objectively, such expectation is in a legal sense legitimate. The requirement of reasonableness is a sensible one that accords with the principle of fairness in public administration, fairness both to the

---

35 *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) at para [19].
36 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para [216].

administration and the subject.[37] It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations.[38] It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.[39]

52. In any event, thus far our Courts have taken the view that a legitimate expectation only entitles a party to procedural fairness.[40] The Supreme Court of Appeal and the Constitutional Court have to date declined to develop the law so as to allow a party to claim substantive relief as a result of a legitimate expectation.[41]

53. In *Duncan*[42] what was in issue was whether the appellant was entitled to be awarded a long-term licence. In assessing the legitimacy of the expectation the Court held as follows:

> '*As I see it, the appellant could not have expected to acquire a long term licence without any reservation and whatever the circumstances. This is particularly so because he knew that the concept of a medium term licence had been introduced as a precursor to long term licences and to provide the Department with a window of observation and research. Common sense therefore dictates that even in the appellant's own mind his subjective expectation must have been subject to some reservations and conditions in the light of what the uncertain future might bring. But what would these conditions and reservations entail? Would it be that fish stocks remain the same; or that the number of participants in the industry remains*

---

37 *Szymanski* at para [19].
38 *Szymanski* at para [19].
39 *Szymanski* at para [19].
40 *Administrator, Transvaal & others v Traub & others* 1989 (4) SA 731 (A) at 758C-G.
41 *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 262 (CC) fn 7, para [31]. See also *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para [36]; *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) at para [96]; *Duncan v Minister of Environmental Affairs and Tourism & another* 2010 (6) SA 374 (SCA) at para [13]; and *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at paras [27]-[28].
42 *Duncan* at para [17].

constant; and so forth? The applicant does not say. In consequence I do not believe that the representations he relied upon met the first requirement of certainty and unambiguity.'

54. ZEP holders were at all times aware that the ZEP was temporary. There is no basis laid for extending the doctrine of legitimate expectation in this case. In particular, that is so because HSF seeks to establish a *de facto* permanent/indefinite residence right in the face of a permit that was expressly granted for a specified limited time.

HSF effectively seeks a substitution order

55. HSF in asking this Court to deem all ZEP's as valid pending a '*fair process*', is asking this Court to extend all 178 00 ZEPs for an indeterminate period (beyond 30 June 2023). It is in substance seeking a substitution order.

56. HSF asks this Court to order the Minister to issue some 178 000 ZEPs in breach of the well-established principle that in the absence of exceptional circumstances such as bias or gross incompetence on the part of an administrator, or a long delay occasioned by an arbitrary decision, a court will not order the issue of a permit unless the only proper decision of the administrator on remittal would be to grant the application.[43]

57. It cannot be said in the present case that the proper decision is a foregone conclusion, or that the Minister has disabled himself from properly making it. Nor are there any other grounds for this Court substituting its decision for that

[43] *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* 1986 (2) SA 663 (A) at 680E – H, per the minority judgment of Van Heerden JA. The SCA has endorsed this approach in *Coin Security Group (Pty) Ltd v Smit NO and Others* 1992 (3) SA 333 (A) at para [33] and *Littlewood and Others v Minister of Home Affairs and Another* 2006 (3) SA 474 (SCA) at para [18].

of the Minister even as an interim measure. In any event, no facts are pleaded which would justify the extraordinary remedy of substitution. Consequently, the relief sought deeming ZEPs to be valid is unsustainable.

The respondents' alleged mischaracterisation of HSF's case

58. HSF contends that the DG has mischaracterised its application as being an application which seeks an indefinite extension of ZEPs.[44] However, HSF's approach in the replying affidavit[45] clearly reveals that HSF does not accept that the ZEPs are temporary in nature.

59. If regard is had to substance rather than form, HSF in effect requires this Court to direct that a discretionary, temporary exemption regime should be converted into a *de facto* permanent exemption regime. There can be no other sensible interpretation of HSF's contentions that the Minister's decisions breach the dignity rights of ZEP holders, given the repeated extensions of the ZEPs and the fact that ZEP holders have *'built lives, families and careers in South Africa'* over a period of 13 years.

60. On HSF's approach, had the Minister taken no steps before 31 December 2021 to extend the validity of the current ZEPs, the Minister could have been compelled by a court to grant '*further exemptions*'. HSF does not accept the necessary consequence of the fact that the exemptions granted by the Minister were for a specified, limited time.

---

[44] RA para 10, rec. 018-6. HSF contends that its case is simply *'that a decision to terminate the ZEP programme and to refuse further exemptions could only be lawful if it follows a fair and rational process, based on sound justification, and ZEP holders are afforded a meaningful opportunity to regularise their status or to place their affairs in order'.* RA para 10.1, rec. 018-6.

[45] See para 32-34.4 above.

HSF'S MISCHARACTERISATION OF THE COMMON CAUSE FACTS

61. In its heads of argument and replying affidavit, HSF contends that certain matters are common cause.[46]

The alleged recognition that the Minister's decision could only be lawful if prior consultation took place

62. HSF incorrectly contends in the replying affidavit that the DG[47] *'appears to accept that the Minister's decision could only be lawful if, at minimum there was*', *inter alia*, a *'process, involving prior notification and an opportunity to make representations'*.[48]

63. In the answering affidavit the DG refers to HSF's contention that there are ample less restrictive means for the Department to achieve its stated objective, namely prior notification of the Minister's intentions and fair warning, and he states that in fact this has been achieved.[49]

64. HSF contends that there is no 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 and to refuse further extensions, and contends that the DG relies on a call for representations made after the Minister communicated his decision. [50]

---

[46] HSF HoA para 10-16, rec. 020-8 - 020-10.
[47] AA para 250-251, rec. 010-85.
[48] RA para 26.1, rec. 018-15. Cf HSF HoA para 11, rec. 020-8 where there is no reference to *'prior notification'*. It is accordingly unclear whether HSF still contends the need for prior consultation is common cause.
[49] AA para 250, rec. 010-85.
[50] HSF HoA para 12, rec. 020-8.

65. The DG states in the answering affidavit that given that the impugned decision would (at that stage),[51] for all intents and purposes, only become effective on 31 December 2022, it was unclear on what basis HSF contended that the call for representations was made *ex post facto* and was not issued for the purposes of eliciting meaningful representations.[52] HSF denies this contention in the replying affidavit.[53]

66. It is not disputed that the Minister is presently of the view that the ZEP will come to an end in due course and that this decision is supported by Cabinet. What is disputed, however, is the implication that the Minister is prevented for some or other reason from considering the granting of further extensions of the validity of the current ZEPs should the need arise. The ZEP's were due to expire on 31 December 2021. The Minister took a decision to extend the validity of the current ZEP's, initially for a period of 12 months and thereafter he took a second decision to extend the validity of the current ZEP's for a further 6-month period.

67. In these circumstances, the call for representations cannot as a matter of law or fact be regarded as an after the fact call for submissions.

68. Clearly these issues are not common cause.

The alleged recognition that the majority of ZEP holders are unable to obtain mainstream visas

69. HSF contends that its statement that there is *'no genuine dispute that the majority of ZEP-holders would not be able to obtain mainstream permanent residence permits*

[51] 15 August 2022.
[52] AA para 164, rec. 010-56.
[53] RA para 186-187, rec. 018-71 - 018-72.

and visas before 31 December 2022, due to the legal and practical barriers standing in their way' is baldly denied by the respondents.[54]

70. HSF's contention that the exemption regime was created because *'most exemption-holders would not qualify for "mainstream" permanent residence permits and temporary visas under the Immigration Act'* and that these barriers have not been eased,[55] is exhaustively dealt with and refuted in the answering affidavit.[56] It is misleading for HSF to contend that the DG's response in paragraph 337 of the answering affidavit, to the effect that paragraph 59 of the founding affidavit is denied for the reasons addressed elsewhere in the affidavit, constitutes a bald denial.[57]

71. Further, HSF wrongly contends that the respondents[58] *'note[s] the applicant's contention that permanent residence, general work visas, critical skills visas, relative visas, and study visas are extremely difficult for ZEP holders to obtain'*,[59] whereas the respondents state that (a) the contents paragraphs 60 to 68 of the founding affidavit are not disputed insofar as they accurately record the relevant provisions of the Immigration Act and the Regulations,[60] and (b), such contents are further denied to the extent that they do not accord with what is set out elsewhere in the answering affidavit.[61] These responses do not amount to an admission of the contentions regarding the difficulty in obtaining the visas referred to in paragraphs 60 to 68 of the founding affidavit.

---

54 HSF HoA, para 13, rec. 020-9; RA para 28, rec. 018-16 with reference to para 59 of the founding affidavit.
55 FA para 59, rec. 001-43.
56 AA para 55 - 104, rec. 010-22 - 010-42.
57 RA fn 19, rec. 018-16.
58 AA para 338-339, rec. 010-101.
59 RA fn 19, rec. 018-16.
60 AA para 338, rec. 010-101.
61 AA para 338, rec. 010-101.

72. Further, the DG denies that HSF has made out a case that the visas are difficult or impossible to obtain for ZEP holders.[62] It is apparent from the founding and supporting affidavits that none of the supporting deponents have applied for visas and/or permits, on the erroneous assumption that visas and/or permits are either too difficult to obtain or will be refused.

The alleged acceptance of backlogs

73. HSF incorrectly contends that there is no dispute that the Department is plagued by systemic backlogs and delays that prevent the speedy determination of applications for visas, permits and waivers, and that DG merely notes the extensive evidence of these backlogs without offering any meaningful explanation as to how they could be addressed before 31 December 2022.[63]

74. Paragraph 74 of the founding affidavit refers to the backlogs highlighted in the *De Saude* case[64] and notes that these backlogs have been exacerbated by Covid.[65]

75. As to *De Saude,* the response in the answering affidavit is that the applicant in the *De Saude* matter had put up evidence of specific backlogs based on its own experience and that HSF has placed no evidence before this Court of any backlogs.[66]

---

62 FA para 59, rec. 001-43; AA para 337, rec. 010-100. AA para 103-104, rec. 010-41 – 010-42.
63 RA para 29, rec. 018-16 referring to FA para 74-75, rec. 001-49 – 001-50 and AA para 350-352, rec. 010-102 - 010-103.
64 *Director-General of the Department of Home Affairs and Others v De Saude Attorneys and Another* 2019 (2) All SA 665 (SCA).
65 FA para 74-75, rec. 001-49.
66 AA para 349, rec. 010-102.

76. HSF incorrectly contends paragraphs 75 to 77 of the founding affidavit are noted.[67] The response in the answering affidavit is that the DG does not take issue with the contentions insofar they accurately reflect that which is stated in Annexure FA25, a circular titled '*Temporary Measures in Respect of Foreign Nationals in Light of Backlog Being Experienced in Processing Outcomes on Waiver Applications and Visa Applications'* in which the Minister refers to a *'backlog in processing outcomes on waiver- and visa applications'* and sets out measures to deal with the backlog.[68]

77. It is also stated in the answering affidavit that the fact that the Minister previously announced special measures to deal with other backlogs makes it clear that if it becomes practically impossible to process visas for ZEP holders timeously, there is nothing which precludes the Minister from further extending the validity of the current ZEPs to deal with backlogs.[69] The further extension of the validity of the current ZEPs granted by the Minister on 2 September 2022 bears this out.

No dispute on the economic and political situation in Zimbabwe

78. HSF incorrectly contends that there is no dispute that Zimbabwe remains politically unstable, political opposition is suppressed and rates of extreme poverty have increased since 2009, and that the DG merely points to evidence of a minor increase in GDP between 2021 and 2022 while allegedly conceding all evidence showing that conditions have otherwise deteriorated or not improved.[70]

---

67 AA para 351 – 352, rec. 010-102 - 010-103.
68 AA para 351, rec. 010-102 and Annexure FA25, rec. 001-178.
69 AA para 352, rec. 010-103.
70 RA para 30, rec. 018-16 – 018-17.

79. In response to HSF's contentions in paragraphs 48 to 50 of the founding affidavit which deal only with the purported economic situation in Zimbabwe, the DG states that the documents relied upon by HSF do not support its contention that the situation in Zimbabwe has not improved since 2009.[71] The DG further states that HSF quotes selectively, avoiding mention of the marked improvements in the Zimbabwean economic situation in 2021 and which are projected for 2022 onwards.[72]

THE ALLEGED CONTRADICTIONS IN THE RESPONDENTS' VERSIONS

80. HSF contends that the DG seeks *'to create the impression that the Minister may grant further extensions, beyond the end of [2022]'*[73] and that this contradicts all previous statements and documents, including his answering affidavit in the *African Amity* application that allegedly *'confirmed that the Minister has decided to terminate the ZEP programme and will entertain no further extensions of ZEPs beyond 31 December 2022'*.[74] It is claimed that the DG has sought to *'reinterpret the Minister's decision after the fact'*[75] and that all the relevant documents show that *'a final decision has been taken'*.[76]

81. In the answering affidavit, the point is made that there is nothing which precludes the Minister from granting further extensions to the validity of the current ZEPs to deal with backlogs if it becomes practically impossible to process visas timeously.[77] This is precisely what the Minister did – he further extended the validity of the current ZEPs to 30 June 2023. There is thus no

[71] AA para 333, rec. 010-100.
[72] AA para 332, rec. 010-100.
[73] RA para 14, rec. 018-8.
[74] RA para 15, rec. 018-9.
[75] RA para 15, rec. 018-9.
[76] RA para 17.3, rec. 018-10.
[77] AA para 352, rec. 010-103.

factual basis to contend that the Minister made a decision that there could be no further extensions of validity of the current ZEPs beyond 31 December 2022.

82. In order to preserve its challenge, HSF focuses on portions of various communications made by the Minister in support of its contention that the decision was such that no extensions could or would be considered under any circumstances in the future.

83. Various Ministers have stated that the ZEP and its predecessors would not be renewed. This notwithstanding, various extensions of and amendments to the exemption dispensation were effected from time to time.[78]

84. HSF in effect contends that the Minister is bound by his public statements in respect of the ZEP and that he is precluded from independently exercising his powers under s 31(2)(b) to extend the ZEP, in an effort to establish that the Minister has made a decision as contended for by HSF. At the same time, HSF contends that once this Court finds that the alleged final decision is bad in law, at that point the Minister may then exercise his powers under s 31(2)(b) to extend the ZEP for a period that HSF deems to be appropriate.

85. HSF's grievance appears to be that this Minister has indicated that this is the last extension of the exemption dispensation and that thereafter all former ZEP holders must seek to regularise their stay in the country in the same way that other Zimbabwean and foreign nationals are required to do.

[78] SAA para 42-48, rec. 010-283 – 010-286.

86. The Minister has broad powers in terms of s 31(2)(b) of the Immigration Act to grant exemptions for good cause, which he exercised in the present case after considering the submissions received from the DAC and granting a further extension of the validity of the current ZEPs in September 2022.

87. HSF's reliance on the notice issued to all ZEP holders dated 7 January 2022 and the letters sent to all ZEP holders[79] in support of its contentions as regards the nature of the Minister's decisions does not withstand scrutiny if regard is had to the content of those documents.[80] The content of these documents indicate that the Minister took a decision this is the last extension of the exemption dispensation and that he took a decision to extend validity of the current ZEPs for a period of 12 months, *inter alia*, to allow ZEP holders to make representations as regards the non-extension of their exemptions and the 12-month extension period.[81]

88. The call for representations is indicative of the fact that the Minister left open the possibility of further extensions. This is borne out by the fact that the Minister granted a further extension of the validity of the current ZEPs to 30 June 2023.

89. As regards the purported contradictions between what the DG states in the answering affidavit in this application and the answering affidavit in the *African Amity* application, HSF in its replying affidavit relies on three statements made

---

[79] The notice issued to all ZEP and letters sent directly to ZEP holders, advised ZEP holders that *'should any exemption holder have any representations to make regarding the non-extension of exemptions and the 12-months' period he/she may forward such representations to Mr Jackson McKay Deputy Director-General: Immigration Services, E-mail ZEPenquiries@dha.gov.za'.* AA para 169-170, rec. 010-57 - 010-58.

[80] RA para 16-17, rec. 010-18 – 010-19.

[81] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18] and *Bothma-Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494 (SCA) at para [12].

the answering affidavit in the *African Amity* application,[82] contending that these statements are *'consistent with a final decision'* and do '*not suggest that the Minister was open to considering further extensions of ZEPs'.*[83]

90. On the facts, it is clear that Minister did not close the door to granting a further extension of the validity of the current ZEPs if this was considered appropriate.

91. HSF contends that the call for representations made in the notices and letters to ZEP holders was made in bad faith. However the notices and letters clearly set out the nature of the decisions that were taken, that ZEP holders were entitled to make representations, and that ZEP holders could apply from inside South Africa for the visas provided for in the Immigration Act should they qualify for such visas.

92. In order for HSF to establish that the call for representations was not intended to facilitate further comment or input on the Minister's decision, it must show on the evidence that at the stage when the letters to the ZEP holders were issued in December 2021 and the notices to the ZEP holders were published on 7 January 2022 that the Minister had already decided that he had no intention of considering any representations received – in essence that the Minister and the DG acted *mala fide*. There is no basis on the evidence for the Court to make such far-reaching findings.

93. Further, the evidence demonstrates that the call for representations elicited responses from ZEP holders.

---

[82] RA para 18, rec. 018-11 – 018-12.
[83] RA para 18.3 and 18.5, rec. 018-11 – 018-12.

94. Given that the Minister's decisions will, for all intents and purposes, only become effective on 30 June 2023, HSF cannot sensibly contend that the Minister has failed to consider the representations made by the ZEP holders and will not, in good faith, consider any representations received.

95. The Minister's decisions did not preclude him from granting further extensions of the validity of the current ZEPs in due course, if warranted. This is demonstrated by the fact that on 2 September 2022 the Minister took a decision to extend the validity of the current ZEP's until 30 June 2023.

96. As regards the Minister's engagements with Scalabrini,[84] HSF contends that these engagements support its contention that the operative decision was made in December 2021, namely that there would be no further extensions of ZEPs under any circumstances.

97. The highwater mark of Mr Chapman's contentions is *that 'the Minister provided no express undertaking that he would reconsider the decision'* but that Scalabrini nonetheless *'hoped to use the meeting to motivate for and evidence the basis for potential reconsideration of the decision/s to discontinue the ZEP regime'.* It is unclear how Scalabrini could hope to use the meeting to convince the Minister otherwise, if it was of the view that the Minister had closed his mind to granting any extensions (blanket or individual) of ZEPs.

98. In the face of Mr Chapman's concession that Scalabrini hoped to influence the Minister's decision by meeting with him, it is difficult to understand how HSF can contend that the Minister was unwilling to entertain representations.

[84] James Chapman of Scalabrini Centre Cape Town ('Scalabrini') has delivered a supporting affidavit in reply.

Consequently, Mr Chapman is driven to contend that the 12-month extension granted by the Minister does not constitute an extension of the ZEPs. This is presumably also why Mr Chapman, later in the replying affidavit, changes tack and states that despite being of the view that there was *'little scope for debate',* Scalabrini *'hoped to convince the Minister to extend the 12-months grace period'*.[85]

99. Mr Chapman, like HSF, is compelled to argue that the 12-month (and the further 6-month) extension of the validity of the current ZEPs granted by the Minister does not constitute an extension, in order to preserve the challenge to the Minister's decision. For the reasons already addressed, these contentions do not withstand scrutiny.

100. It is telling that despite the fact that the Minister's response to Scalabrini's draft agenda was sent to Scalabrini during February 2022, to date Scalabrini has failed to make any representations to the Minister. Instead, Scalabrini waited until late in July 2022 to institute urgent proceedings to intervene in the HSF review application. Clearly HSF, Scalabrini and CORMSA took the view that they would prefer to have the courts direct the Minister to take the steps that they deem to be appropriate, as opposed to embarking on a process of engagement with the Minister in an open and transparent manner.

101. Mr Chapman and HSF incorrectly contend that the Minister has taken contradictory positions in regard to whether ZEP holders may apply for asylum.[86]

---

[85] SA Chapman para 14, rec. 018-295.
[86] SA Chapman, para 15, rec. 018-295 and para 18, rec. 018-297.

102. A data analyst, Mr Warwick Meier, who serves on the DAC has analysed the movements of ZEP holders between South Africa and Zimbabwe. The initial analysis performed by Mr Meier demonstrates that of the 178 412 ZEP holders, **144 840** ZEP holders travelled between South Africa and Zimbabwe in the period 2018 to June 2021. Consequently some 81% of ZEP holders have travelled freely between South Africa and Zimbabwe in the period 2018 to June 2021.[87]

103. It cannot be suggested that those ZEP holders who have travelled between South Africa and Zimbabwe for the past decade can lawfully claim asylum, given that an asylum seeker must demonstrate that they are unable or unwilling to avail themselves of the protection of Zimbabwe in order to qualify for asylum. As the Minister correctly stated in his response to Scalabrini, the majority of ZEP holders are unlikely to qualify as genuine asylum seekers, given that a genuine asylum seeker cannot avail themself of the protection of their country.

104. As regards the issue of whether ZEP holders may apply for permanent residence, it was at all times made clear to qualifying applicants that the exemption regime would not entitle the holders of exemption permits to apply for permanent residence in South Africa. Nonetheless, foreign nationals (including ZEP holders) who are married to South African citizens or permanent residents, or who have children who are South African citizens or permanent residents, may qualify to apply for spousal visas, relatives' visas, or permanent residency, depending on their circumstances, if they meet the requirements of the Immigration Act. There is nothing contradictory about this stance.

[87] SAA para 94-99, rec. 010-297 – 010-298.

105. HSF's contention that ZEP holders who have made representations have been given contradictory information, is not borne out by the facts.

106. HSF relies on the email correspondence between one Lauren Maliwa ('Ms Maliwa'), a ZEP holder, and the Department as evidence of the alleged contradictions between what is stated in the answering affidavit and the responses given the ZEP holders. Ms Maliwa's email contains no detail as to the parties on behalf of whom she is writing (the *'we'* referenced in her email is not clarified), she does not set out any details of her personal circumstances or the details of those on whose behalf she appears to be writing, and she sets out no motivation as to why she or the unidentified persons on whose behalf she appears to be writing should be considered for a four or five year exemption.[88]

107. In the circumstances, the response from the respondents' attorneys that there is no basis for the Minister to reverse his decision in respect of Ms Maliwa and the unidentified persons on whose behalf she is writing cannot be criticised.

108. Accordingly, HSF's contention that the DG sought to *'re-interpret'* the Minister's decision falls to be rejected.

Alleged practical barriers

109. HSF makes much of the alleged practical barriers to obtaining alternative visas and permits. However, it glosses over the actual requirements for obtaining visas and permits in terms of the Immigration Act and the Regulations.

[88] SAA para 103-106, rec. 010-299 – 010-300.

110. First, these so-styled *'legal and practical barriers'*[89] raised by HSF apply to all foreign nationals who seek to apply for a visa and/or permit in South Africa. If HSF seeks to contend that ZEP holders ought to be afforded some form of preferential treatment by virtue of the historical exemption regime, this would appear to be an impermissible reliance on some form of substantive legitimate expectation.

111. Second, it is not correct to state that the Department's position on their eligibility for permanent residence is haphazard.[90] While it is so that the ZEP disentitles ZEP holders from applying for permanent residence irrespective of their period of stay in South Africa, nothing precludes ZEP holders from applying for permanent residence in terms of the various provisions of the Immigration Act which do not require a qualifying period of residence in the country in order to qualify for permanent residence.

112. HSF's contentions regarding the alleged practical and legal barriers to applying for visas or permits in terms of the Immigration Act is unsupported by any evidence and does not accord with the provisions of the Immigration Act and the Regulations.

Permanent Residence: ss 25 and 26 of the Immigration Act[91]

113. HSF incorrectly contends *'any application for permanent residence is almost certain to be rejected',*[92] merely because the ZEPs contained a condition stipulating that

89 FA para 58, rec. 001-43.
90 HSF HoA, para 65.1, rec. 020-28.
91 Section 26 of the Immigration Act provides that subject to s 25 and any prescribed requirements, the DG may issue a permanent residence permit to a foreigner who (a) has held a work visa for five years and can prove that they have received an offer for permanent employment; (b) has been the spouse of a citizen or permanent resident for five years and good faith spousal relationship exists; (c) is a child under 21 years of a citizen or permanent resident; or (d) is the child of a citizen.
92 FA para 60.2, rec. 001-44.

ZEP holders were not entitled to apply for permanent residence irrespective of their period of stay in the country. However, the Minister in granting the 12-month extension of all ZEPs amended that condition to allow ZEP holders to apply for such visas as they may qualify for, from within the country.

114. Consequently, any ZEP holder who meets the requirements of ss 26-27 of the Immigration Act is entitled to apply for permanent residence if they meet the statutory and regulatory requirements.

115. By way of example, any ZEP holder who (a) has been the spouse of a citizen or permanent resident for a period of five years and remains in a good faith spousal relationship; (b) is the child under the age of 21 of a citizen or permanent resident and submits an application for confirmation of permanent residence within 2 years of turning 18; and/or (c) is the child of a citizen, would be entitled to apply for a permanent residence permit as envisaged by s 26.

116. Consequently, HSF cannot demonstrate that any application for permanent residence made in terms of s 26 by a ZEP holder will be rejected only because of the condition contained in the ZEP. HSF's contentions do not accord with the express provisions of the Immigration Act and the Regulations.

Permanent Residence: s 27 of the Immigration Act[93]

117. HSF chooses only to make reference to certain grounds of permanent residence provided for in s 27, while failing to refer to others that may apply to ZEP holders.

[93] The DG may grant permanent residence to a foreigner who (a) has received an offer of permanent employment and who can prove that the position exists, that the position and related job description was advertised in the prescribed form and that no suitably qualified citizen or permanent resident

118. Further, HSF does not accurately describe the circumstances in which applications for permanent residence may be made in terms of s 27. By way of example, HSF incorrectly states that persons who intend to retire in South Africa require retirement earnings of R38 000 a month, when in fact the requirement is that the person must have the right to a pension or an irrevocable annuity which will give them a minimum payment of R37 000 per month, alternatively that the person has a net worth of R37 000.

119. HSF also makes no reference to persons who are the relatives of a citizen or permanent resident within the first step of kinship.

120. The conclusory statement in the founding affidavit that *'[m]ost ZEP-holders would be unable to satisfy [the] requirements of [s 27]'*[94] is made without reference to any evidence and does not accord with the express provisions of the Immigration Act and the Regulations.

General work visas; Critical skills visas; Business visas; Relative's visas and Study visas

121. The majority of HSF's contentions as regards the purported practical barriers to ZEP holders applying for and/or qualifying for such visas, relate to regulatory requirements that can, for good cause, be waived in terms of s 31(2)(c).

was available to fill it; (b) has a critical skill; (c) intends to establish or has established a business in the country, as contemplated in s 15; (d) is a refugee referred to in s 27(c) of the Refugees Act; (e) intends to retire in the Republic; (f) has a prescribed minimum net worth (currently R12 million); or (g) is the relative of a citizen or permanent resident within the first step of kinship.

94 FA para 60.3, rec. 001-44.

Waivers in terms of section 31(2)(c) of the Immigration Act

122. HSF contends that waiver applications are highly complex and technical applications and that an individualised process is not suited to processing thousands of applications from ZEP-holders within a short period,[95] because (a) such applications require the identification of specific provisions in the Immigration Act and the Regulations and (b) ZEP holders would need to demonstrate *'that there is compelling justification for the Minister to waive a particular regulatory requirement'*.[96]

123. These very basic requirements of identifying which provision you fall under and demonstrating that you qualify for the visa you are seeking are necessary for any visa application and do not as a matter of law or logic render waiver applications unduly burdensome. This is yet another example of HSF's true stance – that ZEP holders are entitled preferential treatment for an indefinite period. The Minister is considering positive recommendations on waiver applications.

[95] RA para 42.4, rec. 018-23.
[96] RA para 42.1 - 42.3, rec. 018-22 – 018-23.

Exemptions in terms of section 31(2)(b)

124. Section 32(1)(b) of the Immigration Act contemplates an individual applicant making application for an exemption. The Minister's decisions do not preclude any ZEP holder from applying in terms of s 32(1)(b) for an exemption. They are legally entitled to apply and to have their applications assessed.

125. It is not so that the Minister has closed his mind to considering any individual exemption applications, as Mr Chapman contends in his supporting affidavit. The Minister indicated to Scalabrini that it was *'too early to tell that the 12 month grace period was insufficient and that, at that stage, it appeared that the period was more than adequate.'*[97] The Minister's contention that he did not intend to grant further exemptions in terms of s 31(2)(b) must be understood in this context and at the time that the statement was made.

126. At the stage when the Minister engaged with Scalabrini it was unclear whether the 12-month period would be inadequate. It is equally clear that the Minister acting on advice of the DAC determined in September 2022 that a further 6-month period was necessary to give ZEP holders a fair opportunity to regularise their status, by amongst other things submitting visa and waiver applications.

127. Seeking to attack the Minister's decision on the basis that it does not specifically reference s 31(2)(b) is unsustainable. There is no requirement that reasons advanced by a decision-maker must be perfect.[98]

---

[97] SA Chapman, para 14, rec. 018-295.

[98] *Koyabe and Others v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC) at para [63], citing, *Commissioner for the South African Police Services and others v Maimela and another* 2003 (5) SA (T) at 480.

128. It is submitted that HSF has not established that there are practical barriers that prevent ZEP holders from regularising their status through the Immigration Act.

The asylum system

129. HSF contends that in the absence of meaningful alternatives it is likely that many ZEP holders may again turn to the asylum system.

130. HSF incorrectly contends that it is uncontested that the asylum system is plagued by systemic backlogs. The respondents make specific reference to the fact that the new online system has significantly alleviated backlogs in the asylum management system.[99]

131. If ZEP holders can make out a case that they are entitled to asylum, they may follow this course. However, on the evidence it is clear that a relatively small fraction (17%) of ZEP holders are former asylum seekers who abandoned their asylum applications in order to obtain a DZP. This is borne out by Mr Meier's analysis that demonstrates that the majority (81%) of ZEP holders travel between South Africa and Zimbabwe and are thus unlikely to be genuine asylum seekers.

132. It cannot sensibly be contended that the threat of flooding the asylum system with unmeritorious applications is a basis on which the Court may lawfully direct the Minister to extend ZEPs indefinitely.

[99] AA para 231, rec. 010-80.

THE GROUNDS OF REVIEW

Procedural Fairness and Procedural Irrationality

133. HSF contends that the Minister's decisions were procedurally unfair and/or irrational because (a) the call for representations occurred after the decisions were taken; (b) the invitation for representations is vague and not designed to elicit meaningful representations; and (c) the call for representations made no provision for public participation.

134. HSF has misconstrued the nature of the Minister's decision.

135. The ZEPs were due to expire on 31 December 2021. In order to address the termination of the ZEP, the Minister elected to extend the validity of the current ZEPs, initially for a period of 12 months, and on 2 September 2022 he extended the validity of the current ZEPs for a further 6 months.

136. It is not disputed that the Minister called for representations as regards the non-extension of their exemptions and the 12-month extension period in December 2021.

137. The Minister decided to extend the validity of the current ZEPs for a period of 12 months to allow ZEP holders to make representations and to give ZEP holders who wished to do so the opportunity to apply for alternative visas as contemplated by the Immigration Act. The Minister decided to extend the validity of the current ZEPs for a further period of 6 months, given, *inter alia*, the limited number of applications that had been made by ZEP holders, so as to ensure that ZEP holders have a fair opportunity to regularise their status.

138. In terms of s 3 of PAJA, administrative action which materially and adversely affects an individual's rights or legitimate expectations must be procedurally fair - this requires a clear statement of the administrative action; adequate notice of any right of review or internal appeal; and a reasonable opportunity to make representations. A fundamental underpinning of the right to procedural fairness is that parties who are adversely affected by a decision are given an opportunity to be heard and to affect the outcome of the decision.[100] What constitutes a fair procedure depends upon the circumstances of each of case.

139. In this regard, the '*standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type… The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects*'.[101]

140. What is in issue in this matter are decisions which confer a right for a combined period of 18 months as opposed to 3 or 4 years as had previously occurred albeit that the decisions have the consequence that the exemption regime will to an end in due course.

141. In seeking to ascertain whether the initial 12-month period would be workable, the Minister called for representations on, *inter alia*, this issue. As appears from the answering affidavit, this call occurred through various means, namely various newspapers, the Government Gazette, by way of individual letters to

[100] *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at para [42].
[101] *R v Secretary of State of the Home Department, ex parte Doody* 1993 (3) ALL ER 92 (HL) quoted in *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at para [32].

each ZEP holder, and letters to certain civil society organisations.[102] In addition, as HSF has demonstrated, the Minister engaged with Scalabrini on this issue.

142. There is no basis to contend that the call for representations was not legitimate. The fact that the Minister, acting on advice, took a decision to extend the validity of the current ZEPs for a further 6-month period demonstrates that he was, and is open to persuasion. The fact that HSF does not trust the Minister, or the Department is neither here nor there. On the objective facts, the Minister called for representations, representations were made, the Minister engaged with civil society organisations, and he took advice from the DAC. In light of all of these facts and despite having previously stated that he did not intend to grant further extensions, the Minister decided to grant a further extension of the validity of the current ZEPs.

143. None of the authorities[103] relied upon by HSF provide that a meaningful opportunity to comment can only arise before a decision is taken.

144. In *Pridwin*[104] the Constitutional Court stated that *'[a]fforording an opportunity to be heard in relation to the best interests of EB and DB, prior to a decision being made, could hardly be said to have a detrimental effect (or, indeed, any effect) on the best interests of the other children at the School. It could only have been beneficial.'*

145. In *Blom*,[105] the court in considering a submission that an arrested person was entitled to a hearing after a decision had been taken by the Attorney-General, found that if the correct interpretation of the statutory provision in question was

[102] AA para 160, rec. 010-54 - 010-55.
[103] *AB v Pridwin Preparatory* 2020 (5) SA 327 (CC) at para [205]; *Attorney-General Eastern Cape v Blom and Others* 1988 (4) SA 645 AD at 668D-E.
[104] *Pridwin* at para [205.]
[105] *Blom* at 668.

that the arrested person had no right to be heard before the Attorney-General makes his decision, there was no basis to conclude that the legislature intended that he had such a right subsequent to the making of the decision.

146. In *Everett v Minister of the Interior*[106] the court held as follows:

> *'The more usual application of the rule in quasi- judicial decisions is for a hearing to take place, or representations to be received prior to the decision being arrived at. But that is not always the position. Where expedition is required, it might be necessary not to give the affected person the opportunity of presenting his case prior to the decision, but only after. He thus obtains the opportunity of persuading the official to change his mind.'* [emphasis added].

147. In *Nortje en 'n Ander v Minister van Korrektiewe Dienste*[107] the Court held as follows:

> *'Met verwysing na punt (5) in die aangehaalde dictum het hierdie Hof ook al beslis dat, afhangende van die omstandighede, die audi-reël nagekom kan word deur aan die benadeelde persoon 'n geleentheid tot aanhoring te bied eers nadat die besluit reeds geneem is (sien Visagie v State President and Others 1989 (3) SA 859 (A) op 865B - C). Myns insiens behoort dit egter eerder die uitsondering te wees as die reël. Weens redes wat voor die hand lê, is die persoon wat eers aangehoor word nadat die besluit reeds geneem is aansienlik swakker daaraan toe as wat hy by 'n aanhoring voor die neem van die besluit sou wees. As 'n reël sal aanhoring na die besluit dus slegs voldoende wees as aanhoring voor die tyd nie kon geskied nie (sien bv Wade en Forsyth Administrative Law 7de uitg op 549 - 50).'*

148. In *Trend Finance (Pty) Ltd and Another v Commissioner for SARS,*[108] the facts demonstrated that the applicant had not been advised that the decision-maker intended exercising a particular discretion. Consequently, in the absence of

---

[106] *Everett v Minister of the Interior* 1981 (2) SA 453 C at 458E.
[107] *Nortje en 'n Ander v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (SCA) at para [19].
[108] *Trend Finance (Pty) Ltd and Another v Commissioner for SARS* 2005 (4) All SA 657 (C) at para [82] – [84].

such information, the court found that the applicant had not been given a meaningful opportunity to make representations.

149. The fundamental issue is not when the call for representations is made, but whether the call for representations allows affected parties a meaningful opportunity to deal with how the decision does or will affect them.

150. In any event, on the facts it is clear that the Minister did not, as HSF contends, make a decision when extending the validity of the current ZEPs by 12 months that this period was immutable. What the Minister did do was to grant ZEP holders a right in the form of the 12-month extension of the validity of their current ZEPs. In this context there was no obligation to grant ZEP holders a hearing prior to the Minister's decision. To the extent that ZEP holders had a right to make representations, they were given an opportunity to do so.

151. In summary, we submit that the position is as follows. First, the ZEPs have not expired as a consequence of the extensions granted by the Minister and thus ZEP holders are able to make representations before the validity of the current ZEPs lapse on 30 June 2023.

152. Second, given the number of ZEP holders, it would quite clearly have been impractical to hold a full public participation process before 21 September 2021, alternatively 31 December 2021. The extension of the validity of the current ZEPs was granted for the express purpose of allowing persons an opportunity to make representations prior to the lapsing of the permits.

153. Third, the decisions of the Minister are part of a bigger process which ultimately caters for the right to be heard.[109]

154. In *Mambolo*, the Constitutional Court held:

> *'[20] The appellant's main complaint seems to be that when he was invited to make representations on 28 May 1996, a decision had already been taken to dismiss him. As a general proposition the expectation of procedural fairness gives rise to a duty upon the decision-maker to afford the affected party an opportunity to be heard before a decision is taken which adversely affects his rights, interests or legitimate expectations and a failure to observe this rule would lead to invalidity. Baxter Administrative Law 3rd ed at 587. This Court has said that a right to be heard after the event, when a decision has been taken, is seldom an adequate substitute for a right to be heard before the decision is taken Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 668D.*
>
> *[21] I am entirely in agreement with the dictum in the Blom case supra. However this case stands on a different footing. The decision taken on 14 May 1996 was in substance provisional and not final. This was made clear to the appellant and that is why he was invited to address the council on 28 May 1996, if he so wished. Besides, the decision to consider the confirmation or termination of his appointment is not something that was suddenly sprung upon him; he knew that at the end of his probationary period this issue would arise. He would have applied his mind to it and, if so advised, would have even sought legal assistance.*
>
> *[22] On 28 May 1996 the appellant and his attorney were afforded an opportunity to address the council on the issue. Instead of dealing with the merits of the termination the attorney chose to confine himself to technicalities. Significantly, neither the appellant nor his attorney complain that they were not afforded an opportunity to be heard, nor do they say that the opportunity afforded them was insufficient. There is nothing on the record to show that had the attorney asked for more time, this would not have been granted. In any event, the appellant was still in employment and his termination would have taken effect only on 13 June 1996. Having declined the opportunity to address the council on the merits of his*

[109] *Mamabolo v Rustenberg Regional Council* 2001 (1) SA 135 (SCA) at paras [20] – [24].

dismissal, I do not think that it is open to the appellant to complain at this point that the rules of natural justice were not complied with.

[23] I also do not think that this is a case where a hearing was denied before the decision was taken. Perhaps in form, but not in substance. In any event, I do not think that the actions of the council offended the rules of natural justice. In certain instances a Court may accept as sufficient compliance with the rules of natural justice a hearing held after the decision has been taken, where

' - there is a sufficient interval between the taking of the decision and its implementation to allow for a fair hearing;

- the decision-maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision; and

- the affected individual has not thereby suffered prejudice'. Baxter (op cit at 588).

[24] In casu the decision to terminate the appellant's services was taken on 14 May 1996 and would have taken effect only on 13 June 1996. The mayor made it clear to the appellant that the council was keeping an open mind on the issue. The council appears to have demonstrated this open-mindedness by inviting the appellant to address it on 28 May 1996 with a view to reconsidering its decision.'
[emphasis added]

155. In any event, when the exemptions were first granted and subsequently extended there was no public participation process.

156. HSF makes out no case as to why a 12 or 18 month period in which ZEP holders may make representations is insufficient.

157. It is also unclear on what basis HSF contends that the absence of procedural fairness is compounded by the Minister's decision of 2 September 2022. The decision of 2 September 2022 underscores the absence of any procedural unfairness in the decision-making process.

158. HSF contends that the call for representations is meaningless because the Minister and DG gave inconsistent accounts of what they were attempting to elicit from ZEP holders and the public.

159. The call for representations was not inconsistent or unclear, particularly so if regard is had to the individual letters dispatched to ZEP holders.[110]

160. The Minister did not *'obliquely dangle the possibility of an individual exemption'*, he specifically asked for representations to be made concerning the non-extension of the ZEP holder's exemption.

161. There can be no doubt as to what the Minister required from ZEP holders - the letter is abundantly clear.

Individual exemptions do not cure procedural unfairness

162. It is also unclear on what basis HSF contends that letters sent to all ZEP holders does not amount to procedural fairness.

163. As HSF correctly notes, the question of an individual exemption is distinct from a decision to extend all the ZEPs to 31 December 2022. The right to apply for an individual exemption exists by virtue of s 31(2)(b) and it is an option available to ZEP holders. It does not detract from the fact that ZEP holders were specifically advised that they have the opportunity to make representations with regard to the Minister's decision.

[110] AA Annexure AA4, rec. 010-145 – 010-147.

Public Consultation

164. It is trite that not every administrative decision requires full public consultation. Section 4 of PAJA applies whenever administrative action materially and adversely affects the rights of the public.

165. The withdrawal of an exemption granted to a specific closed group/category of persons, does not, without more require consultation with the public at large.[111]

166. HSF has not made out a case on the facts that the Minister's decisions affect the public at large - the persons directly affected by the decisions are ZEP holders. Section 4 of PAJA allows an administrator to adopt a range of processes as contemplated in s 4(1)(a), including following another appropriate procedure to give effect to s 3. The administrator's choice in this regard is not administrative action for purposes PAJA, and thus not reviewable or enforceable under PAJA[112] and because the decision to hold a public participation process is not administrative action this would seem to make the use of the procedures in s 4 entirely voluntary.[113]

167. HSF's conclusory statement that the Minister's decisions will have an impact on society at large are of no assistance. HSF bears the onus to make out this case on the evidence – it has not done so.

168. In any event the Department engaged with Scalabrini, African Amity, Freedom Advocates and the Zimbabwe Diaspora Association, among others. HSF's

[111] See for example various provincial gambling statutes which require public consultation before the award of a licence to operate limited pay-out machines.
[112] *Hoexter,* Administrative Law, 3rd Edition, p.559, citing, s 1(ii) read with s 6(1) of PAJA, and the remarks of O'Regan J in her separate concurring judgment in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) at para [300].
[113] *Hoexter,* p.559.

complaint appears to be that it was not called upon specifically to make representations. Nothing precludes HSF or any other interested party from making representations before 30 June 2023.

169. The question is whether the persons who are affected by the decisions, *viz*, ZEP holders, have been afforded a meaningful opportunity to affect the decisions. For the reasons already traversed this opportunity was afforded to ZEP holders.

The no difference principle

170. The point made by the DG in the answering affidavit is not that HSF's submissions would have made no difference, but that HSF was not in a position to comment. HSF purposefully misreads that which is set out in the answering affidavit.

171. In this regard, the DG states in the answering affidavit, that[114]:

171.1. ZEP holders have been given an opportunity to make representations with regard both to their particular circumstances and as to whether the exemption regime should be extended for a further period. In these representations they are entitled to raise any issues which they consider relevant. If the ZEP holders require more time because of their specific circumstances, they may raise this in their representations.

[114] AA para 176, rec. 010-59 – 010-62.

171.2. Correspondence was addressed directly to two civil society organisations claiming to represent the interests of Zimbabweans living in South Africa, including holders of ZEPs. These organisations were invited to make representations on whether the exemption regime should be extended for a further period.

171.3. The Minister's decisions are supported by the government of the Republic of Zimbabwe. It is unclear on what basis HSF, or other South African civil society organisations, contend that they are in a better position than the Zimbabwean government to judge whether the present state of the Zimbabwean economy renders it feasible for ZEP holders to return. If there was a possibility of mass unemployment and/or impending economic upheaval one would have expected this to be raised through diplomatic channels between South Africa and Zimbabwe. It is telling that this has not occurred.

171.4. The DZP was introduced in 2010 in response to an influx of Zimbabwean nationals in the face of, *inter alia*, hyperinflation and a humanitarian crisis that commenced in 2008. On the objective available evidence, the economic situation in Zimbabwe has significantly recovered since then.

171.5. It is unclear how civil society can speak to the impact of the Minister's decisions on ZEP holders. That is for the ZEP holders to raise, and they have an opportunity to do so. No rights of civil society are alleged to be at risk of being breached in consequence of the Minister's decisions.

171.6. The question of whether 12 months would be sufficient time to obtain alternative visas is not a matter that can be adequately answered by the public at large, but rather by the affected individuals.

172. The Minister was entitled to take a decision as to the nature of the public participation process. The fact that he took a decision not to invite specific comments from the public (albeit that they are not precluded from making such comments) does not breach the no difference principle. The no difference principle is breached when an administrator has already made a decision and then contends that any participation process would have made no difference to the ultimate outcome.[115]

173. The call for representations was widely publicised and elicited a response.

174. What HSF is, in truth, complaining of is that the public participation process adopted was not the process that it would have adopted. This is not a ground of review.

Rights Challenges

Dignity

175. HSF contends that the Minister's decisions breach the right to dignity of ZEP holders and related rights.

176. HSF has laid no evidentiary basis for the purported dire consequences for ZEP holders in the event that a decision is taken not to grant any further extensions.

[115] *Pridwin* at para [193], citing *My Vote Counts NPC v Speaker of National Assemby* 2016 (1) SA 132 (CC) at para [176].

ZEP holders have not been denied '*due warning*' of any decision. Quite the opposite. The 18-month extension was granted precisely for the purpose of allowing them to make representations and to take steps to regularise their stay in the country. On this basis alone, the dignity challenge falls to be dismissed.

177. However, if this Court were to find that operative decisions were taken that no further extensions of the validity of the current ZEPs would be considered (which is denied), or if it were to find that the 12 or 18-month extension period was inadequate (which is also denied) the following bears mentioning.

178. HSF incorrectly contends that the decision in *Watchenuka*[116] creates a right for non-citizens to work in the country predicated upon the right to dignity.

179. *Watchenuka* related to asylum seekers, not immigrants. The circumstances of foreign persons who seek entry to the country in order to work cannot on any reasonable interpretation be compared to the circumstances of asylum seekers.

180. The SCA stated in *Watchenuka* that, while the right the engage in productive work even where that is not required in order to survive, is an important component of human dignity, the right to human dignity is not absolute and the Constitution accepts that the right may in appropriate circumstances be limited.[117]

[116] *Minister of Home Affairs and Another v Watchenuka and Another* 2004 (4) SA 326 (SCA).
[117] *Watchenuka* at para [27] – [28].

181. The SCA stated:

> *'[i]f the protection of human dignity were to be given its full effect, … - permitting any person at all times to undertake employment - would imply that any person might freely enter and remain in this country so as to exercise that right. But* as pointed out by the United States Supreme Court over a century ago in *Nishimura Ekiu v The United States*:
>
> > *'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'*
>
> *It is for that reason, no doubt, that the right to enter and to remain in the Republic, and the right to choose a trade or occupation or profession, are restricted to citizens by ss 21 and 22 of the Bill of Rights.'*[118]

182. The SCA went on to consider the restriction to citizens of the right to choose a trade, occupation and profession in ss 21 and 22 of the Bill of Rights and found with reference to the First Certification Judgment[119] that limiting the rights of asylum seekers and refugees to take up employment constituted a reasonable and justifiable limitation on the right to dignity protected under s 10 of the Constitution.[120] The SCA, however, held that *'where employment is the only reasonable means for the person's support other considerations arise'.*[121]

183. The majority of ZEP holders are not in the same position as asylum seekers who cannot return home due to a well-founded fear of persecution as evidenced by their travel history. Asylum seekers have no option but to remain in the country and in the absence of economic support from government, an

[118] *Watchenuka* at para [29] – [30].
[119] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) at para [20].
[120] *Watchenuka* at para [30].
[121] *Watchenuka* at para [31].

entitlement to work makes eminent sense. ZEP holders who are not asylum seekers are in effect economic migrants. The legislative scheme does not grant economic migrants the right to remain in the country outside of the provisions of the Immigration Act.

184. In any event, HSF's dignity challenge belies its contention that it does not seek a permanent exemption for ZEP holders. The exemption regime for qualifying Zimbabwean citizens was never permanent. This was made clear at all relevant times to all who applied for DZPs, ZSPs and ZEPs.

185. All ZEP holders were forewarned that the regime would come to an end at some point in the future. This was an express condition of the ZEP. All ZEP holders accepted this condition, as is evident from the fact that no challenge was brought to the temporary nature of the ZEP or its predecessors by those who sought to benefit from the temporary exemption regime at the time.

186. It stands to reason that the coming to an end of an exemption which was always temporary does not implicate the right to dignity of the beneficiaries of that temporary exemption simply because it has come to an end.

187. If the dignity challenge were to succeed it would in effect mean that the very nature and character of the ZEP would have to be ignored. This is clearly demonstrated by HSF's contention that a dignified life is made possible by the fact that ZEP holders have been granted exemptions and a termination or lapsing of the ZEPs will strip ZEP holders of dignity by rendering them undocumented. It follows that if this argument is accepted, any decision that does not permit ZEP holders the right to remain in the country indefinitely would amount to a breach of their right to dignity.

188. We respectfully submit that it would amount to an egregious breach of the separation of powers for the Court to decide that a discretionary, temporary exemption regime should in effect be converted into a permanent exemption regime in circumstances where the legislature has determined that it is for the Minister to determine whether to grant such a regime and to determine the conditions under which such a regime is to be implemented.

189. Further, any decision not to extend the exemption regime does not mean that ZEP holders will face deportation. Section 34(1) of the Immigration Act which deals with the deportation and detention of illegal foreigners confers a discretion on an Immigration Officer whether or not to effect an arrest or detention of an illegal foreigner. There is no obligation to do so.[122] Any such decision is subject to an appeal in terms of s 8 of the Immigration Act and may thus be challenged by someone adversely affected by the decision.

190. The right of access to health, educational and other facilities extend to all persons present within the Republic. A foreigner whose right to lawfully remain in the country terminates for whatever reason is required to leave the country unless they can establish a lawful basis to remain. If they cannot do so and the consequence is that they lose the right to access services reserved for lawful residents (be they citizens, permanent residents or temporary visa holders), this does not amount to a breach of their dignity rights. If the Court were to find that the loss of access to certain services in consequence of the termination of a temporary residence right amounts to a breach of the right to

[122] *Jeebhai And Others* v *Minister Of Home Affairs And Another* 2009 (5) SA 54 (SCA) at para [25]

dignity, the results would be far reaching and would undermine the very purpose of the statutory immigration regime.

191. The Constitution expressly provides that the right to work in the country is a right reserved for citizens and it does not automatically extend to foreigners.[123] ZEP holders are in no different a position to the holders of temporary work visas – at the end of the visa validity period, the holder loses the right to work unless the visa is renewed. This does not amount to a breach of the dignity rights of the holders of work visas, which are by their nature temporary.

192. HSF contends that the decision to terminate all ZEPs leaves holders with a choice either to remain with their families without the right to work, or to leave and break up the family unit. This is not correct.

193. Those ZEP holders are able to regularise their stay in the country will be able to remain. Those who are not able to do so will have to leave the country as contemplated by their ZEPs. In most cases, the entire family would have to leave. There is no risk of family separation when an entire family no longer has the right to reside in the country and must leave. If, however, they have family members in the country who are citizens, permanent residents or holders of visas that entitle their family members to be granted visas, they may apply to remain with their family members who have a right of residence in the country. This does not amount to a breach of the dignity right.

194. In *Nandutu*[124] the Constitutional Court afforded a right of foreign spouses to remain in the Republic to apply for a change in status in circumstances where

[123] *Watchenuka* at para [30].
[124] *Nandutu and Others v Minister of Home Affairs* 2019 (5) SA 325 (CC).

they were in permanent spousal relationships with citizens and/or permanent residents. If ZEP holders are in such relationships there is nothing precluding them from applying for status on this basis.

195. HSF contends that the right to dignity is infringed because no advance warning was given of the Minister's decisions. This misses the point. When the ZEPs were issued in 2017, it was made clear that the ZEPs would terminate on 31 December 2021, as was the case with every prior iteration of the exemption regime. There could not have been a reasonable expectation that the exemption regime would continue in perpetuity or that it would be renewed as a matter of course.

196. For these reasons it is clear that impugned decisions have not breached the right to dignity of ZEP holders.

Rights of Children

197. HSF complains that the Minister's decisions breach the rights of children. In seeking to underpin this contention, HSF relies on the circumstances of one LM who filed a supporting affidavit.

198. LM failed to apply for any visas and failed to make representations. If LM is a genuine asylum seeker and not an economic migrant, he has remedies available to him.[125]

199. There is no risk that children whose parents are ZEP holders whose permits will come to an end on 30 June 2023 will be separated from their parents

[125] AA para 213 to 215, rec. 010-71.

unless the children have an independent right to remain in the country. In those circumstances, it stands to reason that representations to the effect that the parents of those particular children ought to have their ZEPs extended are likely to be accepted. If the parents of the children in question are genuine asylum seekers, they are entitled to apply for asylum and will not be separated from their children.

200. ZEP holders are entitled to make representations, and to apply for waivers based on their circumstances. If they raise issues pertaining to their children in their submissions or waiver applications, these will be considered. This is precisely the individualised decision-making that HSF contends for. There is no factual basis for the contention that all ZEPs will be terminated without regard to the individual circumstances of the children of ZEP holders. The fact that the parents of the children in question may choose not to make representations based on their particular circumstances cannot found a claim for a breach of s 28 rights.

201. Minor children are dependent on their parents for care and to take the necessary steps to protect their rights. It is open to ZEP holder parents of minor children to make representations or apply for waivers based on their children's particular circumstances. Those children who are mature enough to make representations or apply for waivers on their own are free to do so.

202. HSF adopts the contradictory position that children need to remain with their parents as a basis for seeking to challenge the Minister's decisions while at the same time contending that children must treated independently from their parents as a basis for their challenge.

203. Further, if ZEP holders have children who are South African citizens or permanent residents, they can apply for permanent residence. Moreover, children who were born in South Africa of parents who are not citizens or permanent residents (such as ZEP holders), are entitled to apply for citizenship on becoming majors if they have lived in South Africa from the date of their birth and their births have been registered in South Africa.

204. While it is so that the best interests of the child principle has been described as the *'benchmark for the treatment and protection of children',*[126] the question at hand is whether the Minister's decisions fail to take into account the best interests of children.

205. The Minister considered the effect of his decisions on the children. HSF's complaint is that there is no document proving that this was considered and that the Minister's reasons do not specifically reflect a consideration of the effect on children. In the face of an allegation that the Minister did not consider the effect of the impugned decisions on children, he could do no more than state that he considered such an effect.[127]

206. It must also be borne in mind that it was precisely because of the potential effect of a termination of the ZEP that the Minister called for representations. The Minister could do no more than call for ZEP holders to make representations concerning the effect of any subsequent decision on their children. This was eminently reasonable.

[126] *Centre for Child Law v Media 24 Limited* 2020 (3) BCLR 245 (CC) at para [137].
[127] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA).

207. It cannot be suggested that simply because the DG's submission to the Minister and the various press statements do not make specific reference to the rights of children, that these were not considered. The Minister indicates that he considered effects on and implications for children, when making his decisions.

208. The Constitutional Court noted in *Pridwin,*[128] with reference to *Minister for Welfare and Population Development v Fitzpatrick,*[129] that the fact that a child's best interests are paramount does not mean that those interests are superior to, or will trump, all other fundamental rights. The Constitutional Court noted that, if taken literally, it would cover every field of human endeavour that has some direct or indirect impact on children, as indeed the Supreme Court of Appeal sought to reason, and it could even be rendered empty rhetoric.

209. It noted that the import of the principle was eloquently articulated in *S v M*, where the Court held:

> *'The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.'*[130]

210. The Court further stated in *Pridwin* that it had held in *S v M* that:

> '*Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has*

[128] *Pridwin* at para [70].
[129] *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at para [17].
[130] *S v M* 2008 (3) SA 232 (CC) at para [42].

to take account of their relationship with other rights which might require that their ambit be limited.'[131]

211. Consequently, we submit that:

211.1. The Constitution places an obligation on decision-makers to consider the best interests of children, and the Constitution describes the level of consideration to be afforded such rights.

211.2. The Courts have confirmed that the consideration of the best interests of children requires a balancing exercise of the competing interests.

211.3. In the immigration context, the starting point of the enquiry should be the position of the parent who is unlawfully in the country, and not the rights of the children, as contended for by HSF.

211.4. The rights of children are adequately protected by affording them an opportunity to make representations either through their parents or of their own accord.

212. If, however, the mere presence of children were to preclude a decision not to extend ZEPs beyond a certain point, this too in effect would confer a permanent right of residence on ZEP holders (and indeed any foreigner) merely because they have children in South Africa.

[131] *Pridwin* at para [71].

The Limitation of Rights

213. The Minister denies, for the reasons set out above, that there was any breach of the rights relied upon by HSF.

214. To the extent that it is found that the Minister's decisions breach the right to dignity or the rights of the child, we submit that the Minister's decisions constitute a reasonable and justifiable limitation on such rights in an open and democratic society based on human dignity, equality and freedom.[132]

215. HSF proceeds from the incorrect premise. The facts demonstrate that the most recent extensions of the validity of the current ZEPs amount to a period of 1½ years as opposed to 3 years.

216. It is a reasonable and justifiable limitation on the rights of foreign persons in South Africa to place time limits on their rights of residence in the country, unless they are able to establish an entitlement to some form of permanent residence. It is open to any ZEP holder who can demonstrate such an entitlement to make application for the appropriate visa. The conditions of the extended ZEPs now make it possible for ZEP holders to change their status in the country, whereas this was not previously available to them.

217. HSF contends that the nature of the rights in question are those of dignity and the rights of children. The complaint pertaining to the alleged breaches of these rights, however, appears to be predicated upon the failure to afford persons a

[132] *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) at para [34].

fair process in the impugned decisions. These aspects of the matter have been traversed above.

218. As to the nature and extent of the limitation, it is unclear on what basis the Minister's decisions to afford ZEP holders a right to remain in the Republic until 30 June 2023 *'trenches deeply into the rights of ZEP holders'*.

219. HSF incorrectly contends that the Minster has abandoned or disavowed any claims that ZEP holders contributed to unemployment; and that his decisions were motivated by xenophobia. The Minister's decisions were most certainly never driven by xenophobia.[133]

220. There is a reference in the Minister's statement to South Africa's unemployment rate.[134] The Minister made no claim that Zimbabweans were responsible for any unemployment crisis facing South Africa.

221. As to the remaining justifications:

221.1. The Minister clearly explained that the conditions in Zimbabwe had improved to a sufficient degree to render it reasonable for ZEP holders to return home and thus a decision to change the exemption regime was justified.

221.2. There is no basis to contend that the change to the exemption regime would overburden the asylum system.

[133] AA para 248, rec. 010-84.
[134] AA para 245 – 247, rec. 010-83 - 010-84.

221.3. Budgetary constraints further justified any alleged limitation of rights.

222. HSF's criticisms of these justification grounds, based on what it regards as an alleged paucity of information and coupled with a misstatement of what it believes to be common ground facts, are unsupportable.

Conditions in Zimbabwe

223. The point made by the Minister is that an objective assessment of the publicly available evidence demonstrates that the economic situation in Zimbabwe has improved since 2010 and Zimbabwe no longer faces the hyper-inflation crisis that precipitated the mass migration of Zimbabweans to South Africa in 2008/2009.[135] In support of these contentions the DG put up evidence that demonstrates an economic and political improvement in Zimbabwe.[136] The fact that Zimbabwe may not have improved to a degree that HSF finds acceptable is not a ground of review.

Burdens on the Asylum System

224. There are currently some 178 000 ZEP holders, which represents some 8.4% of the undocumented Zimbabwean nationals within the Republic.[137] Further, only 17% of DZP applicants were persons who had previously held asylum seeker permits.[138] It is clear that the introduction of the exemption regime did

[135] AA para 225, rec. 010-85 and para 257-262, rec. 010-86 – 010-87.
[136] AA para para 257-262, rec. 010-86 – 010-87; SAA para 166-170, rec. 010-311 – 010-319; para 183-188, rec. 010-322 – 010-323; para 190 - 196, rec. 010-324 – 010-326.
[137] AA para 230, rec. 010-79.
[138] AA para 123, rec. 010-45.

not significantly decrease pressure on the asylum system or stem the flow of illegal migration to South Africa

225. As is evident from the supporting affidavits put up by HSF, many ZEP holders, even those who initially sought to claim asylum, have returned to Zimbabwe on numerous occasions in the past 13 years. It cannot be suggested that those ZEP holders who travel between South Africa and Zimbabwe can lawfully claim asylum, given that an asylum seeker must demonstrate that they are unable or unwilling to avail themselves of the protection of Zimbabwe in order to qualify for asylum.

226. Given the marginal impact that the exemption regime had in respect of relieving pressure on the asylum system, it is submitted that the changes effected to the exemption regime constitute a reasonable and justifiable limitation on the rights of ZEP holders.

Budgetary Constraints

227. Once again HSF seeks to quibble with the information provided by the DG in the answering affidavit. In this regard HSF seeks to read paragraph 235 of the answering affidavit out of context.[139] It is unclear how HSF can contend that no further details are forthcoming in circumstances where paragraphs 236 to 243 of the answering affidavit provide an explanation in respect of the budgetary constraints which the Department faces.

[139] AA para 235, rec. 010-81.

228. In seeking to make out their case, HSF relies on the following statement in *Rail Commuters Action Group*[140]:

> *'In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities.'*

229. The DG explained what resource constraints the Department was facing. HSF complains that the DG failed to draw any comparison between the continuation of the ZEP and the other so-called laborious alternatives that are proposed. This is not so. The DG set out the position as follows:[141]

> *'The Minister has granted a renewal of all ZEPs for a period of 12 months in order to provide for a period for ZEP holders to seek to regularise their stay in the country. However, a further blanket exemption would require a full application process to be undertaken. The identity of lawful ZEP holders would have to be verified, relevant documents relating to the type of permit sought (work, study, business) would have to be submitted ZEP holders who have died, left the country, obtained permanent residence or some other visa would have to be removed from the system, amongst other things. Consequently it is incorrect to state, as HSF does, that the granting of a longer extension beyond the end of 2022 would be less burdensome on the Department.'*

230. Moreover, at paragraph 243 of the answering affidavit, the DG noted that the current approach adopted in respect of ZEPs has proven effective from a

[140] *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC) at para [88].
[141] AA, para 241, rec. 010-82.

budgetary point of view, as is demonstrated by the fact that months after the period for applications and representations opened some 10 000 ZEP holders have sought to regularise their status, and that there has not been a spike in asylum applications from Zimbabwean nationals.[142]

231. The fact that the affidavit does not traverse the precise costing and figures is not a basis to suggest that the Minister's decisions are unjustified. It appears that what HSF is seeking is an impermissible opportunity to co-direct the process.[143]

The limitation and its purpose

232. When regard is had to the decisions that were actually taken, it is clear that the decisions were rational and proportionate. HSF fails to establish that the alleged *'grave incursion'* into the rights of ZEP holders and their children is not related to any legitimate governmental purpose. Clearly, the regime was always temporary. The reasons traversed above demonstrate that the decisions actually taken (to the extent that they limit any rights) are justifiable.

233. HSF contends that there were less restrictive means to achieve the purpose of the Minister's decisions.[144] These contentions do not bear scrutiny. A fair public consultation process is being followed and more than adequate notice

[142] AA, para 243, rec. 010-83.

[143] *South African Poultry Association v Minister of Agriculture* 2016 ZAGPPHC 862 21 September 2016, at para [15], albeit in the context of procedural fairness, where the court stated:

> '*The evidence suggests that SAPA viewed the process as unfair because it was denied opportunities to co-direct the process. This is evidence by the fact that on numerous occasions SAPA forgot that it is part of the "regulated" and not a part of the "regulator"...Yet, despite its position in society qua citizen, it took it upon itself to bombard the Government with its own research and took it upon itself to suggest that to draft a code of good practice and recommendations ...That the Minister does not agree with SAPA does not render the process unfair'.*

[144] FA para 155, rec. 001-73.

has been given to ZEP holders. A proper assessment the conditions in Zimbabwe demonstrates that there has been an improvement in the political and economic conditions in Zimbabwe to the extent that it cannot be suggested that it is irrational or unreasonable for ZEP holders to return home.

234. If ZEP holders are of the view that they will face persecution or if there are particular reasons why a specific ZEP holder cannot return to Zimbabwe, they have remedies in law available to them.

235. Consequently, it is respectfully submitted that there is no limitation of rights at all, and if there is, it is justifiable limitation.

Failure to consider the impact on ZEP holders and their children

236. We do not traverse the issues already addressed above relating to the rights of children.

237. This challenge is predicated upon a misunderstanding of the decisions that were actually taken.

238. HSF relies on the matter of *e.tv (Pty) Ltd v Minister of Digital Communications and Digital Technologies* [145] in which the relevant minister made a determination without *'any reliable sense of its impact on millions of indigent persons whose currently working television sets will be rendered useless.'*[146]

[145] *e.tv (Pty) Ltd v Minister of Digital Communications and Digital Technologies* 2022 (ZACC) 22 (28 June 2022).
[146] *e.tv (Pty) Ltd* at para [78].

239. Paragraph 79 of *e.tv*[147] is instructive:

> '*I emphasise that what I am saying is not whether another means to achieve the end should have been used. That enquiry goes beyond what this Court is empowered to do. What I do hold is that the means employed by the Minister meant that her decision was made without any reliable indication of the households requiring STBs, and that she therefore failed to take a relevant consideration into account. The Minister was at large to determine how such information was obtained. What she could not do, however, and what tainted her decision with irrationality, was to adopt a process which meant that the analogue switch-off date was determined without considering the numbers of households which would be adversely affected by such switch off*.' [emphasis added]

240. The Minister has adopted a process which would allow him to consider the effect of his decisions bearing on the termination of the exemption regime.

The Conditions in Zimbabwe – Alleged Error of Fact

241. HSF appears to contend that because the conditions in Zimbabwe have allegedly not improved, the Minster's decisions are underpinned by a material error of fact. HSF has misinterpreted this ground of review.

242. HSF seems to take the view that it is incorrect (or false) to contend that the economic situation has improved in Zimbabwe since 2009. This is not so, based on HSF's own evidence and the publicly available evidence. In truth, HSF's complaint is that the situation in Zimbabwe has not improved to a level which is to its liking. That is not a ground of review.

[147] *e.tv (Pty) Ltd* at para [79].

243. For HSF to come home on this ground of review it must at the very least demonstrate that there has been no improvement at all in Zimbabwe. This it cannot do on the evidence.

244. The question of material error of fact is not a basis upon which to infringe upon the distinction between appeal and review.[148] This is not an opportunity for this Court, or indeed HSF, to substitute its own view as to what the findings should have been. Indeed, *Dumani* illustrates a situation unsuitable for the application of this ground of review inasmuch as it related to the assessment of testimony by the officer presiding over a disciplinary enquiry. This is a matter of judgment rather than an objectively verifiable fact.

245. In the matter of *Gorhan v Minister of Home Affairs*[149] it was held that material error of fact was inapplicable to a refugee officer's assessment of the political situation in Somalia.

246. In *ACSA v Tswelokgotso Trading*[150], the Court summarised the position in respect of mistake of fact as follows:

> '*In sum, a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the fact'.*

[148] *Dumani v Nair and Another* 2013 (2) SA 274 (SCA) at para [32].
[149] *Gorhan v Minister of Home Affairs* 2016 ZAECPEHC 70 (20 October 2016) at paras [51] - [52].
[150] *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ).

247. If the conditions in Zimbabwe are as dire as HSF contends, one would have expected a refugee crisis similar to that experienced in 2009 when Zimbabwe was in the grip of a hyperinflation crisis and political violence. The fact that there is no such crisis is indicative of the fact that there has been an improvement.

248. For these reasons it is submitted that the ground of review of material error of fact is unsustainable.

249. It appears that HSF seeks to amplify its ground of review in its heads of argument by contending that the Minister's decision was unlawful because *'special circumstances'* are a jurisdictional fact for the exercise of the Minister's powers. This, in effect, amounts to a lawfulness challenge.

250. The argument advanced by HSF is that the information placed before the Minister must have constituted reasonable grounds for the decision-maker's opinion. HSF further contends that the Minister failed to disclose any information or documents that the Minister consulted on the conditions in Zimbabwe before reaching his decision, nor has he deposed to an affidavit explaining his decision-making processes. Moreover, HSF contends that the DG sought to rely belatedly on a report of the World Bank dated 2019 and two 2022 reports which post-date the Minister's decision.

251. HSF elected to pursue urgent review proceedings and waived its right to obtain a record. It is not open to HSF to now complain about insufficiency of documentation provided.

252. The DG's submission to the Minster made the point that the economic and political situation had improved in Zimbabwe. The Minister was entitled to rely on the submission in this regard. The DG's contentions in the submission are borne out by the objective facts.

253. HSF's reliance on the decision in *Walele v City of Cape Town and Others*[151] is misplaced. The question in *Walele* was whether the documentation before the decision maker was sufficient to establish the existence of certain disqualifying factors. In that matter the documents before the decision maker were held not to be capable of establishing the existence of disqualifying factors. In this matter the question is whether the conditions in Zimbabwe have improved since 2009. There can be no dispute based on the evidence before this Court that they have.

254. The 2022 reports of the World Bank and IMF were placed before the Court this to provide an up to date picture of the conditions prevailing in Zimbabwe and to demonstrate that there has not been a deterioration since the DG's submission was made.

255. Ultimately, it is not for HSF or the Court to decide whether there has been a sufficient improvement to justify or support the Minister's decisions.

THE DECISION WAS OTHERWISE UNREASONABLE OR IRRATIONAL

256. As to the contention that the Minister failed to explain why he elected to extend the ZEPs for 12 months (and a further 6 months) when the DG recommended 3 years alternatively a period of 12 months, as indicated, the DG presented

[151] *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC).

three options to the Minister. The Minister elected to grant a 12 month extension at that stage. It was not inaccurate for the DG to contend in the answering affidavit that there was no automatic entitlement to a 3 year renewal.

257. The Minister's September 2022 press statement clearly reveals why a further 6-month period has been granted. This was as a result of, *inter alia*, a limited uptake in applications by ZEP holders for other visas.

258. It cannot be contended on these bases that the Minister failed to apply his mind to the question of the period of the extension of the validity of the current ZEPs.

259. There were a range of options available to the Minister, one of which was a 12-month extension of the validity of the current ZEPs. Choosing to accept one of the DG's recommendations did not render the Minister's decision unreasonable or irrational.

260. The contentions that the Minister failed to justify his decision on the basis of alleged backlogs and budgetary incapacity, and that a human rights based approach which entitled ZEP holders to make representations was ignored, have already been addressed.

NOTICE IN TERMS OF RULE 35(12)

261. On 18 August 2022 HSF served a notice in terms of Uniform Rule 35(12), alternatively Uniform Rule 35(14) ('the notice'). [152] In response the respondents indicated that they would provide the documents requested in paragraphs 1.1. and paragraph 2 of the notice, subject to the redaction of

[152] Notice ito Rule 35(12), alternatively Rule 35(14), rec. 011-1 – 011-4.

personal information.[153] The respondents declined to provide the remaining documents requested.[154]

262. In paragraphs 1.2, 2.1 to 2.3, and 3 of the notice, HSF sought documents to which reference was not made in the paragraphs of the answering affidavit referred to in the notice.

263. In terms of Rule 35(12), a party is only entitled to those documents to which reference is made in an affidavit. This does not include documents which can be inferentially deduced from the affidavit to exist, or which probably exist.[155] HSF is not entitled to documents not referred to in the affidavit.

264. As HSF ought to be aware, *'the purpose of rule 53 is to "facilitate and regulate applications for review". The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court to fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.'*[156]

---

[153] RA, Annexure RA2, rec. 018-87 – 018-91.
[154] RA, Annexure RA2, rec. 018-87 – 018-91.
[155] *Penta Communication Services (Pty) Ltd v King* 2007 (3) SA 471 (C) at 436B–C; *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) at 246I–J; *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15, 25 April 2016) at para [23]; *Contango Trading SA v Central Energy Fund SOC Ltd* 2020 (3) SA 58 (SCA) at para [9]; *Democratic Alliance v Mkhwebane* 2021 (3) SA 403 (SCA) at para [28]*; Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at para [16].
[156] *Helen Suzman Foundation v Judicial Services Commission* 2018 (4) SA 1 (CC) at para [13], citing, *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661. See also *Bridon International GmbH v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at para [31] and *Lawyers for Human Rights v Rules Board for Courts of Law* [2012] 3 All SA 153 (GNP) at para [23].

265. Moreover, and this is of particular significance in the present matter, an applicant that does not furnish the record to the Court runs the risk of not discharging the *onus*, especially where the allegations upon which it relies are put in issue.[157]

266. HSF, having elected not to call for the record, nonetheless complains in its replying affidavit that the respondents have failed in their duty to be transparent with the Court in that they have offered scant information on how the Minister reached his decision, what information was placed before him, and how the Department is currently handling ZEP holders' applications and representations.

267. It is not open to HSF, having elected not to call for a record, to then protest because the respondents have not placed sufficient documents (in the opinion of HSF) before the Court. It was at all times open to HSF to demand the record of proceedings, even in an urgent review application. It chose to proceed without the record.

268. The respondents have placed before the Court those documents that they deem to be relevant, as they are entitled to do.

269. HSF's criticism of the response to its notice in terms of Rule 35(12) and (14) has no merit.

[157] *SACCAWU and Others v President of the Industrial Tribunal and Another* 2001 (2) SA 277 (SCA) at para [7].

270. Rule 35(14) does not apply to motion proceedings. An application must be made to direct that it is to be applicable.[158] No such application has been made

271. HSF seemingly takes issue with the information provided in respect of the justifications offered by the Minister for the alleged breaches of human rights. HSF relies on *Teddy Bear Clinic*[159] and *NICRO*.[160]

272. The DG in his answering affidavit more than adequately supports his contentions in relation to the conditions in Zimbabwe, amongst other things by reference to HSF's evidence.

REMEDY

273. HSF seeks what amounts to substituted relief. This application is not concerned with preserving the status quo. Rather, it asks this Court in effect to order the continued existence of the ZEP programme post 30 June 2023.

274. HSF's reliance on *All Pay II,*[161] *Black Sash*[162] and *South African Informal Traders*[163] is misplaced.

---

[158] *Loretz v Mackenzie* 1999 (2) SA 72 (T) at 74G; *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T) at 611G; *Fourie NO v Bosch* (unreported, GP case no 56027/2020, 27 August 2021) at paras [9] and [13].

[159] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at para [84].

[160] *NICRO* at para [36].

[161] *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officers, SASSA* 2014 (4) SA 179 (CC).

[162] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law intervening*) 2017 (3) SA 335 (CC).

[163] *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC).

275. In *All Pay II* and *Black Sash* the court was concerned with the award of a tender and the impending conclusion of a tender, in circumstances where the payment of social grants to people in dire need was imperilled.

276. What is here in issue is whether or not the time period of 18 months afforded to ZEP holders is sufficient to (a) make representations (b) apply for waivers (c) apply for visas and/or permits.

277. The Court is asked in this matter to extend the ZEP after the lapsing date of 30 June 2023. That is a decision for the Minister to make, if circumstances require it. It would amount to clear judicial overreach for this Court to intervene in circumstances where the Court is ill-equipped to make such a decision and there is no urgent need for it to do so.

278. As for *South African Informal Traders,* the remedy granted was that of an urgent interim interdict. No case is made out by HSF for urgent interim interdictory relief.

279. While a Court may have a wide discretion to fashion a remedy, what it cannot do is to usurp the function of the executive. It is not open to the Court to direct the Minister how to exercise his powers in terms of s 31 of the Immigration Act.

280. For these reasons, HSF is not entitled to the relief it seeks.

CONCLUSION

281. We respectfully submit that the decisions taken by the Minister were lawful, reasonable and procedurally fair.

028-81

282. Wherefore, we pray that the application be dismissed.

I Jamie SC
SP Rosenberg SC
M Adhikari
M Ebrahim
Chambers, Cape Town
30 September 2022

028-81

TABLE OF AUTHORITIES

1. *Mwelase v Director General, Department of Rural Development and Land Reform and Another* 2019 (6) SA 597.
2. *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA).
3. *International Trade Administration Commission v SCAW South Africa (Pty) Limited* 2012 (4) SA 618 (CC).
4. *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).
5. *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).
6. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).
7. *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC).
8. *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA).
9. *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).
10. *Administrator, Transvaal & others v Traub & others* 1989 (4) SA 731 (A).
11. *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 262 (CC).
12. *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC).
13. *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC).

14. *Duncan v Minister of Environmental Affairs and Tourism & another* 2010 (6) SA 374 (SCA).

15. *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA).

16. *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* 1986 (2) SA 663 (A).

17. *Coin Security Group (Pty) Ltd v Smit NO and Others* 1992 (3) SA 333 (A).

18. *Littlewood and Others v Minister of Home Affairs and Another* 2006 (3) SA 474 (SCA).

19. *Director-General of the Department of Home Affairs and Others v De Saude Attorneys and Another* 2019 (2) All SA 665 (SCA).

20. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

21. *Bothma-Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494 (SCA).

22. *Koyabe and Others v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC).

23. *Commissioner for the South African Police Services and others v Maimela and another* 2003 (5) SA (T).

24. *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

25. *R v Secretary of State of the Home Department, ex parte Doody* 1993 (3) ALL ER 92 (HL).

26. *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A).

27. *AB v Pridwin Preparatory* 2020 (5) SA 327 (CC).

28. *Attorney-General Eastern Cape v Blom and Others* 1988 (4) SA 645 AD.

29. *Everett v Minister of the Interior* 1981 (2) SA 453 C.

30. *Nortje en 'n Ander v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (SCA).

31. *Trend Finance (Pty) Ltd and Another v Commissioner for SARS* 2005 (4) All SA 657 (C).

32. *Mamabolo v Rustenberg Regional Council* 2001 (1) SA 135 (SCA).

33. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC).

34. *My Vote Counts NPC v Speaker of National Assemby* 2016 (1) SA 132 (CC).

35. *Minister of Home Affairs and Another v Watchenuka and Another* 2004 (4) SA 326 (SCA).

36. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC).

37. *Jeebhai And Others* v *Minister Of Home Affairs And Another* 2009 (5) SA 54 (SCA).

38. *Nandutu and Others v Minister of Home Affairs* 2019 (5) SA 325 (CC).

39. *Centre for Child Law v Media 24 Limited* 2020 (3) BCLR 245 (CC).

40. *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA).

41. *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

42. *S v M 2008 (3) SA 232 (CC)* at para [42].

43. *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders* 2005 (3) SA 280 (CC).

44. *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC).

45. *South African Poultry Association v Minister of Agriculture* 2016 ZAGPPHC 862 21 September 2016.

46. *e.tv (Pty) Ltd v Minister of Digital Communications and Digital Technologies* 2022 (ZACC) 22 (28 June 2022).

47. *Dumani v Nair and Another* 2013 (2) SA 274 (SCA).

48. *Gorhan v Minister of Home Affairs* 2016 ZAECPEHC 70 (20 October 2016).

49. *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ).

50. *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC).

51. *Penta Communication Services (Pty) Ltd v King* 2007 (3) SA 471 (C).

52. *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP).

53. *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 25 April 2016).

54. *Contango Trading SA v Central Energy Fund SOC Ltd* 2020 (3) SA 58 (SCA).

55. *Democratic Alliance v Mkhwebane* 2021 (3) SA 403 (SCA).

56. *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA).

57. *Helen Suzman Foundation v Judicial Services Commission* 2018 (4) SA 1 (CC).

58. *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).

59. *Bridon International GmbH v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA).

60. *Lawyers for Human Rights v Rules Board for Courts of Law* [2012] 3 All SA 153 (GNP).

61. *SACCAWU and Others v President of the Industrial Tribunal and Another* 2001 (2) SA 277 (SCA).

62. *Loretz v Mackenzie* 1999 (2) SA 72 (T).

63. *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T).

64. *Fourie NO v Bosch* (unreported, GP case no 56027/2020, 27 August 2021).

65. *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC).

66. *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officers, SASSA* 2014 (4) SA 179 (CC).

67. *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law intervening*) 2017 (3) SA 335 (CC).

68. *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC).

69. *Hoexter,* Administrative Law, 3rd Edition.