IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32323/22

In the section 18 application between:

HELEN SUZMAN FOUNDATION	**First Applicant**
CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	**Second Applicant**

and

MINISTER OF HOME AFFAIRS	**First Respondent**
DIRECTOR GENERAL OF HOME AFFAIRS	**Second Respondent**
ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA	**Third Respondent**

THE HSF'S HEADS OF ARGUMENT: INTERIM ENFORCEMENT

CONTENTS

INTRODUCTION

1 These heads of argument address the interim enforcement of the temporary relief granted by this Court in paragraph 147.4 of its order in the *HSF / CORMSA* matter, pending the finalisation of all applications for leave to appeal and any subsequent appeals. The order reads as follows:

> *"147.4 Pending the conclusion of a fair process and the First Respondent's further decision within 12 months, it is directed that:*
>
> *147.4.1 existing ZEPs shall be deemed to remain valid for the next (12) twelve months;*
>
> *147.4.2 ZEP-holders will continue to enjoy the protections afforded by Immigration Directive 1 of 2021, namely that:*
>
> *1. No holder of the exemption may be arrested, ordered to depart or be detained for purposes of deportation or deported in terms of the section 34 of the Immigration Act for any reason related to him or her not having any valid exemption certificate (i. e permit label I sticker) in his or her passport. The holder of the exemption permit may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act.*
>
> *2. The holder of the exemption may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for the reason of not having valid permit indicated in his or her passport; and*
>
> *3. No holder of exemption should be required to produce –*
>
> *(a) A valid exemption certificate;*
>
> *(b) an authorisation letter to remain in the Republic contemplated in section 32(2) of the Immigration Act when making an application for any category of the visas, including temporary residence visa."*

2 This Court granted this temporary order with the express purpose "*to preserve the* status *quo"* and to ensure that ZEP-holders are protected pending a lawful decision by the Minister, notwithstanding the expiry of their permits on 31 December 2023.[1]

3 The Minister initially insisted that this temporary order is not subject to section 18(2) of the Superior Courts Act 10 of 2013,[2] which states that an interlocutory order is not suspended by an appeal. On that basis, he refused the HSF's request for an undertaking that he would abide by this temporary order pending the finalisation of his application for leave to appeal and any subsequent appeals.[3]

4 This left the HSF with no option but to bring an urgent application in terms of section 18 of the Superior Courts Act for interim enforcement of this Court's temporary order.

5 The respondents, including the Minister, now concede that this Court's temporary order is interlocutory in nature,[4] and that section 18(2) does apply.[5] Inexplicably, they nevertheless "*dispute that the order in the HSF judgment confers protections pending the conclusion of the appeal process*".[6] As at the time of filing these heads of argument, they further refuse to withdraw their opposition and to consent to an order confirming that this Court's temporary order remains in force and effect pending any appeals.

---

[1] Minister's Immigration Directive 2 of 2023. HSF's Founding Affidavit in support of its application for interim enforcement ("FA") Annexure "HSF4" p 066-131.
[2] Respondents' letter p 066-139 para 3.
[3] FA Annexure "HSF5" p 066-136 and Annexure "HSF6" p 066-138.
[4] Respondents' answering affidavit ("AA") p 066-159 para 27.
[5] AA p 066-168 para 76.
[6] AA p 066-178 para 127.

6 Given the respondents' contradictory stance, and refusal to withdraw their opposition, the HSF persists in seeking the relied set out in its notice of motion,[7] on two alternative bases:

6.1 First, if section 18(2) applies to this Court's temporary order, the declaratory orders sought in the notice of motion are both competent and necessary to resolve the contradictory positions adopted by the respondents and to dispel the frightening uncertainty which ZEP-holders now face.

6.2 Second, if the temporary order is not covered by section 18(2), these orders would also be competent, as interim enforcement in terms of section 18(3) of the Superior Courts Act.

7 The remainder of these heads of argument address the following topics:

7.1 First, we explain why declaratory orders under section 18(2) should be granted;

7.2 Second, we address the requirements for interim enforcement under section 18(3), which only apply if this Court finds that section 18(2) does not apply;

7.3 Third, we address the urgency of this application; and

7.4 Fourth, we demonstrate why the Minister's reckless and grossly unreasonable conduct warrants a personal costs order.

[7] HSF's notice of motion p 066-1 paras 2 and 3.

DECLARATORY RELIEF IN TERMS OF SECTION 18(2)

8 The HSF seeks interim enforcement of this Court's temporary order regardless of the outcome of the leave to appeal application. Given the inevitability of further petitions and applications for leave to appeal, it is both permissible and necessary to decide the question now.[8]

9 Section 18 of the Superior Courts Act provides, in relevant part:

> *"(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
>
> *(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."*

10 A clear distinction is drawn between interlocutory orders and final orders. While an application for leave to appeal or a pending appeal suspends the operation and effect of final orders (section 18(3)), interlocutory orders, which do not finally determine rights, are immune from these consequences (section 18(2)).

11 The critical phrase in section 18(2) is "*an interlocutory order not having the effect of a final judgment*". This is what Corbett JA labelled as "*pure*" interlocutory orders,

---

[8] See *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 36

that do not "*have a final and definitive effect*".[9] The Constitutional Court recently expanded on the meaning of these "pure" interlocutory orders in *UDM v Lebashe Investment Group (Pty) Ltd*,[10] in the context of debates over the appealability of an interim interdict:

> *"Whether an order is purely interlocutory in effect depends on the relevant circumstances and factors of a particular case. In* Zweni *it was held that for an interdictory order or relief to be appealable it must: (a) be final in effect and not susceptible to alteration by the court of first instance; (b) be definitive of the rights of the parties, in other words, it must grant definite and distinct relief; and (c) have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."*

12 In this light, the temporary order granted in paragraph 147.4 of the *HSF / CORMSA* judgment is plainly interlocutory in nature:

12.1 This Court was clear that this order is temporary, intended to preserve the status quo pending the Minister's further decision.

12.2 It does <u>not</u> finally determine the rights of ZEP holders, as that is left to the Minister, exercising his powers under the Immigration Act.

12.3 Critically, it would be open to this Court to amend or supplement that temporary order if the circumstances require it, in terms of its remedial powers under section 172(1)(b) of the Constitution. It is trite that interim relief and

---

[9] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 535G – 536A.
[10] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd And Others* 2023 (1) SA 353 (CC) at para 41.

other temporary orders are always open to reconsideration and revision by the Court granting these orders, on good cause shown.[11]

13 Again, the respondents have adopted a contradictory stance on the status of this Court's temporary order and whether section 18(2) applies. And even now that they accept that section 18(2) applies, they contend that they are not obliged to comply with this Court's temporary order.

14 In *Rail Commuters Action Group*,[12] the Constitutional Court emphasised the value of declaratory orders in circumstances such as these, where organs of state are confused as to their legal obligations and require correction. The Court held that:

> *"A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values."*[13]

15 Declaratory relief is therefore competent and appropriate in the circumstances, flowing from the well-established test laid down in *Cordiant Trading*[14] and applied by this Court in *Oakbay*,[15] requiring:

15.1 That the applicant has an interest in an existing, future or contingent right or obligation; and

---

[11] *Knox D'Arcy v Jamieson* 1996 (4) SA 348 (A) at 359 – 360; *Cipla Agrimed (Pty) Ltd V Merck Sharp Dohme Corporation and Others* 2018 (6) SA 440 (SCA) at para 45.
[12] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) (2005 (4) BCLR 301; [2004] ZACC 20) at para 107.
[13] Ibid.
[14] *Cordiant Trading CC v Daimler Chrysler Financial Services* (Pty) Ltd 2005 (6) SA 205 (SCA) at para 15 – 17.
[15] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others* 2018 (3) SA 515 (GP).

15.2 That the court exercise its discretion either to refuse or grant the order sought, having regard to range of considerations, including the existence or absence of a dispute; the utility of the declaratory relief and whether, if granted, it will settle the question in issue between the parties; and considerations of public policy, justice and convenience.[16]

16 Each of these requirements and considerations has been satisfied in this case:[17]

16.1 The HSF plainly has an existing and future right to the enforcement of the order it obtained from this Court;

16.2 There remains a live dispute between the parties as to whether this Court's temporary order continues to bind the respondents pending the conclusion of the appeals process;

16.3 The respondents shifting stances reflect that they, themselves, are confused as to the true status of the order and its binding effect;

16.4 The uncertainty over this question has severe consequences for ZEP-holders, who are required to make consequential decisions about their lives, careers, their families and their children and require certainty on the status and effect of this Court's order;

16.5 Such an order would have a practical effect, in putting an end to further confusion and uncertainty and preventing the respondents from continuing to

[16] Ibid at para 59.
[17] FA p 066-14 para 36 – 37; HSF's replying affidavit ("RA") p 066-366 paras 19 – 20.

pursue a contradictory and inconsistent approach in their engagement with ZEP-holders and the public;

16.6 It will also provide the respondents with necessary guidance on their obligations going forward.

17 There is therefore no basis for the respondents' contention that this Court somehow lacks the competence to make such an order. On the contrary, the power to grant declaratory relief flows directly from section 21(1)(c) of the Superior Courts Act[18] and this Court's just and equitable remedial discretion under section 172(1)(b) of the Constitution.

THE EXTENT OF THE INTERIM ORDER

18 The respondents complain that the HSF is trying to vary the scope of the interim order in an impermissible way.[19] We simply do not know what they mean. The HSF seeks to enforce the relief granted by this Court in paragraph 147.4 of its order, no more and no less.

REQUIREMENTS FOR INTERIM ENFORCEMENT IN TERMS OF SECTION 18(3)

19 Only if the temporary order is not covered by section 18(2) would it then be necessary for the Court to consider the requirements for interim enforcement under section 18(3).

---

[18] Section 21(c) provides that a court may '*in its discretion, enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*".

[19] AA p 066-165 and 066-169 paras 53 and 77.

20 The SCA has laid down a three-part test for such an order, requiring proof, on a balance of probabilities, that:[20]

20.1 Exceptional circumstances exist for interim enforcement;

20.2 There will be irreparable harm if the court refuses to grant this order; and

20.3 The respondents will not suffer irreparable harm if the order is granted.

21 The SCA has further held that the prospects of success on appeal, or the lack thereof, are an important consideration.[21]

Exceptional circumstances

22 The meaning of "*exceptional circumstances*" has been discussed in detail in previous judgments.[22] However, no detailed definitional analysis is needed here. The circumstances of this case are exceptional, on any reasonable definition of the phrase:

22.1 First, if this Court's temporary order is suspended pending appeal, 178,000 ZEP-holders and their children will be stripped of their rights on 31 December 2023.[23] The sheer number of people whose lives are directly affected by this Court's order is staggering.

---

[20] *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at para 16; *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 36; *University of the Free State v Afriforum and another* 2018 (3) SA 428 (SCA) at para 11.
[21] *University of the Free State v Afriforum and another* 2018 (3) SA 428 (SCA) at paras 14 – 15.
[22] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 37, citing *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & another* 2002 (6) SA 150 (C) at 156H-157C.
[23] This Court's judgment in *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 490 (*HSF*) p 000-2 para 1.

22.2 Second, the severity of the impact that a suspension of this Court's order would have on those lives is also exceptional. If ZEP-holders are arrested and deported, the lives and livelihoods they have nurtured and developed over many years will be decimated.[24] The irreparable harms they will suffer as a result are set out below.

22.3 Third, as this Court recognised, this is a "*case of considerable public significance*".[25] The broader public is affected by the ZEP programme, which was introduced to advance "*national security, prevent corruption, and protect vulnerable migrants from exploitation and harassment*".[26]

22.4 Fourth, the suspension of this Court's order would give effect to a decision that was profoundly and egregiously unlawful. This Court correctly concluded that the Minister has demonstrated a "*disdain for the value of public participation*".[27] He took a decision that would devastate thousands of lives without even considering that impact.[28]

22.5 Fifth, the Minister has taken a defiant and insensible stance against this Court's order. Despite accepting that the order is interim and enforceable pending any appeals, the respondents threatens deny that the order protects ZEP-holders pending the Minister's appeal.[29] This response is itself exceptional.

---

[24] FA p 066-14 para 40. The Minister denies this (AA p 066-170 paras 85-6) but as we explain below, even if some ZEP-holders avoid deportation, their lives will be made impossible without documentation.
[25] *HSF* p 000-2 para 2.
[26] *I*d p 000-15 para 32.
[27] Id p 000-4 para 6.
[28] Id p 000-38 paras 85 and 86.
[29] AA p 066-178 para 127.

23 In short, this case is exceptional, both in the scale and magnitude of its consequences and in the egregious unlawfulness at issue.

Irreparable harm to ZEP-holders and the public

24 The suspension of this Court's order pending the Minister's appeal will cause irreparable harm to ZEP-holders and the public. This Court has already made various findings of irreparable harm, which are of direct application here:

24.1 First, it will bring "*an end to the basis on which a multitude of . .. people have built their lives, homes, families and businesses in South Africa".*[30] If deported, ZEP-holders stand to *"lose their homes, businesses and jobs"* .[31] Families will be broken up.[32]

24.2 Second, it will have a lasting impact on children whose *"entire livelihoods and existence [has] been in South Africa". They* will be *"uprooted',* potentially in the middle of the academic year.[33] This profound dislocation will leave an indelible mark on children, who are especially impressionable.

24.3 Third, it will compromise *"national security, international relations, politics" as well as "economic and financial matters"*[34] and will scupper important policy objectives, including crime reduction, reducing the exploitation of vulnerable migrants and human trafficking and economic growth".[35]

---

[30] *HSF* p 000-2 para 2.
[31] *Magadzire and Another v Minister of Home Affairs and* Others [2023] ZAGPPHC 491 (*Magadzire*) at para 78.
[32] Id at para 72.
[33] Id at para 71.
[34] *HSF* p 000-4 para 8.
[35] Id p 000-14 paras 31-2.

24.4 Fourth, it will send a discouraging message to ZEP-holders and the public at large: that despite a Full Bench of the High Court striking down the Minister's unlawful decision, it will take effect anyway, simply because the Minister has the resources to file an ill-conceived appeal.[36] This gradual erosion in the perceived value of constitutional rights and public confidence in the judicial process is also a form of irreparable harm.

25 The respondents deny these harms[37] and suggest that ZEP-holders would not face any real risk of deportation if their permits were to expire at the end of December. Its submissions in this regard are disingenuous and divorced from reality.

25.1 Contrary to what the respondents seem to suggest, there is no realistic prospect of all ZEP-holders obtaining waivers and/or visas from the Minister before 31 December 2023.[38] The respondents admits that he has taken more than a year to issue waivers to just 6% of ZEP-holders.[39] Moreover, they never contested that there are legal and practical obstacles that prevent ZEP-holders from obtaining visas and permits timeously, including an application process that is crippled by backlogs and incapacity.[40]

25.2 In any event, a waiver from the Minister would not protect the rights of ZEP-holders. It is not a permit or visa and does not confer any right to remain. It merely waives some of the requirements for obtaining a visa.[41]

---

[36] FA p 066-18 para 50.
[37] FA p 066-173 para 100.
[38] AA p 066-170 para 83.
[39] Id. RA p 066-368 paras 23.3-4.
[40] HSF's FA in the review application from para 59ff p 001-43 and FA p 001-48 para 69. Bald and evasive denials in the respondents' AA p 010-101 – 102 paras 341 – 347.
[41] RA p 066-368 para 23.2.

25.3 The respondents' further suggestion that the irreparable harms identified above can be avoided as long as internal appeals and reviews under the Immigration Act forestall a ZEP-holders physical deportation is also incorrect.

25.4 Even if a ZEP-holder has the considerable resources and know-how required to navigate the administrative processes for contesting detention and deportation,[42] they will still suffer the devastating consequences of being undocumented in this country once their permits expire at the end of December. They will face the constant risk of arrest, detention and harassment and will lose access to basic services, such as healthcare and schooling for their children. They will be unable to gain employment or operate their businesses and will be relegated to a life of precarity and indignity.[43]

25.5 Finally, the respondents' suggestion that ZEP-holders should be content to wait for a further directive from the Minister, which he is "*not closed off from considering . . . should circumstances dictate*", is callous and out of touch with practical reality. Too much is at stake for ZEP-holders – lives, families, businesses and future plans – to expect them to remain suspended in uncertainty, clinging to vague assurances. They deserve to have certainty regarding their legal status pending the Minister's appeal.

26 The only acceptable and humane solution that will prevent the irreparable harms outlined above is an interim enforcement order clarifying that this Court's temporary order will remain operative pending the finalisation of the Minister's ill-fated appeal.

---

[42] Id para 24.4.
[43] RA para 24.2.

No irreparable harm to the respondents or the public

27 The temporary relief granted by this Court does no more and no less than to preserve the protections already provided by the Minister in his various directives.[44] It places no additional burdens on the Department, it does not call for the deployment of any further resources, nor does it require any fundamental change.[45]

28 The respondents' suggestion that this Court's temporary order would somehow create "*lawlessness*" is unsubstantiated and inflammatory. This court's order is confined to existing ZEP-holders, who have followed the rules, paid the necessary fees and presented proof of clean criminal records.[46] The relief does not extend to undocumented foreign nationals, nor does it restrain the respondents from upholding the law.[47]

29 Notably, the Minister has never sought to justify his decision to terminate the ZEP programme on the basis that it was necessary to protect South Africans or to achieve any particular policy objective. Indeed, as the Minister himself has accepts, it is the ZEP itself that advances important policy objectives.[48]

---

[44] FA p 066-19 para 54. The respondents deny this (AA p 066-179 paras 129-133) but essentially complain that because the protections in the Minister's various directives will be preserved, the Minister and Department will be unable to "enforce the immigration laws" against ZEP-holders. The respondents' apparent frustration stems from the fact that the protections in directives will indeed remain intact.
[45] FA p 066-19 para 55. Unsubstantiated denial AA p 066-179 paras 129-133. The respondents do not say any additional resources will be required.
[46] RA p 066-371 para 32.
[47] Id.
[48] *HSF* p 000-4 para 8. See also Annexure "FA28 " p 001-182 para 13.

URGENCY

30 The Superior Courts Act "*treats the enforceability of a judgment pending appeal processes to be inherently urgent*".[49]

31 The urgency of this matter stems from the severe consequences for ZEP-holders if this Court's temporary order is suspended by the appeal process, which are addressed above.

32 If this matter were heard in the ordinary course, the applicants and ZEP-holders would also be deprived of substantial redress.

32.1 First, unless this application is heard together with the application for leave to appeal, it is unlikely to be finalised before 31 December 2023. Even if a hearing could be secured before 31 December 2023, which is highly unlikely, there is the risk that any further automatic rights of appeal in terms of section 18(4) would drag out long after 31 December 2023. An automatic appeal would lied to the SCA, which would require several months for a hearing and determination.

32.2 Second, it is necessary to ensure that ZEP-holders have certainty and can make adequate plans for their lives as soon as possible. If they are to be stripped of their rights by 31 December 2023, they need to know this well in advance. Persistent uncertainty will undoubtedly impair their ability to make

[49] *Trendy Greenies (Pty) Ltd t/a Sorbet George v De Bruyn and Others* (2021) 42 ILJ 1771 (LC) at para 9.

consequential decisions about their lives.[50] This is itself a form of irreparable harm.[51]

33 Apart from this, it remains convenient for this application to be heard by this Court, which is steeped in the matter, rather than burdening another judge or set of judges who would be coming to this matter cold.

34 The respondents do not dispute these grounds of urgency but contend that this urgency was somehow self-created.

35 However, the applicants were entitled to trust that ZEP-holders would be protected by the combined effect of the temporary order in the *HSF / CORMSA* matter and the interim interdict in the *Magadzire* matter. The applicants were also entitled to trust that the Minister would respect and comply with these interim orders, especially in light of the plain meaning of section 18(2) of the Superior Courts Act.

36 The applicants were disabused of that trust on 29 August 2023, when the Ministers' attorneys denied that section 18(2) applied and flatly refused to provide any undertakings to comply with these orders pending the outcome of the appeals process.[52]

37 It is that shocking response which necessitated this urgent application.

---

[50] RA p 066-366 para 19.3.
[51] Id p 066-370 para 28.
[52] Letter p 066-138 para 3; p 066-142 para 4.

38 The respondents' late-in-the-day concession that section 18(2) does apply only serves to validates the HSF's initial assumption that there was no need for an interim enforcement application.[53]

39 But the respondents continue to "*dispute that the order in the HSF judgment confers protections pending the conclusion of the appeal process*".[54] This makes it necessary to persist with this application.

40 In these circumstances, any alleged prejudice to the respondents is entirely of their own making.

40.1 The respondents could have avoided this application altogether by accepting that this Court's orders are not suspended and providing the requested undertaking to respect this Court's orders.

40.2 Having conceded in their answering affidavit that this Court's order is interim in nature, and that section 18(2) does apply, the respondents could have withdrawn their opposition to this application and consented to an order in terms of prayers 1 to 3 of the notice of motion. Inexplicably, they have refused to do so.

[53] FA p 066-8 para 8.
[54] AA p 066-178 para 127.

PERSONAL COSTS

41 The Minister's obstinate refusal to respect and comply with this Court's orders and his disdainful treatment of this Court's judgments is a grave matter.

42 The Minister is under a constitutional obligation to both to respect orders and to protect the dignity and effectiveness of the Court's.[55] As we have noted in our heads of argument in the leave to appeal application, the SCA has repeatedly castigated the Minister's predecessors for breaching these constitutional obligations.[56]

43 The Minister has yet again ignored these warnings. This must have consequences.

44 The Constitutional Court has confirmed that where a public office-bearer has acted with recklessness, gross negligence, or in bad faith, personal costs may be ordered against him or her.[57] This applies both to the conduct of litigation and in the performance of constitutional duties. The Constitutional Court has described the relevant considerations as follow:[58]

> *[152] … [T]he source of a court's power to impose personal costs orders against public officials is the Constitution itself. The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court.*

---

[55] Section 1(c) and section 165(4) of the Constitution: "*Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*")
[56] *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) at paras 35 – 36; *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 (4) SA 125 (SCA) at para 72.
[57] *Black Sash Trust v Minister of Social Development (Corruption Watch (NPC) RF and South African Post Office Soc Limited Amicus Curiae)* 2018 (12) BCLR 1472 (CC) at para 9. Confirmed in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) (*PP v SARB*) at para 50, 154.
[58] *Public Protector* ibid at paras 152 – 160.

> *"[153] The purpose of a personal costs order against a public official is to vindicate the Constitution. These orders are not inconsistent with the Constitution; they are required for its protection because public officials who flout their constitutional obligations must be held to account. And when their defiance of their constitutional obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer. This Court has repeatedly affirmed the principle that a public official who acts in a representative capacity may be ordered to pay costs out of their own pockets in certain circumstances.*
>
> *[154] In Black Sash II, this Court held that the common law rules regarding the granting of personal costs orders are well grounded and buttressed by the Constitution. The traditional common law tests of bad faith and gross negligence must be infused by the Constitution. Froneman J said that the question whether the conduct of a public official justifies the imposition of liability for personal costs can be answered by having regard to institutional competence and constitutional obligations. He went on to explain:*
>
> > *"From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position. Where specific constitutional and statutory obligations exist the proper foundation for personal costs orders may lie in the vindication of the Constitution, but in most cases there will be an overlap."*
>
> *[155] … A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. The need to hold government to the pain and duty of proper court process is sourced in the Constitution itself. This is because the Constitution regulates all public power and public officials are required to act in accordance with the law and the Constitution.*
>
> *[156] … This is also consistent with section 165(4) of the Constitution which requires organs of State to assist and protect the courts in order to ensure that they are effective. … "* (Emphasis added)

45 Formal joinder of the office bearer in her personal capacity is not a prerequisite for granting such an order.[59] As the Constitutional Court has explained, "*it is sufficient*

[59] See, for example, *SARB v PP*, in which a personal costs order against the Public Protector was upheld. The Public Protector was not cited in her personal capacity.

that the party against whom this order is sought is informed that the order will be asked for and has an opportunity to advance reasons why the order should not be granted."[60] These requirements were satisfied here.

46 The Minister's conduct in this litigation is indefensible and warrants a personal costs order requiring him to pay the costs of this litigation from his own pocket.

46.1 This application was necessitated by the Minister's refusal to provide an undertaking that he would abide by this Court's order.

46.2 By denying that this matter is urgent, and opposing that it be heard together with his application for leave to appeal, the Minister has taken a stand against procedural expedience, indifferent to his duty as a responsible state litigant to conserve precious judicial resources.

46.3 The Minister's stance in this matter is premised on his refusal to acknowledge the irreparable harms that ZEP-holders and their children face if this Court's order is not executed.[61] The Minister again demonstrates the same disregard for the impact of his decisions on ZEP-holders and their children that was noted by this Court in its judgment.[62]

46.4 The Minister has not articulated a single cogent reason for why, despite conceding that section 18(2) applies to this Court's order, he continues to oppose this application. The Director General's contention that this application for interim enforcement, which is designed to give effect to the

[60] Ibid para 165.
[61] AA p 006-173 para 100.
[62] *HSF* p 000-38 para 85.

express terms of this Court's order, will somehow result in a variation of that order is illogical.[63]

46.5 By litigating without a lawful rationale for doing so, the Minister has acted irrationally and with gross negligence. The Minister's obstinance appears designed to frustrate the implementation of this Court's order. The public should not be made to pay the costs of such reckless, contradictory and ill-advised opposition to this application

46.6 The Minister has again revealed his disdain for participating meaningfully in these proceedings.[64] As at the date of filing these heads of argument, the Minister has filed only a *pro forma* confirmatory affidavit that provides no explanation for his conduct.

46.7 The SCA has repeatedly emphasised that where crucial evidence needs to be placed before court, a court is entitled to expect the deponent with personal knowledge to depose to the events in question directly rather than filing a confirmatory affidavit which merely confirms an affidavit's contents insofar as it relates to him or her. In *Drift Supersand (Pty) Ltd v Mogale City Local Municipality*, the SCA held as follows:[65]

> *"[T]he Municipality adopted the sloppy method of adducing evidence by way of a hearsay allegation made by Mr Mashitisho supported by a so-called "confirmatory affidavit" by Mr Van Wyk, who stated no more than that he had read the affidavit of Mr Mashitisho and "confirmed the contents thereof insofar as it relates to me and any of [my] activities". This might be an acceptable way of placing non-contentious or formal evidence before court, but <u>where, as here, the</u>*

[63] AA p 066-165 para 53.
[64] *HSF* p 000-39-43 paras 90, 91 and 95.
[65] *Drift Supersand (Pty) Limited v Mogale City Local Municipality* [2017] 4 All SA 624 (SCA) at para 31.

> *evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency."*[66]

46.8 In S*IU v Engineered Systems Solutions* [67], the SCA cited this dictum and added that, since the deponent, Mr du Toit, had not made an application to admit hearsay evidence, all the evidence of which he had no personal knowledge was **inadmissible hearsay evidence**.

46.9 This matter is on all fours with these cases. The Director General has no direct knowledge of one of the most important issues before the Court and, because the "*so-called 'confirmatory affidavit'*" of the Minister is "*sloppy*" and meaningless, there is in fact no evidence from the decision-maker before the Court. This means, among other things, that there is no evidence as to whether and how the Minister applied his mind in making the impugned decision.

46.10 Accordingly, the *'confirmatory affidavit'*" of the Minister does not cure the problem of hearsay that this Court identified in the application.

---

[66] See also *Mail and Guardian Media Ltd v Chipu N.O.* 2013 (6) SA 367 (CC) ("***Chipu***") at para 16 and *Watson NO v Ngonyama and Another* 2021 (5) SA 559 (SCA) at para 56.

[67] *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* 2022 (5) SA 416 (SCA) at paras 36-40

CONCLUSION

47 In conclusion, we submit that this application should be heard on an urgent basis and that the declaratory relief sought in the applicants' notice of motion should be granted, together with a personal costs order against the Minister.

CAROL STEINBERG SC
CHRIS MCCONNACHIE
ZIPHOZIHLE RAQOWA
MICHAELA KRITZINGER

Counsel for HSF
Chambers, Sandton
15 September 2023