

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 32323/22

In the matter between:

HELEN SUZMAN FOUNDATION

Applicant

and

MINISTER OF HOME AFFAIRS

First respondent

**DIRECTOR- GENERAL OF THE DEPARTMENT
OF HOME AFFAIRS**

Second respondent

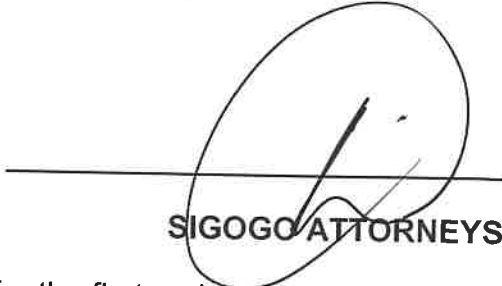
FILING NOTICE

DOCUMENTS PRESENTED FOR FILING:

1. First and second respondents' answering affidavit
2. Annexures "AA1 - AA12"

FILED BY: SIGOGO ATTORNEYS

SIGNED at PRETORIA on this the 15th day of August 2022.



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HOME AFFAIRS**

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RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

LIVHUWANI TOMMY MAKHODE

do hereby make oath and state that:

1. I am the Director-General of the Department of Home Affairs ('the Department'). I am duly authorised to depose to this affidavit on behalf of the first and second respondents ('the respondents').

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2. The facts deposed to in this affidavit are true and correct and fall within my personal knowledge. To the extent that I rely on facts which are not within my personal knowledge, I believe them to be true and correct. To the extent that I make averments in respect of the law, I do so on the advice of the respondents' legal representatives and make averments in reliance on such advice.

INTRODUCTION

3. Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic State founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism, and the supremacy of the Constitution and the rule of law.
4. The Immigration Act 13 of 2002 ('the Immigration Act') is one of a suite of legislative instruments enacted to protect our national sovereignty and our borders. The express, stated purpose of the Immigration Act is to "*provide for the regulation of admission of persons to, their residence in, and their departure from the Republic; and for matters connected therewith*".
5. The Preamble of the Immigration Act provides, *inter alia*, as follows:

"In providing for the regulation of admission of foreigners to, their residence in, and their departure from the Republic and for matters connected therewith, the Immigration Act aims at setting in place a new system of immigration control which ensures that—

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- (b) security considerations are fully satisfied, and the State retains control over the immigration of foreigners to the Republic;
- ...
- (d) economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased, academic exchanges within the Southern African Development Community is facilitated and tourism is promoted;
- ...
- (f) the entry and departure of all persons at ports of entry are efficiently facilitated, administered and managed;
- (g) immigration laws are efficiently and effectively enforced, deploying to this end significant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration;
- ...
- (i) the contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers;
- ...
- (l) immigration control is performed within the highest applicable standards of human rights protection;
- (m) xenophobia is prevented and countered;
- (n) a human rights based culture of enforcement is promoted;
- (o) the international obligations of the Republic are complied with; and
- ..." [emphasis added]

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6. It is clear from the Preamble that the objectives of the Immigration Act are to (a) safeguard the sovereignty of South Africa, (b) facilitate and control the entry into and residence in South African of desirable foreign persons, (c) prevent undesirable foreign persons from entering into South Africa and (d) facilitate the removal of foreign persons who are no longer entitled to lawfully reside in South Africa.
7. In short, the Immigration Act and the regulations promulgated thereunder, being the Immigration Regulations, GNR.413 of 22 May 2014: Immigration Regulations, *Government Gazette* No. 37679 ('the Regulations'), seek to achieve a balance between the rights and interests of South African citizens and foreign persons who are lawfully entitled to reside and/or remain in South Africa, in line with the Constitution and South Africa's international obligations.
8. The first respondent ('the Minister'), as he was entitled to do, in 2009 took a policy decision that a particular class of foreign persons, being Zimbabwean nationals, would be granted 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.
9. It was at all times made clear to qualifying applicants that the exemption regime was of a temporary nature, would not entitle the holders of exemption permits to apply for permanent residence in South Africa and was not intended to be renewable or extendable.

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10. It is important to note that:

- 10.1. The first iteration of the exemption regime, known as the Dispensation of Zimbabwe Project ('DZP'), was intended to grant the large number of undocumented Zimbabweans (an estimated 1.5 million persons) the opportunity to regularise their stay in South Africa. As demonstrated by the uptake figures, only a small portion of undocumented Zimbabweans took up the offer.
- 10.2. The first extension of the exemption regime, known as the Zimbabwean Special Permit ('ZSP'), expressly allowed those who had unsuccessfully applied for DZP permits to re-apply and allowed those who had been granted DZP permits to apply for an extension of those permits. Again, only a small number of eligible persons (i.e. holders of DZP permits or those who had unsuccessfully applied for DZP permits) took up the invitation to re-apply.
- 10.3. The next extension of the exemption regime, known as the Zimbabwe Exemption Permit ('ZEP'), did not allow unsuccessful DZP or ZSP applicants to re-apply, and was expressly limited to persons who were holders of ZSPs.
- 10.4. It is evident that the number of persons applying for and receiving exemption permits over the years has steadily declined.

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11. The remainder of this affidavit is structured as follows –
- 11.1. First, I set out the true nature of the relief sought.
- 11.2. Second, I deal with the relevant legislative and regulatory scheme.
- 11.3. Third, I explain the details of the three exemptions granted to Zimbabwean nationals in terms of the Immigration Act, since 2009.
- 11.4. Fourth, I deal in turn with each of the five grounds of review raised by the applicant ('HSF') in turn.
- 11.5. Finally, I respond to the founding and supporting affidavits *ad seriatim*.

THE TRUE NATURE OF THE RELIEF SOUGHT

12. HSF states in the founding affidavit 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*".
13. However, when regard is had to the relief sought and the bases upon which such relief is sought, it is clear that HSF seeks exactly that which it says it does not seek – a permanent exemption for ZEP holders.

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14. In its Notice of Motion HSF seeks the following relief:
- 14.1. An order reviewing and setting aside, and declaring unconstitutional, invalid and unlawful:
- 14.1.1. The Minister's alleged decision to terminate the ZEPs;
- 14.1.2. The Minister's decision to grant a limited extension of ZEPs for a period of 12 months; and
- 14.1.3. The Minister's alleged decision to refuse any further extensions of ZEPs beyond 31 December 2021.
- 14.2. An order remitting these decisions to the Minister for reconsideration following *"a fair process that complied with the requirements of ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA')"*.
- 14.3. An order directing that pending the aforementioned *"fair process"* :
- 14.3.1. All existing ZEPs be deemed to be valid; and
- 14.3.2. ZEP holders will continue to enjoy the protections afforded by Immigration Directive 1 of 2021.
15. All of the approximately 178 000 ZEPs expired by effluxion of time on 31 December 2021.

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16. The Minister decided to extend the ZEPs for a period of 12 months for two purposes.
- 16.1. First, to allow ZEP holders to make individual representations as regards the non-extension of their exemption permits and the 12-month extension of the current ZEPs.
- 16.2. Second, to give ZEP holders who wished to do so, the opportunity to apply for visas as contemplated by the Immigration Act.
17. There was, as a matter of law and fact, no decision taken to terminate all ZEPs in that: (a) the ZEPs expired by effluxion of time on 31 December 2021, and (b) the ZEPs were renewed for a period of 12 months. Consequently the ZEPs have not expired and remain valid until 31 December 2022.
18. Further, no decision has been taken not to grant further exemptions to ZEP holders. This is clear from the fact that ZEP holders are entitled to and were invited to make representations as to why their ZEPs should not be terminated and/or why their ZEPs should be extended for a period longer than the 12-month extension granted by the Minister.
19. In light hereof, the only decision that HSF can properly seek to challenge is the Minister's decision to extend the ZEPs for a period of 12 months.

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20. If regard is had to the grounds of review, it is clear that HSF contends that because ZEP holders have lived and worked in South Africa for approximately a decade, any decision not to grant a further blanket exemption to all ZEP holders would amount to an unjustifiable breach of the fundamental rights of ZEP holders.
21. In particular, HSF contends that the decision not to grant a further blanket exemption to ZEP holders and/or the decision to extend the ZEP for a 12-month period ('the impugned decisions'), violates the fundamental rights of ZEP holders because the impugned decisions:
- 21.1. *"[W]ill strip thousands of Zimbabwean nationals of [a life of human dignity], as it will render them undocumented";*
- 21.2. 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";*
- 21.3. *"[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"; and*
- 21.4. 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.

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22. If the Court were to accept these contentions as grounds upon which to review the impugned decisions, the Minister would be precluded from ever deciding not to grant a further, indefinite blanket extension of the ZEP.
23. This is so because all holders of ZEPs have lived and worked in South Africa since 2010 alternatively 2014, and as a consequence any decision not to grant them a further blanket extension would be invalidated simply because ZEP holders have made lives for themselves and their families in the country for several years.
24. HSF is asking this Court to find, notwithstanding (a) the express time limitation of the ZEPs (and all the prior iterations thereof), 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 ZEP holders rights to remain in South Africa permanently would amount to a breach of their fundamental rights simply because they have built lives in the country for the past decade.
25. The relief that HSF seeks will effectively confer rights of permanent residence on ZEP holders, in the face of the express conditions on which the ZEPs were issued and in breach of the provisions of the Immigration Act, given that HSF contends that most ZEP holders will not qualify for temporary residence permits (visas) or permanent residence permits.
26. Simply put, HSF appears to contend that since ZEP holders have lived and worked in the country for a decade and because their previous permits were renewed from time to time, this confers on ZEP holders a substantive legitimate

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expectation that their exemption permits will be renewed in perpetuity. This is entirely inconsistent with the applicable legislative framework.

27. In addition, HSF contends that until the economic situation in Zimbabwe improves to an acceptable degree, any decision not to grant a further blanket exemption to ZEP holders will be irrational.
28. In effect, HSF contends that ZEP holders are entitled to remain in the country for an indefinite period, until the economic situation in Zimbabwe improves to an extent that HSF and the Court find to be acceptable. However, HSF does not attempt to delineate what would constitute a sufficient improvement in the economic situation in Zimbabwe to justify a decision not to grant a further blanket exemption to ZEP holders.
29. The relief sought by HSF would render the Court as the sole arbiter of the nature and extent of economic recovery that would entitle the Minister not to grant a further blanket exemption to ZEP holders.
30. Put differently, the relief sought would compel the Minister to grant further blanket exemptions to ZEP holders until the Court is satisfied that the Zimbabwean economy has recovered sufficiently for ZEP holders to return to their country of origin. Any such order would amount to a far-reaching breach of the separation of powers.
31. Moreover, it is estimated that there are more than a million undocumented Zimbabweans currently living in South Africa. An order that declares that it is unconstitutional to deny further exemptions to ZEP holders until the

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- Zimbabwean economy has recovered sufficiently, whatever that might mean, would entitle any undocumented Zimbabwean to compel the Minister to grant him/her an exemption from the provisions of the Immigration Act because of the economic situation in that country.
32. 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.
33. Moreover, in the 6-month period since the Minister's decision to extend the ZEPs for 12 months was announced, only **6 000** of the approximately 178 000 ZEP holders have taken the opportunity to make representations to the Minister.
34. HSF in asking the Court to deem all ZEP's as valid pending a "*fair process*" is in fact asking this Court to extend all 178 00 ZEPs for an indeterminate period (beyond 31 December 2022), in circumstances where only 6 000 of the approximately 178 000 ZEP holders have made representations to the Minister asking for such relief.
35. The relief sought by HSF is in substance a substitution order.
36. Such relief in effect amounts to this Court issuing 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

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permit unless the only proper decision of the administrator on remittal would be to grant the application.

37. It cannot be said in the present case that the only proper decision is a foregone conclusion, nor can it be said that the Minister has disabled himself from properly making the decision, nor are there any other grounds for this Court substituting its decision for that of the Minister, even as an interim measure (HSF itself accepts that this is so, hence the request for a remittal).
38. Consequently, the relief sought in respect of deeming ZEPs to be valid is legally unsustainable.

THE LEGISLATIVE AND REGULATORY SCHEME

39. The legislative framework creates important checks, balances and safeguards against those who seek to take advantage of the system.
40. The framework is designed to mitigate administrative inconvenience and, amongst other things, to prevent persons who are not entitled lawfully to enter and remain in the country from circumventing the immigration restrictions or compromising the legitimate security and other interests of the State and the best interests of the citizens of the country.
41. In the absence of these safeguards, there will essentially be no mechanism in place to ensure that those who seek to take advantage of the system are prevented from doing so and that the rights of citizens and the interests of the State are adequately protected.

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42. The Immigration Act and the Regulations envisage, amongst other things, expeditious procedures that ensure that security considerations are fully satisfied, whilst being mindful that immigration control is to be performed within the highest applicable standards of human rights protection.
43. The Immigration Act and the Regulations are also aimed at ensuring that the participation of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers.
44. Section 31 of the Immigration Act deals with exemptions and provides in relevant part:

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

(a) ...

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

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

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

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

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

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45. As indicated, the Minister granted a category of foreigners (being Zimbabwean nationals who were present in South Africa in the period 20 September 2010 and 31 December 2010) the opportunity to apply for rights akin to permanent residence for a specified period of time and under specific conditions.
46. The first exemption (DZP) was granted for the period 31 December 2010 to 31 December 2014.
47. The Minister in August 2014 granted this same class of persons the right to make application between 1 October 2014 and 31 December 2014 for either an extension of the exemption that had been granted to them or to re-apply for such exemption if their previous applications had been unsuccessful.
48. This second exemption (ZSP) was granted for the period ending 31 December 2017.
49. The third exemption (ZEP) differed from the first and second exemptions in that the Minister decided to allow only those persons who had been granted permits in terms of either the DZP or the ZSP to apply to renew their exemptions for a further period of four years until 31 December 2021.
50. This latter exemption has been extended for a period of 12 months to 31 December 2022.
51. What HSF seeks is that this Court should direct the Minister to grant a blanket fourth exemption to this entire latter class of persons (i.e. holders of ZEPs)

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52. However, ZEP holders are not without a remedy in the absence of a fourth blanket exemption. This is so because s 32(1)(b) of the Immigration Act contemplates an individual applicant making application for exactly this kind of exemption. The impugned decisions in fact allow for this, as ZEP holders have an opportunity to make such application, as in terms provided for in the Minister's decision.
53. The mechanism through which this application can be made is set out in Regulation 28 of the Immigration Regulations which provides that an application contemplated in s 31(2)(b) of the Immigration Act shall be made to the Minister on Form 47, supported by reasons for the application.
54. HSF fails to engage with the fact that ZEP holders are entitled to exercise the right to apply for individual exemptions, and the implications of the fact that save for some 6 000 persons, ZEP holders have failed and to use this remedy.
55. Further, HSF makes the conclusory statement in its founding affidavit that most ZEP holders *"would not qualify for "mainstream" permanent residence permits and temporary visas under the Immigration Act"*. Given this statement, it is necessary to deal with the visas and permits referred to in the founding papers.

Permanent Residence: ss 25 and 26 of the Immigration Act

56. Section 25 of the Immigration Act provides that:
- 56.1. The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights,

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privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship;

- 56.2. Subject to the Immigration Act, upon application one of the permanent residence permits set out in ss 26 and 27 may be issued to a foreigner; and
- 56.3. A permanent residence permit shall be issued on condition that the holder is not a prohibited or an undesirable person, and subject to s 28.
57. Section 26 of the Immigration Act provides that subject to s 25 and any prescribed requirements, the Director-General may issue a permanent residence permit to a foreigner who:
- 57.1. Has been the holder of a work visa in terms of the Immigration Act for five years and has proven to the satisfaction of the Director-General that he or she has received an offer for permanent employment;
- 57.2. Has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists, provided that such permanent residence permit shall lapse if at any time within two years from the issuing of that permanent residence permit the good faith spousal relationship no longer subsists, save for the case of death;

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- 57.3. Is a child under the age of 21 of a citizen or permanent resident, provided that such visa shall lapse if such foreigner does not submit an application for its confirmation within two years of his or her having turned 18 years of age; or
- 57.4. Is the child of a citizen.
58. HSF incorrectly contends that the condition attached to the ZEPs that the permits do not entitle the holders to apply for permanent residence irrespective of their period of stay in the country means that *"any application for permanent residence is almost certain to be rejected"*.
59. This misconception appears to be based on the fact that HSF persists in ignoring the fact that the Minister has granted a 12-month extension of all ZEPs, and in that decision has in terms allowed holders of ZEPs to apply for such visas as they may qualify for.
60. Consequently, any ZEP holder who meets the requirements of s 26 of the Immigration Act is entitled to apply for permanent residence based on any of the grounds contained in that section.
61. The Minister accepts that it is unlikely that a ZEP holder would also be the holder of a work visa in terms of the Immigration Act, given that the ZEP allowed holders to work in the country. However, it is by no means certain that there are no ZEP holders who may also be holders of work visas.

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62. HSF puts up no evidence of how many ZEP holders are also holders of work visas.
63. However, 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.
64. HSF puts up no evidence of how many ZEP holders are in good faith spousal relationships with South African citizens or permanent residents, are the minor children of South African citizens or permanent residents, or are the children of South African citizens.
65. On the evidence, HSF cannot demonstrate that any application for permanent residence made in terms of s26 by ZEP holders will be rejected.

Permanent Residence: s 27 of the Immigration Act

66. Section 27 of the Immigration Act provides that the Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who:
- 66.1. Has received an offer for 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

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citizen or permanent resident was available to fill it. Such visas may be extended to the foreigner's spouse and children younger than 18 years of age;

66.2. Is able to demonstrate that he or she possesses extraordinary skills or qualifications. Such visas may be extended to members of the foreigner's immediate family;

66.3. Intends to establish or has established a business in the country, as contemplated in s 15 (which deals with business visas), investing in it or in an established business the prescribed financial contribution to be part of the intended book value, provided that the Director- General may waive or reduce such financial or capital contribution for businesses in the national interest or when so requested by the Department of Trade and Industry. Such visas may be extended to members of the foreigner's immediate family.

66.3.1. The prescribed financial contribution is currently set at R5 million in cash, alternatively cash and a capital contribution consisting of new machinery and/or equipment to the value of R5 million.

66.3.2. The following businesses are deemed to be in the national interest and therefore qualify for reduction or waiver of the capitalisation requirements :

66.3.2.1. Agro-processing;

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- 66.3.2.2. Business Process Outsourcing and IT Enabled Services;
- 66.3.2.3. Capital/Transport equipment, metals and electrical machinery and apparatus;
- 66.3.2.4. Electro Technical;
- 66.3.2.5. Textile, Clothing and Leather;
- 66.3.2.6. Consumer goods;
- 66.3.2.7. Boatbuilding;
- 66.3.2.8. Pulp, paper and Furniture;
- 66.3.2.9. Automotives and Components;
- 66.3.2.10. Green Economy Industries;
- 66.3.2.11. Advanced Manufacturing;
- 66.3.2.12. Tourism infrastructure;
- 66.3.2.13. Chemicals, plastic fabrication and pharmaceuticals;
- 66.3.2.14. Creative and Design Industry;
- 66.3.2.15. Oil and Gas;

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66.3.2.16. Mineral beneficiation;

66.3.2.17. Infrastructure Development; and

66.3.2.18. ICT.

- 66.4. Is a refugee referred to in s 27 (c) of the Refugees Act;
- 66.5. Intends to retire in the Republic, provided that such foreigner proves that (a) he or she has the right to a pension or an irrevocable annuity or retirement account which will give them a prescribed minimum payment (currently R37 000 per month) for the rest of their life; or (b) has a minimum prescribed net worth (currently R37 000);
- 66.6. Has a prescribed minimum net worth (currently R12 million) and has paid a prescribed amount (currently R120 000) to the Director-General upon approval of the application; or
- 66.7. Is the relative of a citizen or permanent resident within the first step of kinship.
67. The circumstances in which applications for permanent residence may be made in terms of s 27 are not accurately described by HSF in its founding affidavit.
By way of example:
- 67.1. HSF makes no reference to persons who have an offer for permanent employment where the position having been duly advertised cannot be filled by South Africans.

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- 67.2. 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.
- 67.3. HSF makes no reference to persons who are the relatives of a citizen or permanent resident within the first step of kinship.
68. The conclusory statement in the founding affidavit that “[*m*]ost ZEP-holders would be unable to satisfy [*the*] requirements of [*s* 27]” is made without reference to any evidence.

General work visas: s 19 of the Immigration Act

69. Section 19(2) of the Immigration Act provides that a general work visa may be issued by the Director- General to a foreigner who does not possess a critical skill and who complies with the prescribed requirements.
70. In terms of Regulation 18(3) an application for a general work visa must be accompanied by:
- 70.1. A letter issued to the prospective employer by the Department of Labour to the effect that a certificate has been issued to the Department confirming that:

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- 70.1.1. Despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant;
 - 70.1.2. The applicant has qualifications or proven skills and experience in line with the job offer;
 - 70.1.3. The salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in the Republic; and
 - 70.1.4. The contract of employment stipulating the conditions of employment, signed by both the employer and the applicant, is in line with the labour standards in the Republic and is issued on condition that the general work visa is approved.
71. However, in terms of s 31(2)(c) the requirements in Regulation 18(3) may be waived by the Minister on application and for good cause shown. To date approximately 4 000 ZEP holders have made application to the Minister to waive the Department of Labour requirements contained in Regulation 18(3). These applications are currently being considered.
72. HSF puts up no evidence of how many ZEP holders intend to or have applied for general work visas or how many are not able to meet the requirements in s 19(2) read with Regulation 18(3). Consequently, the conclusory statement in

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the founding affidavit that “[m]ost ZEP-holders and their employers will have difficulty satisfying these requirements”- and the statement in the founding affidavit that “the assessment of a general work visa application, may significantly delay the final determination of their applications until after 31 December 2022” are speculative at best and have no evidentiary basis.

Critical skills visas: s 19(4) of the Immigration Act

73. Section 19(4) of the Immigration Act provides that subject to any prescribed requirements, a critical skills work visa may be issued by the Director-General to an individual possessing such skills or qualifications determined to be critical for the Republic from time to time by the Minister by notice in the Gazette and to those members of his or her immediate family determined by the Director-General under the circumstances or as may be prescribed.
74. While it is correct that critical skills work visas are more difficult to obtain than ordinary work visas, this is so because an applicant must demonstrate that they have a skill that is regarded as critical for the Republic at a particular point in time. This is so for all applicants who wish to obtain a critical skills work visa, not just ZEP holders.
75. Regulation 18(5) provides that an application for a critical skills work visa must be accompanied by proof that the applicant falls within the critical skills category, in the form of:
- 75.1. Confirmation, in writing, from the professional body, council or board recognised by the South African Qualifications Authority (‘SAQA’) in

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terms of s 13(1)(i) of the National Qualifications Framework Act 67 of 2008 ('NQF Act'), or any relevant government department, confirming the skills or qualifications of the applicant and appropriate post qualification experience;

75.2. If required by law, proof of application for a certificate of registration with the professional body, council or board recognised by SAQA in terms of s 13(1)(i) of the NQF Act; and

75.3. Proof of evaluation of the foreign qualification by SAQA and translated by a sworn translator into one of the official languages of the Republic.

76. The Critical Skills List was updated on or about 2 August 2022 in GN 2334 of 3 August 2022: Critical Skills List(*Government Gazette* No. 47182). A copy of the updated list is annexed marked "AA1". The updated Critical Skills List contains a list of 140 skills or qualifications regarded as being critical for the Republic in relation to an application for a critical skills work visa or permanent residence permit.

77. HSF puts up no evidence as to how many ZEP holders have applied for critical skills work visas; the timeframes within which such applications are processed; and the nature and extent of the alleged delays in obtaining the relevant verifications and certifications necessary to much such applications. Consequently, the conclusory statements in the founding affidavit that "*these processes are time consuming and subject to frequent delays*" and that "*[q]ualifying ZEP-holders are unlikely to obtain the necessary certifications*

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before the 31 December 2022 cut-off are speculative and have no evidentiary basis.

Business visas: s 15 of the Immigration Act

78. In terms of s 15 of the Immigration Act a business visa may be issued by the Director-General to a foreigner intending to establish or invest in, or who has established or invested in, a business in the Republic in which he or she may be employed, provided that:

78.1. The foreigner invests the prescribed financial or capital contribution in such business;

78.2. The contribution forms part of the intended book value of such business; and

78.3. The foreigner has undertaken to:

78.3.1. Comply with any relevant registration requirement set out in any law administered by the South African Revenue Service; and

78.3.2. Employ the prescribed percentage or number of citizens or permanent residents within a period of 12 months from the date of issue of the visa.

78.4. No business visa may be issued or renewed in respect of any business undertaking which is listed as undesirable by the Minister

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from time to time in the Gazette, after consultation with the Minister responsible for trade and industry.

- 78.5. The holder of a business visa may not conduct work other than work related to the business in respect of which the visa has been issued.
- 78.6. The Director-General may reduce or waive the financial or capital contribution referred to for businesses which are prescribed to be in the national interest, or when so requested by the Department of Trade and Industry.
- 78.7. The holder of a business visa shall submit proof to the satisfaction of the Director-General that he or she has fulfilled the financial or capital contribution requirements within 24 months of the issuance of the visa, and within every two years thereafter.
- 78.8. A business visa may be issued to a foreigner for more than one entry if multiple entries into the Republic by that foreigner over a period of time are necessary for that foreigner to conduct the business in question effectively.
79. The business visa requirements and exemptions available in respect of such visas are dealt with above.
80. Regulation 14 provides that an application for a business visa must be accompanied by:

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- 80.1. A certificate or report issued by a chartered accountant registered with the South African Institute of Chartered Accountants, a professional accountant registered with the South African Institute of Professional Accountants or a business accountant registered with the South African Institute for Business Accountants to the effect that the applicant has available the amount in cash or the amount in cash and the capital contribution required to be invested in the business for which a visa is sought;
- 80.2. An undertaking by the applicant that at least 60% of the total staff complement to be employed in the business shall be South African citizens or permanent residents employed permanently in the business;
- 80.3. An undertaking to register with the South African Revenue Service; the Unemployment Insurance Fund; the Compensation Fund for Occupational Injuries and Diseases; the Companies and Intellectual Property Commission, where legally required; and the relevant professional bodies, boards or councils recognised by SAQA in terms of s 13(1)(i) of the NQF Act, where applicable;
- 80.4. A police clearance certificate; and
- 80.5. A letter of recommendation from the Department of Trade and Industry regarding the feasibility of the business; and the contribution to the national interest of the Republic.

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81. The regulatory requirements referred to above are not particularly onerous and amount to no more than an applicant having to demonstrate that they meet the requirements for obtaining a business visa.
82. The registration requirements apply to all business owners in South Africa and are not more onerous or burdensome to foreigners who invest in or establish businesses in South Africa.
83. HSF puts up no evidence as to how many ZEP holders are able to meet the financial and/or capital requirements for a business visa or how many operate businesses that fall within the categories that would entitle them to exemption from such requirements. Consequently, the conclusory statement in the founding affidavit that the *"steep capital requirement excludes all but a tiny minority of ZEP-holders"* has no evidentiary basis.
84. HSF puts up no evidence of any ZEP holders who have applied for business visas and were unable to meet the requirements due to onerous requirements or delays in obtaining the necessary documents.
85. Further, a ZEP holder who owns or has invested in a business in South Africa but who does not qualify for a business visa would be entitled to make representations to the Minister for the extension of their ZEP based on their personal circumstances, the number of persons that they employ and their contribution to the economy. HSF puts up no evidence as to how many, if any, ZEP holders have made such representations.

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Relative's visas: s 18 of the Immigration Act

86. Section 18 of the Immigration Act provides that a relative's visa may be issued for the prescribed period by the Director-General to a foreigner who is a member of the immediate family of a citizen or a permanent resident, provided that such citizen or permanent resident provides the prescribed financial assurance.
87. Regulation 17 provides that an applicant for a relative's visa must submit:
- 87.1. A police clearance certificate; and
- 87.2. Proof of kinship within the second step between the applicant and the citizen or permanent resident as contemplated in s 18(1) of the Immigration Act, in the form of an unabridged birth certificate and where necessary, paternity test results.
88. The financial assurance contemplated in s 18(1) is an amount of R8 500 per person and per month, to be proven by means of a current salary advice or a certified bank statement not older than three months at the time of application, provided that the financial assurance shall not be required where the South African citizen or permanent resident is a dependent child.
89. HSF puts up no evidence of how many ZEP holders have applied for relative's visas and have been unable to meet the prescribed requirements.
90. Further, where proof of kinship is objectively "*difficult to obtain*" or where the applicant is unable to provide the necessary financial guarantees, nothing stops

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a ZEP holder from applying for an exemption from this regulatory requirement. In any event, financial guarantees need only be provided where the relative in question is not a dependent child.

91. HSF puts up no evidence to show that the requirements for obtaining a relative's visa are unattainable for ZEP holders generally.
92. It appears that HSF's main complaint is that a holder of a relative's visa may not work in the country. It is precisely for this reason that the financial guarantees are required where the relative in question is an adult and not a dependent child.
93. When regard is had to the fact that relative's visas are available only to members of the immediate family of citizens or permanent residents, i.e. persons within the second step of kinship including siblings, grandparents and grandchildren, the contention that the absence of a right to work would compel ZEP holders to either stay on relative's visas and face unemployment or require family units to break up, is difficult to understand.
94. Further, where one member of the immediate family of a ZEP holder is granted a relative's visa and the remaining family members do not qualify for any other visa, those ZEP holders would be entitled to make representations to the Minister for the extension of their ZEPs based on their particular family circumstances. HSF puts up no evidence as to how many, if any, ZEP holders have made such representations. Consequently, the claim of family separation is speculative and has no evidentiary basis.

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95. As pointed out above, spouses, children or parents of a citizen or permanent resident are able to apply for permanent residence in terms of s 27(g) of the Immigration Act.

Study visas: s 13 of the Immigration Act

96. Section 13 of the Immigration Act provides that the Director-General may issue a study visa to a foreigner intending to study in the Republic for a period not less than the period of study and that the holder of a study visa may conduct certain work.
97. Regulation 12 provides that an application for a study visa must be accompanied by:
- 97.1. An official letter confirming provisional acceptance or acceptance at the learning institution and the duration of the course of study;
- 97.2. Undertakings by the Registrar or Principal of the learning institution to provide proof of registration or in the event of failure to register by the closing date, to provide the Director-General with a notification of failure to register; to notify the Director-General that the applicant is no longer registered with such institution; and to notify the Director-General when the applicant has completed his or her studies or requires to extend such period of study;
- 97.3. In the case of a learner under the age of 18 years, an unabridged birth certificate; a copy of his or her identity document, if applicable; proof

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of physical address and contact number of the adult person residing in the Republic, who is acting or has accepted to act as such learner's guardian, including a confirmatory letter from that guardian; and proof of consent for the intended stay from both parents or, where applicable, from the parent or legal guardian who has been issued with a court order granting full or specific parental responsibilities and rights or legal guardianship of the learner;

97.4. A police clearance certificate;

97.5. Proof of medical cover renewed annually for the period of study with a medical scheme registered in terms of the Medical Schemes Act; and an undertaking by the parents or legal guardian that the learner will have medical cover for the full duration of the period of study; and proof of sufficient financial means available to the learner whilst resident in the Republic.

98. Further, the holder of a study visa at an institution of higher learning may conduct part-time work for a period not exceeding 20 hours per week.

99. The contention in the founding affidavit that the requirements to obtain a study visa are onerous is simply incorrect. The requirements are to ensure that the learner is intending to study at a registered learning institution, has the consent of their parents do so, and has the relevant means to support themselves financially and to obtain medical treatment during their period of study.

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100. Children of ZEP holders who are currently studying at registered learning institutions will have little difficulty in meeting these requirements and to the extent that financial means or proof of medical cover are unavailable, application can be made for an exemption.
101. HSF puts up no evidence as to how many ZEP holders have children who have applied for or intend to apply for study visas and whose parents will have no means to apply for any other visa.
102. Further, where a child is granted a study visa and the parent is a ZEP holder who does not qualify for any other visa, those ZEP holders would be entitled to make representations to the Minister for the extension of their ZEPs for the period their children are studying in South Africa. HSF puts up no evidence as to how many, if any, ZEP holders have made such representations. Consequently, the prospect of family separation is again speculative and has no evidentiary basis.
103. In conclusion on this point, it bears mention that applicants for ZSPs and ZEPs were required to submit to the Department either proof of employment for a work permit, proof of acceptance from a tertiary institution or school for a student permit or a proof of company registration for a business permit, as part of their exemption applications.
104. Consequently, HSF's complaint that the requirements for ZEP holders who wish to apply for work, study or business visas are unreasonable or that it is prohibitively difficult for ZEP holders to have to submit proof of employment, or acceptance from a tertiary institution or school, or company registration when

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making application for such visas cannot be accepted, given that applicants would have had to submit these documents in order to have obtained ZSPs and ZEPs in the first place.

THE THREE EXEMPTIONS GRANTED TO ZIMBABWEANS

The Dispensation of Zimbabweans Project (DZP)

105. The DZP sought to achieve the following four objectives:
- 105.1. To regularise Zimbabweans who were residing in South Africa illegally.
 - 105.2. To curb the deportation of illegal Zimbabwean migrants.
 - 105.3. To reduce pressure on the asylum seeker and refugee management systems.
 - 105.4. To provide amnesty to Zimbabweans who had obtained South African documents fraudulently.
106. The Department implemented the DZP between 20 September 2010 and 31 December 2010. The DZP permits were to expire on 31 December 2014 and they gave previously undocumented Zimbabweans the right to reside and work, study or conduct business in South Africa on a four-year temporary special permit.

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107. The DZP provided an alternative documentation process to the asylum system for many undocumented Zimbabwean migrants.
108. The primary documents required for applications were an application form with the applicant's fingerprints, a Zimbabwean passport and documentation confirming one of the following: (a) proof of employment; (b) proof of registration with an educational institution; or (c) proof of business (e.g. company registration, registration with the South African Revenue Service.
109. Undocumented Zimbabweans who could not fulfil these criteria had no legal basis to remain in the country.
110. Under the DZP process, the Department issued 242 731 permits and rejected 51 780 applications.
111. At the time, it was estimated that there were approximately 400 000 Zimbabwean asylum seekers living in South Africa. At the launch of the DZP in 2010, the Department estimated that there were approximately 1.5 million undocumented Zimbabweans in South Africa.
112. The majority of DZP applicants (81%) were general applicants who had not previously applied for asylum and were not in possession of fraudulent South African documents.
113. 17% were persons who had previously made asylum claims but voluntarily resorted to applying for DZPs.

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114. 2% of the applicants were in possession of fraudulent South African documents.
115. Based on these findings it can be concluded that the DZP in the main attracted undocumented Zimbabwean migrants who had not sought asylum, or who had not acquired fraudulent documents.
116. The fact that 81% of DZP applicants were general applicants who were neither holders of fraudulent documents seeking asylum nor on the asylum management system demonstrates that it was mainly undocumented Zimbabwean migrants who took the opportunity to apply for the DZP in order to formalise their stay in the country.
117. However, the number of applicants (294 511) and the number of DZP permits which were issued (242 731) was very low, considering estimates that there were approximately 1.5 million undocumented Zimbabweans in South Africa in 2009.
118. It is apparent that the DZP process reached fewer persons than required to achieve one of its key objectives, being regularising the stay of Zimbabweans who were residing in South Africa illegally, given that less than 20% of the estimated 1.5 million undocumented Zimbabweans sought to regularise their stay through the DZP.
119. Pressure on the asylum management system was one of the main reasons why the Department resorted to implementing the DZP. The DZP process provided an alternative to the flooded asylum management system at the time

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(2008/2009), which had been experiencing backlogs owing to the unprecedented influx of Zimbabwean applicants, most of whom were ineligible for asylum as they were economic migrants.

120. The Department encouraged asylum seekers to apply for the DZP, but only 17% of the DZP permit applicants were persons who had surrendered their asylum claims.
121. It is clear that very few asylum claimants were willing to apply for the DZP. This was probably because a number of people viewed asylum seeker permits and the prospect of refugee status which allows holders to apply for permanent residence as a better option than a short-lived 4-year special permit.
122. Moreover, for those who viewed themselves as genuine asylum seekers and not economic migrants, opting for the DZP would not be appropriate in the long term because the DZP was by its nature temporary and required a successful applicant to return to Zimbabwe when their permit expired.
123. It is clear from these figures that the DZP had limited success in achieving the second of its key objectives, being reducing pressure on the asylum management system, given that only 17% of the estimated 400 000 asylum seekers sought to abandon their asylum applications through the DZP.
124. Further, only 2% of the undocumented Zimbabweans who applied for DZP permits were persons seeking amnesty on condition that they would surrender fraudulently acquired South African documents. By implementing the DZP,

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South Africa offered special immunity to Zimbabwean nationals who were in possession of fraudulent South African documents. The entire project recovered about approximately 13 251 fraudulent documents.

125. Given that amnesty applicants only made up 2% of the total number of DZP applications, it is apparent the DZP had limited success in achieving the third of its key objectives, being to provide amnesty to Zimbabweans who had obtained fraudulent South African documents (and by extension, reducing the number of Zimbabweans in possession of fraudulent South African documents).

The Zimbabwean Special Permit (ZSP)

126. On 12 August 2014 the Department announced the implementation of the ZSP in order to document people who had previously applied for DZPs.
127. Former DZP applicants, including the 51 780 rejected applicants, were required to apply for the ZSP between 1 October 2014 and 31 December 2014.
128. The ZSP was aimed at catering for all (accepted and rejected) 294 511 DZP applicants.
129. Like the DZP, the ZSP came with conditions and requirements. The ZSP would be valid for three years from 2014 to 31 December 2017. Notices were placed in local newspapers notifying Zimbabweans of the cut-off date for the applications, which was 30 September 2015.

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130. The Department made it clear that:
- 130.1. Unlike regular work, study and business permits, ZSP permits were not renewable in South Africa.
 - 130.2. ZSPs would only be valid until 31 December 2017, after which they would expire.
 - 130.3. From the 1 January 2018, Zimbabweans would be expected to apply for normal visas.
 - 130.4. Upon the completion of the ZSP process, the Department would begin to deport undocumented Zimbabwean migrants.
131. Unlike the DZP process which was facilitated through direct interaction with the Department, the ZSP process was conducted using a new electronic permit application system. Permit applications had to be submitted online via the Visa Facilitation Services Global ('VFS') website. Applicants were required to book an appointment for the capture of biometrics using the VFS online application system.
132. During the ZSP process VFS front end systems were utilised to capture permit applicants' biometric photographs and fingerprints which were then submitted to the South African Police Service ('SAPS') for fingerprint identification and criminal record checks. Original documents and certified photocopies had to be submitted for verification on the appointment day along with a payment receipt indicating that an applicant had paid the required R870 for adults and

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R800 for minors. Furthermore, those who needed to transfer their ZSP permits to new passports had to pay R1 350 for the transfer of permits from old to new passports.

133. Like the ZDP, the requirements for the ZSP included proof of employment for a work permit, proof of acceptance from a tertiary institution or school for a student permit, and proof of company registration for a business permit.
134. Applications were received by VFS Global and adjudicated by the Department.
135. By the beginning of November 2014 the Department had received only 104 315 out of an expected 294 511 applications. By November 2015, 208 967 applications were received. The Department adjudicated 99.7% of over 200 000 ZSP applications within the first six months of the project.
136. Of the 208 967 applications, 197 950 of the applicants submitted their applications and biometrics to VFS and a total of 197 790 permits were approved.
137. One of the advantages of the ZSP was that the Department allowed all persons whose applications for the DZP permit had been rejected in 2010 to make a second attempt at being documented as long as they could confirm that they had a valid DZP application reference number.
138. The ZSP targeted only former DZP applicants. Accordingly, it did not affect the more than 1 million undocumented Zimbabweans in South Africa.

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139. It is evident that around 67% (197 790) of the initial 294 511 DZP applicants successfully obtained ZSPs. Only some 71% of the initial 294 511 DZP applicants applied for ZSPs.

The Zimbabwean Exemption Permit (ZEP)

140. On 15 September 2017 the Department announced that Zimbabweans with ZSPs could apply for the ZEP.
141. The ZEP was introduced to cater for ZSPs that were due to expire at the end of December 2017. The ZEP would only be open for those in possession of a valid ZSP. In other words, there were no new applications, only ZSP renewals.
142. Prospective applicants were required to submit applications online from 15 September 2017 through the VFS website, and the cut-off date for submission of applications was 30 November 2017.
143. An administrative application fee of R1 090 was charged.
144. ZEPs would be issued for a maximum period of 4 years, effective from 1 January 2018 and expiring on 31 December 2021, notwithstanding the date of application.
145. After submitting their applications, ZEP applicants would be allocated appointments for the submission of fingerprints and supporting documents to VFS, from 1 October 2017.

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146. Applicants were required to submit the following: (a) a valid Zimbabwean passport; (b) evidence of employment in the case of an application for work rights; (c) evidence of business registration in the case of an application for business rights; and/or (d) evidence of an admission letter from a recognised learning institution in the case of an application for study rights.
147. ZSP holders who successfully applied for ZEPs were advised that:
- 147.1. The ZEP holders would be entitled to work, study and/or conduct business depending on the type of ZEP they had applied for and been issued with.
- 147.2. A ZEP did not entitle the holder to apply for permanent residence irrespective of the period of stay in the South Africa.
- 147.3. The ZEP would not be renewable/extendable and did not allow a holder to change the conditions of his/her permit while in South Africa.
- 147.4. ZSP holders who wished to convert their status to any other mainstream visa should apply timeously for such visa from within South Africa provided that they met all the requirements for that visa.
- 147.5. A ZSP holder would be allowed to travel using the ZEP application receipt and the expired ZSP until such time as the ZEP was issued, without being declared undesirable.
148. In the Ministerial statement the following was said: *"I trust that the ZEP will go a long way in assisting the Zimbabweans to rebuild their lives as they prepare,*

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at work, in business and in educational institutions, for their final return to their sovereign state – Zimbabwe –in the near future.”

149. In addition, all issued ZEPs contained the following conditions:

149.1. The ZEP was valid until 31 December 2021.

149.2. The ZEP entitled the holder to work and be employed (alternatively to study or establish a business).

149.3. The ZEP did not entitle the holder to apply for permanent residence, irrespective of the period of stay in the country.

149.4. The ZEP would not be renewable or extendable.

149.5. The ZEP holder could not change the conditions of his/her permit in South Africa.

150. There could have been no doubt in the mind of ZEP holders that the permits issued to them were temporary in nature, given that they were expressly advised that the permits were not open to renewal and did not entitle a holder to apply for permanent residence.

151. I turn now to address the grounds of review raised by HSF.

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THE GROUNDS OF REVIEW

152. HSF contends that the Minister's purported decisions to (a) terminate the ZEP and (b) refuse any extension beyond 31 December 2022 (I deny that such decisions were in fact taken) are subject to legal scrutiny on three bases:

152.1. They constitute administrative action which is reviewable under PAJA;

152.2. If PAJA is inapplicable, they are reviewable under the principle of legality;

152.3. To the extent that they limit constitutional rights, any limitation must be justifiable under s 36 of the Constitution.

153. HSF raises the following five grounds of review:

153.1. The impugned decisions were procedurally unfair and/or procedurally irrational;

153.2. The impugned decisions unjustifiably limit constitutional rights;

153.3. The impact on ZEP holders and their children was not considered;

153.4. The impugned decisions are predicated upon a material error and/or are irrational, given the conditions which prevail in Zimbabwe; and

153.5. The impugned decisions are otherwise unreasonable and/or irrational.

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Procedural Fairness / Procedural Irrationality

154. The procedural fairness challenge is two-fold:
- 154.1. First, HSF contends that there was a failure to consult with ZEP holders; and
- 154.2. Second, HSF contends that there was a failure to consult with civil society and/or the public at large.

The ZEP holders

155. It is settled that fair administrative procedure depends on the circumstances of each case.
156. Section 3 of PAJA requires:
- 156.1. A clear statement of the administrative action;
- 156.2. Adequate notice of any right of review or internal appeal; and
- 156.3. A reasonable opportunity to make representations.
157. What appears to be in issue in this application are:
- 157.1. The Minister's decision to extend the ZEPs for a period of 12 months only; and
- 157.2. The Minister's alleged decision not to grant a further exemption to all ZEP holders in terms of s 31(2)(b) of the Immigration Act.

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158. The Minister decided to extend all ZEPs for a period of 12 months for two purposes:

158.1. First, to allow ZEP holders to make individual representations on the 12-month extension period.

158.2. Second, to give ZEP holders who wished to do so the opportunity to apply for alternative visas as contemplated by the Immigration Act.

159. As I have explained, in the 6-month period since the Minister's decision to extend the ZEPs for 12 months was announced, only 6 000 of the approximately 178 000 ZEP holders have taken the opportunity to submit representations to the Minister on the 12-month extension period.

160. A number of notices have been issued and circulated widely in respect of the ZEPs. In particular:

160.1. A public notice dated 7 January 2022 to all ZEP holders, which was published in the Star and the Sowetan, a copy of which is annexed marked "**AA2**"; (the notice which was published in the Star is attached as **FA13** to the founding affidavit);

160.2. A notice was published in the Government Gazette dated 7 January 2022, entitled *Immigration Act, 2002 (Act 13 of 2002): Implementation of decision to extent Special Zimbabwean Exemption Permits* (GN 45727, No.1666, 7 January 2022) (attached as **FA14** to the founding affidavit);

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- 160.3. A press statement was issued by the Minister dated 7 January 2022 and published Sunday Times, City Press and the Sunday World on 9 January 2022, annexed marked "**AA3**" (the statement published in the Sunday World is attached as **FA28** to the founding affidavit);
- 160.4. I instructed VFS to address individual letters to each of the 178 142 ZEP holders – a copy of the letter sent to ZEP holders is annexed marked "**AA4**";
- 160.5. On 4 January 2022 VFS reported that it had sent 178 768 email notifications to the registered email addresses of ZEP holders, of which 177 785 were successfully sent and 983 were not sent as a consequence of invalid or incorrect email addresses. As all ZEP holders were required to apply for ZEPs through the online VFS system which requires applicants to provide an email address, VFS has a database of the email addresses of all ZEP holders. In addition, VFS set up a dedicated call line and email helpdesk to provide ZEP holders with information relating to the application process. A copy of the email verification of this information is annexed marked "**AA5**".
- 160.6. I addressed a letter to the Zimbabwean Diaspora Association in South Africa NPC, a copy of which is annexed marked "**AA6**";
- 160.7. I addressed a letter to African Amity NPC, a copy of which is annexed marked "**AA7**";

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161. These publications and notices clearly set out:
- 161.1. The nature of the decisions that were taken;
 - 161.2. That ZEP holders were entitled to make representations; and
 - 161.3. That ZEP holders could apply for the visas provided for in the Immigration Act, should they qualify for such visas, from inside South Africa.
162. ZEP holders have been specifically called upon to engage with the Minister for the purpose of addressing both the non-extension of exemptions and the 12-month extension period.
163. It is clear that the persons potentially adversely affected by the impugned decisions have been given an opportunity to make representations as to why those decisions should not apply to them, based on their particular circumstances.
164. Given that the impugned decisions will only become effective on 31 December 2022, it is unclear on what basis HSF contends that the call for representations was issued (a) after the impugned decisions were made and (b) that the call for representations was not issued for the purposes of eliciting meaningful representations.
165. Moreover, HSF seeks to limit the ambit of the call for representations by contending that the Minister's press release of 7 January 2022 was only issued for the purposes of "*clear[ing] the confusion which existed at the time*".

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166. Presumably this is a reference to the statement in my answering affidavit in the African Amity application where I stated as follows in relation to the procedural unfairness challenge in that application:

“The Minister took several steps, including issuing a Press Statement to clear the confusion which was existing at the time”.

167. The same press statement which was issued by the Minister dated 7 January 2022 is annexed to the founding affidavit as Annexure **FA28**.

168. It is evident that this press statement did not advise ZEP holders of their right to make representations. The press statement, *inter alia*, set out the background of the ZEP regime and it dealt with the granting of exemptions, the internal inputs received, the submission made by me as Director-General, the decisions made, and various other related aspects.

169. The various press statements referred to above which were widely published in the media, and the letters to organisations purporting to represent Zimbabweans in South Africa, 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”.*

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170. Further, the letters sent directly to ZEP holders advised them that *“should you have any representations to make regarding the non-extension of your exemption and the 12-month period you may forward such representations to Mr Jackson McKay Deputy Director-General: Immigration Services, E-mail ZEPenquiries@dha.gov.za”*.
171. It is disingenuous for HSF to contend that there has been a concession that the media statements were issued solely for the purposes of resolving confusion and not to elicit meaningful representations, when the Department through various platforms and on numerous occasions advised ZEP holders that they had the opportunity to make representations on both the non-extension of the ZEPs and the 12-month period.
172. I reiterate that HSF has fundamentally misunderstood the nature of the decisions that were taken. The ZEP's expired on 31 December 2021. The Minister took a decision to extend the ZEP's to 31 December 2022 and called for representations on this issue from ZEP holders. In response, 6 000 representations and 4 000 waiver applications have been received and are being considered.
173. On these facts it cannot be sensibly contended that ZEP holders were not granted a fair opportunity to make representations. It is evident that these calls for representations elicited a response from ZEP holders.

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The Public at Large

174. HSF contends that it was required that not only ZEP holders but also civil society organisations representing their interests be afforded an opportunity to make representations on the proposed extension before it was approved.

175. HSF contends that ZEP holders and civil society were well-placed to inform the Minister on:

175.1. Whether the circumstances which justified the exemption regime had changed;

175.2. The particular impact that the purported decision not to extend the ZEPs would have on individual ZEP holders, as well as their families and children;

175.3. Whether a 12-month extension until 31 December 2022 would provide ZEP holders with sufficient time to obtain alternative status under a permit or visa under the Immigration Act; and

175.4. Whether a longer extension period would be more suitable to protect ZEP holders' rights and interest.

176. In respect of these four aspects of the matter I say the following:

176.1. First, ZEP holders have been given an opportunity to make representations with regard both to their individual 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

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which they consider relevant to their personal circumstances and the circumstances of ZEP holders generally. If the ZEP holders require more time because of their specific circumstances, they may raise this in their representations.

176.2. Second, 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.

176.3. Third, as regards the present situation in Zimbabwe, it bears mention that the impugned 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 and to comment meaningfully on whether the present state of the Zimbabwean economy renders it feasible for ZEP holders to return to Zimbabwe. If there was a possibility of mass unemployment and/or impending economic upheaval that would result from the return of approximately 178 000 Zimbabweans at the end of 2022, one would have expected this to be raised through diplomatic channels between South Africa and Zimbabwe. It is telling that this has not occurred. In his opening address at the mid-term review meeting of the third session of the Zimbabwe–South Africa Bi-National Commission, which took place on

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10 August 2022, the Zimbabwean Minister of Foreign Affairs and International Trade stated in regard to the ZEP:

“The Zimbabwe Exemption Permit will expire at the end of this year. Its expiry is naturally causing much anxiety to the holders of this permit. Our two governments must work closely in the implementation of this decision. We are ready to receive our nationals back home.”

A copy of the opening statement is annexed marked “**AA8**”.

- 176.4. Fourth, 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 which commenced in 2008. By all accounts, the economic situation in Zimbabwe has significantly recovered since 2008. From the documentation attached to the founding affidavit (particularly **FA16**) it is clear that there has been positive growth in GDP. It is clear that circumstances in Zimbabwe have significantly improved since 2010;
- 176.5. Fifth, it is unclear how civil society can speak to the impact of the impugned 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 impugned decisions.

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- 176.6. Sixth, the question of whether 12 months would be sufficient time to obtain alternative visas is not a matter which can be adequately answered by the public at large.
- 176.7. Finally, as indicated above, if specific ZEP holders require more time, they can raise this in their representations. It is unclear how the public at large could make any meaningful representations on this aspect of the matter, as is demonstrated by this application where HSF resorts to broad generalisations and emotive language, based on no objective evidence.
177. It bears mention that not every decision that is administrative in nature requires public consultation.
178. What is in issue in this application is whether the persons affected by the impugned decisions, namely the ZEP holders, will have a meaningful opportunity to be heard.
179. It is submitted that the call for representations from ZEP holders adequately protects their procedural fairness rights, in that they are entitled to make representations and in so doing to make out a case why the impugned decisions (both for those who choose to make representations and for ZEP holders generally) should not be applied or should be applied differently.
180. Given the extensive public process implemented to seek comment from every affected ZEP holder and from civil society organisations representing the interests of ZEP holders, there is no basis on which the impugned decisions

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fall to be challenged for lack of procedural fairness, either in terms of PAJA or on the basis of the principle of legality.

181. In summary, the contention that there was a failure to conduct a fair public participation process and that this renders the impugned decisions susceptible to challenge does not bear scrutiny.

Limitation of Constitutional Rights

182. HSF contends that the impugned decisions constitute unjustifiable infringements of the right to dignity (and related rights) as well as the rights of children, and that these infringements are not reasonable and justifiable as contemplated by s 36 of the Constitution.
183. The rights challenges in effect amount to a claim by HSF that ZEP holders are entitled to a permanent exemption, as explained above.

Dignity and related rights

184. The dignity and related rights challenge advanced by HSF is unclear. HSF appears to contend that:
- 184.1. The impugned decisions will strip the ZEP holders of the right to a life of human dignity, which encompasses the enjoyment of employment opportunities, access to health, educational and other facilities, being protected from deportation and thus from a possible violation of the right to freedom and security of the person, and communing in ordinary human intercourse without undue state interference;

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- 184.2. ZEPs make a life of dignity possible for ZEP holders, and the purported decision to terminate ZEPs on 31 December 2022 will strip holders of a life of dignity, as they will be rendered undocumented;
- 184.3. The impugned decisions strip ZEP holders of the right to a meaningful family life; and
- 184.4. Extending the ZEPs for a period of 12 months purportedly deprives holders of the agency to make life choices, because the extension period does not afford them due warning of a decision which allegedly has life-altering consequences.
185. It bears mention that there is no basis laid by HSF for the allegedly dire consequences for ZEP holders in the event that a decision is taken not to grant any further blanket exemptions to ZEP holders. I repeat that no such decision has in any event been taken. ZEP holders have not been denied “*due warning*” of any decision. Quite the opposite. The 12-month extension was granted precisely for the purpose of allowing ZEP holders to make representations on the impugned decisions.
186. On this basis alone, the dignity challenge falls to be dismissed.
187. However, if this Court were to find that decisions were taken that all ZEPs were to be terminated and not renewed (which is denied), or if it were to find that the 12-month extension period was inadequate (which is also denied) I respond as follows.

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188. The exemption regime for qualifying Zimbabwean citizens was never meant to be permanent. This was made clear at all relevant times to all who applied for DZPs, ZSPs and ZEPs.
189. 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.
190. It stands to reason that the termination of an exemption regime which was always temporary in nature does not implicate the right to dignity of the beneficiaries of that temporary regime simply because the regime has come to an end.
191. It does not lie in the mouth of the beneficiaries of a temporary exemption regime to accept the benefits of the temporary regime and then to claim when the regime comes to an end that the temporary nature thereof violates their rights.
192. If the dignity challenge were to succeed it would in effect mean that no decision could be taken that would have the effect of terminating the exemption regime. 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 the claim that a decision to terminate ZEPs will strip ZEP holders of dignity by rendering them undocumented. It follows that if this argument is accepted, a

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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.

193. HSF claims that this is not what it seeks. But this is the necessary implication of a challenge based on the contention that the termination of the temporary regime will violate the rights of ZEP holders to a life of human dignity by depriving them of enjoyment of the rights and privileges afforded to them by the ZEP to build a life in South Africa over the past decade.

194. I respectfully say 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.

195. Those ZEP holders who have a well-founded fear of being persecuted by reason of their race, gender, tribe, religion, nationality, political opinion or membership of a particular social group and who are unable or unwilling to avail themselves of the protection of Zimbabwe, are entitled to apply for asylum in terms of the Refugees Act. They will not be rendered undocumented.

196. Those who are not asylum seekers are not entitled to rights beyond those afforded to other foreigners in South Africa. Such persons may remain in the country if they qualify for one of the temporary visas or permanent residence permits provided for in the Immigration Act. There is no breach of the dignity

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right in requiring ZEP holders who are not able to make out a case for the extension of their individual ZEPs and who do not qualify for asylum seeker status, to comply with the rules that apply to all other foreigners in South Africa, solely because they were granted a temporary exemption based on the circumstances in Zimbabwe more than a decade ago, which circumstances have materially changed.

197. Further, the alleged decision not to extend the ZEP past 31 December 2022 (which is not conceded) does not mean that ZEP holders will face deportation. The decision to deport is a separate decision that will have to be taken by the Department in due course based on the circumstances of each individual whose deportation is being considered. Any such decision may be challenged by someone adversely affected by the decision.
198. The right of access to health, educational and other facilities extends 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.
199. 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 dignity, the results would be far reaching and would

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undermine the very purpose of the statutory immigration regime in South Africa.

200. By way of example, if the holder of a 5 year general work visa has, during the subsistence of their visa, accessed medical care in South Africa that is unavailable in their home country, they would be entitled to demand that their work visa be extended (irrespective of any entitlement to such extension) simply because the termination of their visa would result in a loss of access to medical care which would, in turn, amount to an unjustified breach of their right to dignity. This only has to be stated to be rejected.
201. 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. To the extent that the impugned decisions might mean that certain ZEP holders will not lawfully be entitled to work within the Republic, they would be in the same position as every other foreigner within the Republic who does not have authorisation to work.
202. 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.
203. HSF contends that the purported 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.

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204. Those ZEP holders who:

204.1. Apply for and obtain visas will be entitled to remain in the country in terms of those visas;

204.2. Apply for and obtain waivers will be entitled to remain in the country on the basis of the waivers granted to them; and

204.3. Who make representations and whose representations result in the extension of their ZEPs will be entitled to remain in the country on the basis of their extended ZEPs.

205. Those who are not able to access any of these avenues will have to leave the country. 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 will not be required to leave the country and 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.

206. HSF contends that the right to dignity is infringed because no advance warning was given of the intention of the Minister to discontinue the ZEPs. This too is incorrect. When the ZEPs were issued in 2017, it was made clear that the ZEPs would terminate on 31 December 2021.

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207. In this regard it bears mention that HSF and the intervening party, CORMSA, have delivered only four affidavits each from ZEP holders who contend that the impugned decisions will adversely affect them, while the Zimbabwe Immigration Federation has delivered a total of eight purported affidavits, from ZEP holders who contend that the impugned decisions will adversely affect them.
208. On the facts before this Court, it must be accepted that given the wide publicity that this application, the related applications and the impugned decisions have received, there can be no claim by holders of ZEPs that their dignity rights have been infringed, where only 16 out of approximately 178 000 affected persons have seen fit to deliver affidavits in the three applications before this Court and only 6 000 have made representations.
209. For these reasons I deny that the impugned decisions have breached the right to dignity of ZEP holders.
210. In the alternative and only to the extent that the Court finds that the impugned decisions limit the dignity rights of ZEP holders, I submit that any such limitation is reasonable and justifiable as addressed below.

Rights of the Child

211. HSF contends that "*allowing the ZEP to terminate*" amounts to a breach of several principles underpinning the best interests of children as contemplated by s 28 of the Constitution.

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212. As an example, HSF relies on the case, of one LM whose redacted affidavit has been filed. LM contends that he and his wife are ZEP holders and that they have two children born in South Africa. He further contends that they will not qualify for any visa in terms of the Immigration Act.
213. It is telling that LM does not state that he or his wife have made representations to the Minister seeking an extension of their permits based on their personal circumstances and the alleged impact of the impugned decisions on their children. LM does not state that either he or his wife have sought to apply for any visas available in terms of the Immigration Act or that they have made applications for their school-going children to obtain study visas.
214. While LM contends that he was an asylum seeker, at the same time he concedes that he has repeatedly returned to Zimbabwe over a number of years. These contentions cannot both be true. A genuine asylum seeker cannot avail themselves of the protection of their home country. LM and his family are economic migrants who were granted a temporary right to remain in South Africa.
215. It is respectfully submitted that LM's case does not demonstrate that the impugned decisions amount to a breach of the rights in s28 of the Constitution.

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216. HSF contends that the alleged decision to terminate the ZEPs violates four principles pertaining to the rights of the child:

216.1. First, it is not in the best interests of children to be undocumented for extended periods or separated from their parents and siblings, which HSF contends is likely to occur given the purported alleged legal and factual barriers.

216.1.1. In response I say that LM and his wife have chosen not to make representations or to apply for visas on behalf of themselves or their minor children. It is, consequently, likely that they will become undocumented on 31 December 2022. However, if they have a basis on which to seek an extension of their ZEPs, it is incumbent on them to make representations to the Minister. In these circumstances, there is no breach of their children's s 28 rights.

216.1.2. There is no risk that children whose parents are ZEP holders whose permits will come to an end 31 December 2022, will be separated from their parents 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.

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216.1.3. 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.

216.2. Second, HSF contends that the termination of all ZEP's without regard to the individual circumstances of permit holders violates the principle that there should be individualised decision-making in all matters concerning children.

216.2.1. As I have indicated, each ZEP holder is entitled to make representations pertaining to their particular situation. If they raise issues pertaining to their children in those submissions, these will be considered on a case-by-case basis. This is precisely the individualised decision-making that HSF contends for.

216.2.2. 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.

216.3. Third, HSF contends that the impugned decisions violate the principle that children must be seen as individuals with their own inherent

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dignity and rights, not as mere appendages of their parents or caregivers.

216.3.1. HSF persists in failing to acknowledge that each ZEP holder is entitled to make representations based on their personal circumstances and to request that their ZEP be extended.

216.3.2. 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 based on their children's particular circumstances. Those children who are mature enough to make representations on their own are free to do so. This also deals with the fourth complaint raised by HSF that children are not being heard in respect of decisions which affect them.

216.3.3. HSF puts up children needing to remain with their parents as a basis for seeking to challenge the impugned decisions. Conversely, it also relies on children requiring to be treated independently from their parents as a basis for its challenge.

216.3.4. If ZEP holders have children who are South African citizens or permanent residents, they can apply for permanent residence based on the status of their children.

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216.3.5. 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.

217. Consequently, it is denied that s 28 of the Constitution is breached by the impugned decisions.

Section 36 Analysis

218. To the extent that it is found that the impugned decisions breach the right to dignity or the rights of the child, I submit that the impugned decisions constitute a reasonable and justifiable limitation on such rights in an open and democratic society based on human dignity, equality and freedom.

219. HSF proceeds from the incorrect premise that the exemption regime has been terminated alternatively will be terminated on 31 December 2022.

220. The exemption regime has not materially changed, save that the last extension was granted for a period of 1 year as opposed to 3 years, with further extensions being available based on the individual circumstances of ZEP holders. I submit that in light of the material change in the conditions in Zimbabwe from 2009 to date, the changes to the exemption regime to allow for the extension of ZEPs for a 12-month period with the possibility of further extensions based on individual circumstances constitute a reasonable and justifiable limitation on the rights of ZEP holders.

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221. It is a reasonable and justifiable limitation on the rights of foreign persons in South Africa to place temporal 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 permanent residence. 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.

222. HSF appears to accept that ZEP holders are not entitled to demand a permanent exemption, while at the same time contending that the extension of the exemption regime "*demonstrates that these exemptions are anything but temporary*". The permanent exemption regime that HSF seeks to impose is not in the public interest, as it undermines the integrity of the immigration regime as explained above. Nor is it consistent with the terms of the exemption regimes that have been in place since 2009.

223. Much is made of the fact that the Minister has allegedly not explained how it could be that the special circumstances in Zimbabwe that warranted the decision to implement the exemption regime in 2009 have materially changed. However, the evidence put up by HSF undermines its contention that conditions in Zimbabwe have not materially changed since the implementation of the exemption regime.

223.1. As appears from Annexure **FA16** to the founding affidavit (the press release in respect of the Executive Board of the International Monetary Fund ('IMF') Article IV Consultation with Zimbabwe on

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21 March 2022), Zimbabwe's projected GDP growth for 2022 and 2023 is 3.5% and 3.0% respectively.

- 223.2. The IMF concluded that real GDP had risen by 6.3% in 2021, reflecting a bumper maize harvest, strong pickup in mining, and buoyant construction. A tighter policy stance since mid-2020 (relative to 2019) contributed to lowering inflation to 60.7% (year-on-year) at end 2021. Fiscal policy was tightened in 2020-2021, reflecting increased revenues and lowered spending. The current account balance turned into a surplus during 2019-2021, reflecting favourable metals' prices, lower imports, and a surge in remittances. The output recovery that resumed in 2021 is expected to continue, albeit at a slower pace, with growth projected at about 3.5% in 2022 and 3% over the medium term in line with Zimbabwe's growth potential.
224. According to the World Bank, Zimbabwe's GDP is estimated to have grown by 5.8% percent in 2021 after contracting by 6.2 % in 2020. Disinflation policies were effective in bringing down inflation in 2021. Inflation slowed from 838% in July 2020 to 60.7% in December 2021. Poverty levels decreased, reflecting the bumper maize harvest of the 2021 season. There was a marked improvement in food security, with the share of population in severe or moderate food insecurity falling from 61% to 38% between March 2021 and November 2021. Poverty levels are expected to further decline in 2022, albeit marginally. A copy of the World Bank report is attached marked "AA9".

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225. I submit 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.
226. In contrast, South Africa's National Treasury has projected a growth in GDP in South Africa at an average 1.8% for the next three years, I attach an extract of the 2022 Budget Review from National Treasury demonstrating the foregoing, marked "**AA10**".
227. According the World Bank, after the pandemic-induced contraction of 6.4% in 2020, South Africa's economy started to recover in 2021, with GDP growth reaching 4.9%. However, the recovery has been job-less thus far with less people employed at the end of 2021 compared with the quarter before the pandemic struck. The pandemic shock has broadly weighed on social outcomes, with poverty rates, based on the poverty line for upper-middle income countries, estimated to have risen to levels of more than a decade ago. A copy of the World Bank in South Africa Overview is attached marked "**AA11**".
228. The World Bank stated that the South African economy was already in a weak position when it entered the pandemic after a decade of low growth. In 2019, the economy grew by 0.1% partially caused by the resurgence of load - shedding associated with operational and financial difficulties at Eskom. From 2021, the recovery is expected to continue in 2022, with GDP growth expected at 2.1% and to average 1.7% over the medium term. Longstanding structural

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constraints, such as electricity shortages, continue to be binding. The percentage of the population below the upper-middle-income-country poverty line fell from 68% to 56% between 2005 and 2010 but has since trended upwards to 57% in 2015 and is projected to have reached 60% in 2020. Structural challenges and weak growth have undermined progress in reducing poverty, which has been exacerbated by the COVID-19 pandemic. The achievement of progress in household welfare is severely constrained by rising unemployment, which reached an unprecedented 35.3% in the fourth quarter of 2021. The unemployment rate is highest among youths aged between 15 and 24, at around 66.5%.

229. It is evident that not only has the economic situation in Zimbabwe improved markedly since the crisis in 2009 which prompted in part the decision to implement the exemption regime, but the economic situation in South Africa has markedly declined. Consequently, the changes effected to the exemption regime constitute a reasonable and justifiable limitation on the rights of ZEP holders. Further, HSF's contention that the "*conditions in Zimbabwe have not meaningfully improved*" is misplaced.

230. It bears mention that there are currently some 178 000 ZEP holders, which represents some 8.4% of the undocumented Zimbabwean nationals within the Republic. Further, as explained above, only 17% of DZP applicants were persons who had previously held asylum seeker permits. It is clear that the introduction of the exemption regime did not alleviate the pressure on the asylum system and consequently there is no basis to contend that the

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changes effected to the exemption regime will significantly increase pressure on the asylum system.

231. In any event, there have been significant changes in the administration of the asylum system since the activation in April 2021 of an online platform for renewal of refugee status and asylum seeker permits. I point out that as of 8 September 2021 the Department had extended 93 518 asylum seeker permit and refugee status documents through the online platform (24 333 refugee status permits and 69 185 asylum seeker permits).
232. 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.
233. Given the minimal 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.
234. The Covid-19 pandemic had unprecedented impacts on Home Affairs services. At the beginning of the pandemic and during the subsequent lockdowns, certain Home Affairs services were suspended in order to reduce the number of people attending at Home Affairs offices. Further, in terms of

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the applicable public service rules at the time, the Department was required to ensure that only one third of the staff were on site at any one time.

235. Covid-19 also put significant pressure on certain Home Affairs systems, in particular, death registrations and the issuing of death certificates.
236. The Department implemented several temporary measures such as longer opening hours for the issuing of death certificates only. Health facilities were encouraged to register all births and deaths at the institutions where the births or deaths occurred. Mobile units were deployed to assist with issuing of death certificates where Home Affairs offices were closed.
237. The Department was forced to temporarily suspend certain activities and services for applicants for Smart ID Cards and passports, and marriage services were suspended for several months.
238. As the effects of the pandemic eased, affected services were incrementally resumed from September 2021.
239. The Department's budget was cut by R562 million in the 2020/2021 Special Adjustment Budget and by a further R301 million during the Medium-Term Expenditure Framework. The base line was cut by R969 million, the bulk of which was for Compensation of Employees (R671 million). The Compensation of Employees ('COE') ceiling for 2021/22 was set at R3,4 billion, which is insufficient to

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cover the existing staff complement. The Department was thus required to prioritise its budget, as it was unable to employ more staff members in immigration services.

240. In light of the increased demand for civic services for South African citizens, and various budgetary cuts, a range of operational decisions had to be made as to the best allocation of resource, financial and otherwise, so as to best address the Department's statutory and constitutional obligations. The decision to prioritise services to citizens was rational and reasonable and it constitutes a reasonable and justifiable limitation on the rights of ZEP holders.

241. 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.

242. The calculations relied on by HSF for the contention that the ZEP "*has paid for itself*" are misplaced. The fees charged for ZEPs or indeed any other visa are not solely revenue-generating. The Department utilises the services of VFS to process all such applications. VFS' services come at a cost. VFS

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does not process the applications but merely provides administrative services. Each visa or permit application must be adjudicated by the Department, a process which requires extensive staff and other resources, all of which come at a cost.

243. The new case-by-case approach to applications for extensions of ZEPs has proven effective from a budgetary point of view, as is demonstrated by the fact that some 6 months after the period for applications and representations opened some 10 000 ZEP holders have sought to regularise their status. I would point out that there has not been a spike in asylum applications from Zimbabwean nationals in the past month.

244. HSF misconstrues the Minister's contentions as regards the unemployment rate. The Minister in his press statement did not state that ZEPs were a cause of unemployment in South Africa, nor did he state that the purported termination of ZEPs will reduce unemployment in South Africa.

245. I quote below the sole reference in the Minister's statement to South Africa's unemployment rate:

"According to Statistics South Africa ("Stats SA") Quarterly Labour Force (QLFS) quarter 2 of 2021, South Africa's unemployment rate increased by 1,8% bringing the overall rate to 34%. This is the largest recorded since the start of the QLFS in 2008."

246. The exemption regime allowed for temporary permits to be granted to Zimbabweans based on the unprecedented economic conditions in that

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country during 2008/2009 and the impact that had on South Africa. As a consequence, the ZEP (and its predecessors) allowed holders, *inter alia*, to conduct work, study or operate a business in South Africa. In the nature of things, the majority of ZEPs enable the holders to conduct work or to operate a business.

247. In these circumstances, where South Africa is facing an unemployment rate of 34% with youth unemployment at 66.5%, while Zimbabwe's unemployment rate is around 5.2%, the decision to consider further extensions of ZEPs on a case-by-case basis is both rational and reasonable and constitutes a reasonable and justifiable limitation on the rights of ZEP holders. ZEP holders are in precisely the same position as any other foreigner with a temporary right to work in the country. At the end of the period of validity of their work visas, an assessment is made on a case-by-case basis as to whether it would be lawful and appropriate to grant a further extension of the right to work.

248. I deny that the discontinuance of the ZEP programme was influenced by a xenophobic attitude within the Department. The fact that members of the public have expressed xenophobic attitudes on social media is certainly regrettable but in no way reflects the Department's position.

249. I take issue with HSF's contention that the Minister's purported silence "*comes close to an endorsement*" of xenophobic statements and "*threatens to reinforce and entrench xenophobic attitudes toward Zimbabwean nationals*". These contentions have no basis in fact. They are scurrilous and vexatious.

250. HSF contends that there are ample less restrictive means for the Department to achieve its stated objective, namely:

250.1. Prior notification of the Minister's intentions and fair warning. For the reasons explained above, this has been achieved.

250.2. A fair public consultation process. It cannot be said that that process, where each ZEP holder is specifically asked for comment, is procedurally unfair or irrational.

251. HSF contends that that there ought to be sound justification, requiring proper assessment of the conditions in Zimbabwe and the impact on ZEP holders.

251.1. First, the economic situation and conditions in Zimbabwe have improved since 2008/2009.

251.2. Second, if there are particular reasons why a specific ZEP holder cannot return to Zimbabwe, they may raise this in their representations and/or apply for asylum.

251.3. The complaint that ZEP holders have not been afforded a meaningful opportunity to regularise their status given the so-called backlogs within the Department is not understood. The ZEP holders have been given a meaningful opportunity extending over a year, to regularise their status and a special task team has been set up to deal with their applications.

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252. To the extent that it is found that there is a limitation of the rights of ZEP holders (which is denied), it is submitted that the limitation is justifiable, inasmuch as the least restrictive means has been adopted in achieving the Department's objectives.

The alleged failure to consider the impact on ZEP holders and their children

253. As I have explained, the ZEP holders were specifically called upon to make representations, which would include the impact of the decision, if any, on their children and families.

254. The fact that Minister's public statements do not reference the impact on ZEP holders and their children does not mean that these issues were not considered.

255. The question of the impact on children and families weighed heavily in the deliberations of the Department and the Minister. The purpose of calling for submissions was to obtain specific information from persons who would be affected so that the merits of each case could be considered.

256. I deny that relevant considerations were ignored.

Conditions in Zimbabwe

257. Based on HSF's own evidence and the publicly available evidence, as pointed out above the situation in Zimbabwe has improved since 2008/2009. In truth,

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HSF's complaint is that the situation in Zimbabwe has not improved to a level which is to its liking. That is not a sustainable ground of review.

258. In effect, HSF contends that ZEP holders are entitled to remain in the country indefinitely until the economic situation in Zimbabwe improves to an extent that HSF and the Court find acceptable.
259. Put differently, the relief sought would compel the Minister to grant further blanket exemptions to ZEP holders until the Court is satisfied that the Zimbabwean economy has recovered sufficiently for ZEP holders to return to their country of origin. Any such order would amount to a far-reaching breach of the separation of powers.
260. It falls to the Minister, in exercising his discretion to grant an exemption, to decide whether or not the circumstances in Zimbabwe have improved. I also indicated in my reasons that there was and is a need in Zimbabwe for its nationals to build a new and prosperous Zimbabwe. This is not addressed at all by HSF.
261. I point out that the influx of Zimbabwean nationals into the Republic occurred at a particular point in time, and was the result of profound political instability in Zimbabwe, and a rare hyperinflation crisis.
262. The fact that HSF may disagree with the Minister and I on this issue, is not a sustainable ground of review.

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The decision was otherwise unreasonable and irrational

263. HSF contends that the impugned decisions were irrational and/or unreasonable in five further respects:

263.1. The Minister failed to offer any explanation as to why he chose 12 months as opposed to three years;

263.2. The Minister took a decision without affording ZEP holders an opportunity to place their personal circumstances before him and without any investigation into the practicalities of migrating ZEP holders to permits and/or visas;

263.3. There is a disjuncture between the reasons provided and the impact that a limited 12-month extension will have, namely:

263.3.1. Although intended to address budgetary and capacity constraints, the refusal is poised to increase backlogs at the Department;

263.3.2. The decision will simply thrust ZEP holders back into an already overburdened system.

263.4. The impugned decisions are not rationally connected to the purpose of the Immigration Act, namely to promote a "*human rights-based culture of enforcement*". The stated purpose of the exemption regime was to provide Zimbabweans with rights to live and work in South

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Africa pending the improvement in the political and economic situation in Zimbabwe;

- 263.5. The impugned decisions are unreasonable in view of the purported barriers to obtaining a visa or permit. Extending the ZEP until 31 December 2022 is not reasonably capable of achieving its objective of alleviating burdens on the Department and affording ZEP holders sufficient time to regularise their status in the country.
264. As to the first ground, the fact that there were previous exemptions granted for three-year periods is not an indication that there is an automatic entitlement to another three-year renewal. It appears that HSF seeks to rely in part on a substantive legitimate expectation, which is not part of South African law.
265. In any event, the Minister has specifically called for representations concerning the 12-month extension period. The Minister was of the view that a 12-month period would be sufficient for affected persons to make representations. It is also not correct to state that I suggested a three-year period and the Minister departed from that suggestion. I suggested a three-year period, a 12-month period, or any other period that the Minister deemed appropriate. The decision as to the length of the extension rested with the Minister.
266. As to the second ground, I have addressed this aspect above. I do not do so again.

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267. As to the third ground, the fact that the Department's resources and systems are stretched does not render the impugned decisions unlawful. I point out that a special task team has been set up to deal with the potential applications. However, as pointed out above, in the 6-month period since the extension was granted and ZEP holders were invited to regularise their status, there has not been a deluge of applications for extensions or other visas.
268. As to the fourth ground, an approach which entitles each ZEP holder to make representations and apply for a visa or permit based on their specific circumstances is a human rights-based approach to enforcement.
269. I have addressed the alleged breaches of constitutional rights above. As to the contention that the purpose of the exemption was to provide Zimbabweans with a right to live and work until the economic and political situation in Zimbabwe improved, I have also addressed this above.
270. As to the fifth ground, I point out that whether the impugned decisions will achieve their purpose can only meaningfully be assessed once the interested parties have made the submissions called for.
271. I turn now to address the founding affidavit *ad seriatim*

THE FOUNDING AFFIDAVIT

Ad paragraphs 1 - 3

272. Save to state the all the allegations in the founding affidavit are not true and correct, the remainder of the content hereof is noted.

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Ad paragraphs 4 – 5.3

273. The contents of these paragraphs are noted.

Ad paragraphs 6 - 8

274. The contents hereof are denied for the reasons set out above. The ZEP was always temporary in nature and was not meant to provide ZEP holders with a way to remain in the country indefinitely. For the reasons explained above, I deny that there was any decision to terminate the ZEP.

Ad paragraph 9

275. The content hereof is denied for the reasons set out above.

Ad paragraph 10

276. I deny that the circumstances in Zimbabwe have not improved, I have addressed this issue above.

277. I deny that Zimbabwean nationals face the real risk of being left undocumented, or that they will be unable to obtain alternative visas in time, for the reasons addressed above.

Ad paragraphs 11 to 12

278. Save that HSF is not entitled to the relief it seeks and that the impugned decisions are not susceptible to review for the reasons addressed above, I note the contents of these paragraphs.

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Ad paragraphs 13 to 14

279. For the reasons addressed above, I deny that that HSF has correctly summarised the proper nature of this application.
280. Notwithstanding HSF's contentions, in truth it seeks an extension of the ZEP in perpetuity. Accordingly, I deny the content of these paragraphs.

Ad paragraph 15

281. I deny the content of this paragraph. HSF not only challenges the manner in which the Minister reached the impugned decisions, but also the underlying rationale of the decisions.

Ad paragraph 16

282. The content of this paragraph is denied for the reasons addressed above. I have explained the process that is being followed in respect of the extension of ZEPs, the engagement with affected persons, and the process for ZEP holders to regularise their stay in the country.

Ad paragraph 17 to 20

283. The contents of these paragraphs are noted.

Ad paragraph 21

284. Save to deny that the impugned decisions threaten the rights of thousands of vulnerable people, for the reasons already traversed, the content of this paragraph are noted.

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Ad paragraph 22 to 23

285. The contents of these paragraphs are noted.

Ad paragraph 24

286. Save to record that the State Attorney is not the attorney of record in this matter, the content of this paragraph is noted.

Ad paragraph 25 and 26

287. The contents of these paragraphs are not disputed to the extent that it accurately reflects that which is contained in s 31(2)(b) of the Immigration Act.

Ad paragraph 27

288. The content hereof is denied to the extent that it does not accord with what is set out above.

Ad paragraph 28

289. The content of this paragraph is noted.

Ad paragraphs 29 to 29.2

290. The contents hereof are not disputed insofar as it accurately records that which is contained in Annexure **FA1**.

Ad paragraph 30 to 30.2.4

291. The contents hereof are not disputed insofar as it accurately records that which is contained in Annexure **FA2**.

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292. In his statement, Minister Gigaba noted, *inter alia*, that there was by 2014 an improvement in Zimbabwe's economic and political condition, and the ZSP was a temporary bridge to the near future when all Zimbabweans would re-enter the mainstream immigration process in South Africa.

Ad paragraphs 30.3 to 30.3.2

293. The contents hereof are not disputed insofar as they accurately record what is contained in Annexure **FA3**.

Ad paragraph 30.4

294. The content of this paragraph is noted.

Ad paragraph 31

295. The content of this paragraph is noted.

Ad paragraphs 32 to 32.6

296. The contents hereof are not disputed insofar as they accurately record what is contained in Annexure **FA4**.

297. The allegation that the statement does not evidence an "*appreciation for the vulnerability of Zimbabweans*" is denied. This is an interpretation proffered by HSF.

298. Minister Gigaba did not say that Zimbabwe's recovery would be "*fraught*". He did state that even at that stage the circumstances in Zimbabwe had improved and that it would take time to recover.

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299. During August 2014 Minister Gigaba contemplated that the programme would terminate in three years, in December 2017.

300. It is telling that HSF makes no mention of Minister Gigaba's statement that the Department was aware that *"Zimbabwe will need this rich human capital to further advance its own development, but accept for the time being, that many DZP permit-holders would prefer to continue their stay in South Africa."*

Ad paragraph 33

301. The content of this paragraph is noted.

Ad paragraph 34 to 34.3

302. The contents hereof are not disputed insofar as they accurately record what is contained in Annexure **FA5**.

303. I also pause to point out that the statement concludes as follows:

"I trust that the ZEP will go a long way in assisting the Zimbabweans to rebuild their lives as they prepare, at work, in business and in educational institutions, for their final return to their sovereign state – Zimbabwe – in the near future."

Ad paragraph 34.3

304. The content hereof is not disputed insofar as it accurately records that which is contained in Annexure **FA6**.

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305. HSF has not attached the full 2017 White Paper on International Migration Policy. The full White Paper is attached marked "**AA12**".

306. It will be noted that the purpose of the ZEP was to address the fact that a large number of Zimbabweans were residing in the Republic unlawfully. While the ZEP may have assisted initially, it did not have the desired effect. National security is, at least partly, dependent upon knowing the identity and civil status of every person within a country. There remain by the estimates of the Department some 1,5million undocumented Zimbabwean persons within the Republic.

Ad paragraph 35

307. The content hereof is not disputed insofar as it accurately records that which is contained in Annexure **FA7**.

308. I refer to what I have stated in this regard above. I also point out that Minister Mkhize indicated that the program would, in effect, be coming to an end "*in the near future*".

Ad paragraphs 35.1 to 35.2

309. The contents hereof are denied for the reasons set out above.

310. The fact that Cabinet met a month before the ZEPs were initially set to expire, is not of any significance. The impugned decisions were taken by the Minister and not by Cabinet. It is however customary for the Minister to approach Cabinet for its views.

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Ad paragraph 36

311. The content hereof is denied, for the reasons set out above. There was no decision to terminate the ZEP.

Ad paragraph 36.1

312. Save to take issue with the implication that my submissions were made available "*for the first time*" in the answering affidavit in the African Amity matter, I note the content of this paragraph.

Ad paragraph 36.2

313. The content of this paragraph is noted.

Ad paragraph 36.3

314. Save to state that the Minister decided to grant a 12-month extension period, the remainder of the content hereof is denied, for the reasons set out above.

Ad paragraph 37

315. The content hereof is not disputed insofar as it accurately records that which is contained in Annexure **FA9**.
316. To the extent that HSF seeks to contend that the impugned decisions were taken by Cabinet and not the Minister, this is denied for the reasons already addressed.

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Ad paragraphs 38 and 39

317. The contents hereof are not disputed insofar as they accurately record what is contained in Annexures **FA10** and **FA11**.
318. The directive was withdrawn, as HSF notes in paragraph 39 of the founding affidavit.

Ad paragraph 40

319. The content hereof is not disputed insofar as it accurately records that which is contained in Annexure **FA12**.
320. HSF seeks to create the impression that the Department incorrectly claimed success. It is clear from the newspaper article attached as **FA12** that the litigation at that stage turned on urgency. There is no statement that the merits of the applications were considered or decided.

Ad paragraph 41

321. I have explained that the Minister has called for representations from ZEP holders.

Ad paragraph 42

322. The content hereof is not disputed insofar as it accurately records that which is contained in Annexure **FA13**.
323. The ZEP has been extended for a year to allow ZEP holders to regularise their status. ZEP holders have been called upon to make representations.

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Ad paragraph 43

324. The content hereof is not disputed insofar as it accurately records that which is contained in Annexure **FA14**.

325. I have explained the reason that the directive is headed Directive 1 of 2021 in the African Amity matter. The directive was issued in 2021 although it was to be gazetted in 2022.

Ad paragraphs 44 to 44.5

326. The contents hereof are not disputed insofar as they accurately record what is contained in Annexure **FA15**.

327. This paragraph does not record all the reasons as appear from my submission and the press statement.

Ad paragraphs 45 to 46

328. I deny the contents of these paragraphs, for the reasons set out above.

Ad paragraph 47

329. The content hereof is denied, for the reasons set out above.

330. The IMF and the World Bank do not hold the view that conditions in Zimbabwe remain dire. HSF's complaint is that circumstances have not improved to a level which it finds acceptable. This is not a ground of review.

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Ad paragraphs 48 to 50

331. The contents hereof are denied insofar as they do not accurately record what is contained in Annexures **FA16** and **FA17.1**.
332. These annexures do not support HSF's contention that the situation in Zimbabwe has not improved since 2009. HSF quotes only those aspects of these annexures relating to the 2019/2020 period and the adverse impacts of Covid-19 while avoiding mention of the marked improvements in the Zimbabwean economic situation in 2021 and projected for 2022 onwards.
333. I reiterate that the economic situation in Zimbabwe is not the same as that which prevailed when the ZEP (or its previous iterations) was first introduced.

Ad paragraphs 51 to 56

334. The contents hereof are not disputed insofar as they accurately record what is contained in Annexures **FA18** to **FA22**.
335. If any ZEP holders face genuine political persecution in the event that they were to return to Zimbabwe, they are entitled to apply for asylum. It is unclear, however, which ZEP holders would, in fact, face political persecution. HSF has only provided two supporting affidavits in this regard.

Ad paragraph 57

336. The content of this paragraph is noted.

Ad paragraphs 58 and 59

337. The contents hereof are denied, for the reasons addressed above.

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Ad paragraphs 60 to 68

338. The contents hereof are not disputed insofar as they accurately record the relevant provisions of the Immigration Act and the Regulations.
339. The contents hereof are further denied to the extent that they do not accord with what is set out above.
340. I deny the contention that the purported decision to terminate the ZEP is evidence that the Minister has prejudged any s 31(2)(b) applications which may serve before him. There is no factual basis for this assertion. In any event, there has been no decision to terminate the ZEP.

Ad paragraph 69

341. The content hereof is denied to the extent that it does not accord with that which is set out above.
342. It is unclear which practical obstacles are being referred to in this paragraph. To the extent that these obstacles are referred to in the paragraphs below, I address them as necessary.

Ad paragraph 70

343. The content hereof is denied, for the reasons set out above.
344. There is no requirement for a person applying for a visa, waiver or exemption to retain the service of a legal practitioner.

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Ad paragraph 71

345. The content hereof is denied.
346. The costs associated with visa applications apply to all persons applying for visas.
347. I point out that the schedule of fees annexed as **FA24** demonstrates that visa fees are no more costly than the R1090 fee that was previously charged for ZEP applications.

Ad paragraph 72

348. The content hereof is denied, for the reasons set out above.

Ad paragraph 73

349. This is a matter for legal argument. I do, however, point out that in the case referred to in this paragraph the applicant put up evidence of specific backlogs based on its own experience. HSF has placed no evidence before the Court of any backlogs. I refer to what I have stated in this regard above.

Ad paragraph 74

350. The content of this paragraph is noted.

Ad paragraphs 75 to 77

351. The contents hereof are not disputed insofar as they accurately record what is contained in Annexures **FA25**.

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352. These paragraphs demonstrate that if it becomes practically impossible to process visas timeously, there is nothing which precludes the Minister from granting further extensions to deal with backlogs.

Ad paragraph 78

353. The content hereof is denied, for the reasons set out above.

Ad paragraph 79

354. The content hereof is denied, for the reasons set out above.

355. It is unclear on what basis it is contended that the Minister was required to delineate what the Department would do to deal with the anticipated spike in applications, or indeed to provide exact details on the task team set up to deal with the applications.

356. As explained above, there has not been a surge of applicants in the 6-month period since the impugned decisions were announced.

Ad paragraph 80 and 81

357. The contents of these paragraphs are denied, for the reasons addressed above.

Ad paragraph 82 to 88

358. The contents hereof are not disputed insofar as they accurately record what is contained in Annexures **FA26** to **FA27**.

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359. HSF puts up no evidence of the purported strain on the asylum system. In the 6-month period since the impugned decisions were announced, there has not been a surge of asylum applications.

360. For the rest, the content hereof is denied, for the reasons addressed above.

Ad paragraphs 89 to 89.6

361. The contents hereof are denied, for the reasons addressed above.

362. I deny that the ZEP programme has been terminated. The alleged risks which ZEP holders may face are entirely speculative.

Ad paragraph 90

363. I address the supporting affidavits filed further below.

Ad paragraph 91

364. The content of this paragraph is noted. It is unclear whether or not the specific deponents were the subject of xenophobic attacks or intimidation.

Ad paragraphs 92 to 97: the supporting affidavit of GN

Ad paragraph 92

365. The content hereof is noted.

Ad paragraphs 93 and 94

366. I have no knowledge of the contents of these paragraphs and cannot admit same.

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Ad paragraphs 95 to 96

367. I have no knowledge of the contents of these paragraphs and cannot admit same.
368. I point out that GN does not state that she has made submissions to the Minister seeking an extension of her ZEP, or that she has applied for and been refused a visa. Her complaint that she will be forced to leave South Africa is entirely speculative. If she chooses not to take up the opportunities afforded to her to regularise her stay in the country, the consequences of that choice will follow.

Ad paragraph 97

369. I deny that the asylum system is "*very dysfunctional*", for the reasons already addressed.
370. I note the remainder of the content of this paragraph.

Ad paragraphs 98 to 101: the affidavit of EWS**Ad paragraphs 98 and 99**

371. Save to note EWS's contention that he is a DZP holder, I have no knowledge of the contents of these paragraphs and cannot admit same.

Ad paragraph 100

372. I point out that EWS does not state that he has made submissions to the Minister seeking an extension of his ZEP or that he has applied for and been refused a visa. His complaint that he will be forced to leave South Africa is

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entirely speculative. However, if he chooses not to take up the opportunities afforded to him to regularise his stay in the country, the consequences of that choice will follow.

Ad paragraph 101

373. The content of this paragraph is noted.

Ad paragraph 102 – 105: the affidavit of DJN

Ad paragraphs 102 to 103

374. Save to note DJN's contention that he was a DZP holder and subsequently became a ZSP holder, I have no knowledge of the contents of these paragraphs and cannot admit same.

Ad paragraph 104 and 105

375. I point out that DJN does not state that he has made submissions to the Minister seeking an extension of her ZEP or that he has applied for and been refused a visa. His complaint that he will be forced to leave South Africa is entirely speculative. However, if he chooses not to take up the opportunities afforded to him to regularise his stay in the country, the consequences of that choice will follow.

Ad paragraph 106 to 110: the affidavit of LM

Ad paragraph 106

376. I have no knowledge of the content of this paragraph and cannot admit same.

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Ad paragraph 107

377. Save to note LM's contention that he is a DZP holder and that he obtained an asylum seeker permit, I have no knowledge of the content of these paragraphs and cannot admit same.

Ad paragraph 108

378. I have no knowledge of the content of this paragraph and cannot admit same.

Ad paragraphs 109 to 111

379. I point out that LM does not state that he has made submissions to the Minister seeking an extension of his ZEP or that he has applied for and been refused a visa. His complaint that he will be forced to leave South Africa is entirely speculative. However, if he chooses not to take up the opportunities afforded to him to regularise his stay in the country, the consequences of that choice will follow.

Ad paragraph 112

380. For the reasons already dealt with, I deny that there is a decision to terminate the ZEP or to refuse any extensions beyond 31 December 2022.

Ad paragraph 112.1 to 113

381. The contents hereof constitute legal argument and will be addressed at the hearing.

Ad paragraph 114 to 132

382. The contents hereof are denied, for the reasons addressed above.

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383. I have explained in detail above why the impugned decisions are not procedurally unfair or procedurally irrational. Consequently, I deny any breach of ss 6(2)(c), 6(2)(f)(ii), 6(2)(e)(iii) and 6(2)(i) of PAJA or the principle of legality.

384. The remainder of the content hereof constitutes legal argument and will be addressed at the hearing.

Ad paragraphs 133 to 156

385. The contents hereof are denied, for the reasons addressed above.

386. I deny that the impugned decisions have breached any rights of ZEP holders, for the reasons already addressed. To the extent that it is found that the impugned decisions breach the right to dignity and/or the rights of the child, I contend that the impugned decisions constitute a reasonable and justifiable limitation on such rights in an open and democratic society based on human dignity, equality and freedom, for the reasons already addressed. Consequently, I deny any entitlement to relief in terms of s 172(1)(a) of the Constitution or s 6(2)(i) of PAJA or the principle of legality.

387. The remainder of the contents hereof constitute legal argument and will be addressed at the hearing.

Ad paragraphs 157 to 161

388. The contents hereof are denied for the reasons addressed above.

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389. I deny that the Minister failed to consider the impact of the impugned decisions on ZEP holders or their children, for the reasons already addressed.

390. For the reasons traversed, I deny that the impugned decisions fall to be set aside in terms of ss 6(2)(e)(iii), 6(2)(f)(ii), 6(2)(h) or 6(2)(i) of PAJA or the principle of legality.

391. The remainder of the contents hereof constitute legal argument and will be addressed at the hearing.

Ad paragraphs 161 – 167.3

392. The contents hereof are denied, for the reasons addressed above.

393. I deny HSF's contentions as regards the conditions in Zimbabwe, for the reasons addressed above.

394. I deny that the impugned decisions fall to be set aside in terms of ss 6(2)(e)(iii), 6(2)(f)(ii) or section 6(2)(h) of PAJA or the principle of legality.

395. The remainder of the contents hereof constitute legal argument and will be addressed at the hearing.

Ad paragraphs 168 to 174.4

396. The contents hereof are denied, for the reasons addressed above.

397. I deny that the impugned decisions are irrational or unreasonable, for the reasons addressed above. Consequently, I deny that the impugned decisions

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fall to be reviewed or set aside in terms of ss 6(2)(f)(ii), 6(2)(e)(iii), 6(2)(h) or 6(2)(i) of PAJA or the principle of legality.

398. The remainder of the contents hereof constitute legal argument and will be addressed at the hearing.

AD REMEDY

Ad paragraphs 175 to 180

399. For the reasons traversed, I deny that the impugned decisions are unconstitutional, unlawful or invalid. If this Court however does set the decision aside, I submit that it is appropriate for it to be remitted back for reconsideration.

400. I deny that HSF is entitled to the relief sought in the notice of motion and ask that the application be dismissed.

THE AFFIDAVIT OF GN

Ad paragraphs 1 to 4

401. Save to state that not all the allegations in the affidavit of GM are true and correct the remainder of the contents hereof are noted.

Ad paragraphs 5 and 6

402. Save to state that no decision has been taken to terminate the ZEP, as explained above, the remainder of the contents hereof are noted.

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Ad paragraphs 7 to 10

403. I have no knowledge of the contents of these paragraphs and cannot admit same.

Ad paragraphs 11 to 20

404. Save to note that LM applied for asylum, and was granted a DSP, ZSP and a ZEP, I have no knowledge of the contents of these paragraphs and cannot admit same.

Ad paragraphs 21 to 27

405. I point out that GN does not state that she has made submissions to the Minister seeking an extension of her ZEP or that she has applied for and been refused a visa. Her complaint that she will be forced to leave South Africa is entirely speculative. If she chooses not to take up the opportunities afforded to her to regularise her stay in the country, the consequences of that choice will follow.

THE AFFIDAVIT OF EWS**Ad paragraphs 1 to 4**

406. Save to state that not all the allegations in the affidavit of EWS are true and correct, the remainder of the contents hereof are noted.

Ad paragraphs 5 and 6

407. Save to state that no decision has been taken to terminate the ZEP as explained above, the remainder of the contents hereof are noted.

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Ad paragraphs 7 to 12

408. Save to note that EWS was granted a ZEP, I have no knowledge of the contents of these paragraphs and cannot admit same.
409. It appears from EWS's contentions in these paragraphs that he may qualify to apply for asylum. However, I note that he states that he has travelled back to Zimbabwe and has lived in Zimbabwe for a period after coming to South Africa.

Ad paragraphs 13 to 22.2.3

410. I note that EWS applied for and was granted a DSP, ZSP and a ZEP. I note too that EWS does not appear to have applied for asylum.
411. Save as aforesaid, I have no knowledge of the contents of these paragraphs and cannot admit same.

Ad paragraphs 23 to 35

412. I point out that EWN does not state that he has made submissions to the Minister seeking an extension of his ZEP or that he has applied for and been refused a visa. His complaint that he will be forced to leave South Africa is entirely speculative. If he chooses not to take up the opportunities afforded to him to regularise his stay in the country, the consequences of that choice will follow.
413. EWN has no knowledge of the circumstances of all other ZEP holders and cannot give evidence in this regard.

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THE AFFIDAVIT OF BJN**Ad paragraphs 1 to 4**

414. Save to state that not all the allegations in the affidavit of BJN are true and correct, the remainder of the contents hereof are noted.

Ad paragraphs 5 and 6

415. Save to state that no decision has been taken to terminate the ZEP as explained above, the remainder of the contents hereof are noted.

Ad paragraphs 7 to 11

416. Save to note that BJN applied for and was granted a DSP, ZSP and a ZEP, I have no knowledge of the contents of these paragraphs and cannot admit same.

Ad paragraphs 12 to 17

417. I point out that BJN does not state that he has made submissions to the Minister seeking an extension of her ZEP or that he has applied for and been refused a visa. His complaint that he will be forced to leave South Africa is entirely speculative. If he chooses not to take up the opportunities afforded to him to regularise his stay in the country, the consequences of that choice will follow.

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THE AFFIDAVIT OF LM**Ad paragraphs 1 to 4**

418. Save to state that not all the allegations in the affidavit of LM are true and correct, the remainder of the contents hereof are noted.

Ad paragraphs 5 and 6

419. Save to state that no decision has been taken to terminate the ZEP as explained above, the remainder of the contents hereof are noted.

Ad paragraphs 7 to 9.4

420. Save to note that LM and his wife applied for and were granted ZEPs, I have no knowledge of the contents of these paragraphs and cannot admit same.

Ad paragraphs 10 to 17

421. Save to note that LM applied for and was granted an asylum seeker permit and thereafter a DSP, ZSP and a ZEP, I have no knowledge of the contents of these paragraphs and cannot admit same.

Ad paragraphs 18 to 27

422. I point out that LM does not state that he or his wife have made submissions to the Minister seeking an extension of their ZEPs or that they have applied for and been refused visas. His complaint that they will be forced to leave South Africa is entirely speculative. If he and his wife choose not to take up the opportunities afforded to them to regularise their stay in the country, the consequences of that choice will follow.

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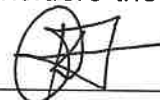
CONCLUSION

423. For the reasons addressed above, I submit that the application falls to be dismissed.



LIVHUWANI TOMMY MAKHODE

Thus signed and sworn to before me at Randfontein on this 15th day of **AUGUST 2022** the Deponent having acknowledged that he knows and understands the contents of this affidavit, that same are all true and correct, that he has no objection to taking the prescribed oath, and that he considers the prescribed oath to be binding on his conscience.



COMMISSIONER OF OATHS

THEMDO KHAMELE

Commissioner of Oaths

Ex Officio Practicing Attorney, RSA

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