IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32323/22

In the application for leave to appeal between:

MINISTER OF HOME AFFAIRS	First Applicant
DIRECTOR GENERAL OF HOME AFFAIRS	Second Applicant
ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA	Third Applicant
and	
HELEN SUZMAN FOUNDATION	First Respondent
CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	Second Respondent

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THE HSF'S HEADS OF ARGUMENT: LEAVE TO APPEAL

CONTENTS

INTRODUCTION

1 There are two sets of applications before this Court in the *HSF / CORMSA* matter:

1.1 An application for leave to appeal brought by the Minister of Home Affairs and the Director General and another by ATDFASA (collectively, “the respondents"); and

1.2 An urgent application brought by the Helen Suzman Foundation (HSF), in terms of section 18 of the Superior Courts Act 10 of 2013, for interim enforcement of the temporary relief granted by this Court in paragraph 147.4 of its order, pending the finalisation of appeal processes.

2 These heads of argument address the respondents’ applications for leave to appeal, demonstrating why they fall to be dismissed with costs.

3 Separate heads of argument will be filed in the HSF’s section 18 application, once pleadings have closed, to ensure that the two sets of applications may be heard together or in short succession.

4 The rights of 178,000 Zimbabwean Exemption Permit (ZEP) holders and their children are at stake in these applications, despite this Court’s best efforts to protect their rights.

5 In two separate judgments handed down on 28 June 2023, in the *HSF / CORMSA* matter and the parallel *Magadzire* matter, this Court granted both a temporary order

and an interim interdict "*to preserve the* status *quo"* and the rights of ZEP-holders and their children.

6 The HSF trusted that the Minister would respect these interim and temporary orders and the protective purpose for which they were granted. Instead, the Minister has expressed disdain for this Court's judgments[1] and has refused to provide any undertaking to comply with this Court's orders pending further appeal processes.[2]

7 The stark consequences of the Minister's position are that:

7.1 By 31 December 2023, 178,000 ZEP-holders, their family members and children, face the risk of being stripped of their existing rights, arrested, detained and deported, <u>despite</u> this Court's judgments and orders.

7.2 That consequence would follow <u>even if</u> this Court refuses leave to appeal. The Minister has publicly stated that he refuses to accept this Court's judgment and order, labelling it a "dangerous precedent", which makes further petitions to the SCA and the Constitutional Court inevitable.

7.3 That means that ZEP-holders would be deprived of their rights <u>even if</u> the SCA and the Constitutional Court ultimately dismiss the Minister's appeal, as any judgment from these courts would only be expected in a year or more.

[1] See press statement p 066-26 para 3: "*the two judgments … set a dangerous precedent*".
[2] See correspondence at p 066-136 – 142.

8 The HSF seeks to avert these consequences and to ensure that this Court's orders are respected, without further delay.

9 In what follows, we show that there is no merit to any of the respondents' grounds of appeal. Before doing so, we highlight several insurmountable obstacles facing the respondents.

THE TEST FOR GRANTING LEAVE TO APPEAL

10 Section 17(1) of the Superior Courts Act 10 of 2013 ("*the Superior Courts Act*") provides as follows:

> *"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
>
> *(a) (i) the appeal would have a reasonable prospect of success;*
> *or*
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."* (our emphasis)

11 It appears that the Minister relies on section 17(1)(a)(i) of the Superior Courts Act in applying for leave to appeal.

12 The Supreme Court of Appeal interpreted the test for leave to appeal in terms of section 17(1)(a)(i) as follows:[3]

> *"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success.* Section 17(1)(a) of the [Superior Courts Act] *makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.*
>
> *[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, it is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."* (our emphasis)

13 We submit that the Minister has not raised grounds of appeal that have a realistic chance of success on appeal.

THE FATAL OBSTACLES TO ANY APPEAL

14 The respondents face unalterable facts and settled legal principles which are entirely fatal to any prospective appeal.

15 First, the Minister failed to depose to any affidavit in the review proceedings. As this Court held, only the Minister, as the decision-maker, could give evidence as to what passed through his mind.[4] It was impermissible (and inadmissible) for another official, who was not the decision-maker, to speculate on these matters. The Supreme Court of Appeal (SCA) has repeatedly confirmed this point, most recently

[3] *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016).
[4] HSF / CORMSA Judgment p 000-39 paras 90 – 93, citing *Gerhardt v State President* 1989 (2) SA 499 (T).

in *Freedom Under Law v Judicial Services Commission*.[5] No amount of argument on appeal will erase the Minister' failure or this settled law.

16 Second, it was always common cause that the Minister made his decision to terminate the ZEP programme in September 2021 without any prior consultation with ZEP-holders, civil society, or the wider public.[6] Instead, the respondents relied on a call for representations issued exclusively to ZEP-holders after the Minister had already communicated his decision.[7]

17 Third, the Minister's counsel properly conceded that such after-the-fact consultations would be meaningless "*when an administrator has already made a decision and then contends that any participation process would have made no difference to the ultimate outcome*."[8] But that is precisely what the undisputed evidence showed: the Minister[9] and his own lawyers[10] told the world that his decision was final and not open to change.

18 Fourth, there was not a shred of evidence on record showing that the Minister applied his mind to the impact of his decision on ZEP-holders and their families, nor was there any evidence that he considered the impact of his decision on children's

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[5] See *Freedom Under Law v Judicial Service Commission and Another* [2023] ZASCA 103 (22 June 2023) at para 27.
[6] AA p 010-54 - 55 para 160. Each of the alleged invitations for representations relied upon by the Director General and Minister were issued in January 2022.
[7] AA p 010-58 para 173.
[8] Respondents Heads of Argument para 172 p 028-54.
[9] Supporting Affidavit from Scalabrini p 018-294 para 10; Annexure SCCT 1 p 018- 303 para 8.
[10] Annexure RA 7 p 018-152 – 153.

rights. This was in circumstances where the HSF invited the Minister to disclose all relevant documents showing his deliberations, including his assessment of these impacts.[11] When none were provided, the HSF issued a Rule 35(12) request to obtain these documents.[12] But no documents were ever forthcoming.[13] Yet again, no amount of argument on appeal can change the respondents' utter failure to provide evidence.

19 Fifth, this Court exercised its just and equitable remedial powers under section 172(1)(b) of the Constitution in granting temporary relief. Such powers involve the exercise of a "true discretion", which means that the remedy is immune from appellate interference unless a clear misdirection is established.[14] The respondents have failed to identify any misdirection, which is the end of the matter.

20 Finally, ATDFASA brought a counter-application to review and set aside the 2017 decision to initiate the ZEP programme, more than six years late and without any condonation application for the delay. The law is clear. Without a condonation application there was nothing to consider.

[11] FA p 001-28 para 20.
[12] RA 1 p 018-85 para 4.
[13] RA 2 p 018-89 para 8.
[14] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) at para 68.

21 In the face of these obstacles, nit-picking at parts of this Court's judgment does not establish any reasonable prospects of success on appeal. An appeal, after all, lies against the order and not against specific reasons set out in the judgment.[15]

22 In addition, there are no compelling reasons for granting leave to appeal. As the SCA has emphasised, the prospects of success remain a "*vitally important*" consideration in considering compelling reasons. The lack of any prospects is "*often decisive*".[16] Moreover, where a matter involves the application of settled law to the undisputed facts, as in this case, there can be no good reason to burden the SCA.

23 In addition to all of this, there is a further critical consideration: the Minister cannot simultaneously seek this Court's aid while disrespecting its judicial authority. The Minister's outright refusal to comply with this Court's interim and temporary orders ought to be the end of the application for leave to appeal.

24 In *SS v VV-S*,[17] the Constitutional Court dismissed an application for leave to appeal in similar circumstances, where the applicant was in breach of binding court orders. The Court emphasised that *"[t]he judicial authority vested in all courts, obliges courts to ensure that there is compliance with court orders to safeguard and enhance their integrity, efficiency, and effective functioning."*[18] It added that to do otherwise would–

[15] *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 714J-715E.
[16] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para 2.
[17] *SS v VV-S* 2018 (6) BCLR 671 (CC).
[18] Ibid para 18.

> *" dilute the potency of the judicial authority and it will send a chilling message to litigants that orders of court may well be ignored with no consequence. At the same time, it will signal to those who are the beneficiaries of such orders that their interests may be secondary and that the value and certainty that a court order brings counts for little."*[19]

25 The Constitutional Court further stressed that where court orders are designed to protect the rights of children, as in this case, disregard for those orders is a particularly egregious matter.[20]

26 In *Minister of Home Affairs v Somali Association of South Africa*,[21] the SCA echoed these sentiments:

> *"It is a most dangerous thing for a litigant, particularly a State department and senior officials in its employ, to wilfully ignore an order of court. After all there is an unqualified obligation on every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.*
>
> *…*
>
> *As this Court stressed in Gauteng Gambling Board & another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) para 52: '[o]ur present constitutional order is such that the State should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of constitutional rights.'"*

27 On these grounds alone, we submit that the applications for leave to appeal ought to be dismissed. While it is strictly unnecessary to engage with the respondents' grounds of appeal in any detail, we now turn to address those grounds. Our responses are grouped thematically.

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[19] Ibid at para 35.
[20] Ibid at paras 23 – 24.
[21] *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) at paras 35 – 36.

THE GROUNDS OF APPEAL

The application of PAJA

28 The respondents take issue with this Court's finding that the Minister's decision was administrative action, reviewable under PAJA.[22] But the respondents make no effort to engage with this Court's reasoning on this score.[23]

29 Moreover, the respondents fail to acknowledge that previous judgments,[24] including the judgment of the SCA in *De Saude*,[25] have accepted that the Minister's decisions under section 31(2)(b) of the Immigration Act are administrative action that are subject to review under PAJA.

30 In any event, all of this Court's findings on the reviewable defects in the Minister's decision fall squarely under the principle of legality. That means that even if another Court were to hold that PAJA does not apply, that would have no bearing on the outcome.

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[22] Minister's notice of application for leave to appeal ("**NoA**") p 064-6 para 15; see Minister's heads of argument ("**HoA**") p 067-12 para 25.
[23] HSF / CORMSA Judgment pp 000-23 to 000-24 paras 47 to 48.
[24] *Tima and Others v Minister of Home Affairs* (34392/2014) [2015] ZAGPPHC 763 (9 July 2015); *Kuhudzai and Another v Minister of Home Affairs* [2018] ZAWCHC 103 (24 August 2018).
[25] *Director-General of the Department of Home Affairs and Others v De Saude Attorneys and Another* [2019] 2 All SA 665 (SCA).

First ground: Procedural unfairness and irrationality

31 First, the respondents criticise this Court for allegedly not applying a 'fact-sensitive' approach to the question of procedural fairness and procedural rationality. While the respondents accept that there was no consultation process before the Minister made his decision, they persist in claiming that the limited after-the-event call for representations was somehow sufficient.[26] These criticisms are baseless.

32 This Court devoted more than 10 pages of its judgment to the relevant law and evidence on this after-the-fact consultation process, to which the respondents offer no meaningful response. In sum:

32.1 This Court set out the relevant law, which holds that consultations prior to decisions are the norm and that this fair process may only be departed from in exceptional cases.[27]

32.2 This Court further demonstrated, point-for-point, why the limited after-the-fact consultations were woefully unfair and procedurally irrational, finding, *inter alia*, that:[28]

32.2.1 The Minister had already made a final decision and told the world that it was not open to change, as reflected in his communications with the Scalabrini Centre and the letters sent to ZEP-holders.[29]

[26] Minister's HoA p 067-15.
[27] Ibid p 000-36 paras 82 – 84.
[28] HSF / CORMSA Judgment p 000-28-38 paras 59 – 84.
[29] Ibid p 000-32-33 paras 70 – 74.

32.2.2 The call for representations from ZEP-holders was meaningless, as it failed to provide any indication of the purpose of these representations or what was required of ZEP-holders.[30]

32.2.3 In support of this finding, we note that the respondents' affidavits provided no coherent account of what, exactly, their call for representations was attempting to elicit from ZEP holders. In one breath, it was suggested that ZEP-holders were asked to address the termination of the ZEP programme. In another, it was claimed that ZEP-holders were invited to apply for individual exemptions under section 31(2)(b).[31]

32.2.4 There was no genuine attempt made to consult with civil society organisations representing the interests of ZEP-holders, beyond letters sent to two organisations.

32.2.5 There was no call for comment from the general public whatsoever.

32.3 And, most damning of all, this Court correctly noted that throughout the respondents' affidavits, there was *"a notable disdain for the value of public participation."*[32]

[30] Ibid para 72.
[31] AA p 010-56 paras 162 – 163; AA p 010-22 para 54.
[32] HSF / CORMSA Judgment p 000-34 para 75.

33 While the respondents fail to address these findings, they criticise this Court for not considering approximately 6000 representations from ZEP-holders that were allegedly made and responded to.[33]

34 However, the respondents never provided these alleged 6000 representations, despite the HSF issuing repeated requests for these documents in terms Rule 35(12).[34]

35 The few hundred representations that were eventually provided to the HSF were properly considered by this Court.[35] This Court correctly held that they illustrate that the invitation to make representations was vague and not designed to elicit meaningful comment.[36]

36 As was explained in the HSF's supplementary affidavit, the "representations" largely consisted of desperate pleas for assistance in obtaining alternative visas and permits from bewildered ZEP-holders. Only a handful addressed the situation in Zimbabwe[37] and the personal circumstances of the individual ZEP-holders.[38]

37 These "representations" made clear that most ZEP-holders believed that they were only entitled to submit enquiries, not genuine representations on the Minister's

[33] Minister's NoA p 064-7 para 16.3.
[34] Notice in terms of Rule 35(12) pp 011-1 to 011-4.
[35] HSF / CORMSA Judgment 000-32 paras 70 – 71.
[36] HSF / CORMSA Judgment 000-33 para 72.
[37] See Bundle 2 p 75; Bundle 3 p 21; Bundle 5 p 65; Bundle 7 p 16
[38] See Bundle 2 p 53; Bundle 2 p 57; p 70; Bundle 3 p 78; Bundle 3 p 61; Bundle 3 p 54; Bundle 3 p 15; Bundle 4 p 3; Bundle 4 p 21; Bundle 5 p 28;

decision. And no meaningful response was provided to these "representations", nor was there any evidence that the Minister gave them any thought.

Second ground: Failure to consider the impact on ZEP-holders and their children

38 The respondents contend that this Court erred in concluding that the Minister failed to consider the impact of his decision on ZEP-holders, their families and children.[39] In support, the respondents argue that:

38.1 the first directive issued by the DHA somehow evidences that "both the Minister and the Director-General" considered the impact of the Minister's decision;[40] and

38.2 the fact that the Department Advisory Committee was set up in order to fast-track the ZEP-holders' applications and outside lawyers were appointed to advise the Minister on waiver applications demonstrates that the impact of the decision on ZEP holders was considered.[41]

39 Once again, we emphasise that there is no affidavit from the Minister in these proceedings. Therefore, this Court was correct in finding that "*there is simply no admissible evidence from the Minister on whether he took these considerations [of impact] into account and how*"[42].

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[39] Minister's NoA p 064-9 para 22.
[40] Minister's HoA p 067-17 para 43, Minister's NoA p 065-9 para 22.1.
[41] Minister's HoA p 067-17 para 44, Minister's NoA p 065-10 paras 22.2 and 22.3.
[42] HSF / CORMSA Judgment p 000-42 para 95.

40 This Court went on to set out additional facts which illustrate that the Minister could not, as a matter of fact, have considered the impact of his decision on ZEP holders.[43]

40.1 In its founding affidavit, the HSF expressly invited the respondents to attach to their answering affidavit all relevant documents and records which were relevant to the Minister's decision, in lieu of a Rule 53 record.[44]

40.2 No documents or information were forthcoming.

40.3 In the answering affidavit, the Director-General was content to make the bald allegation that *"the question of the impact on children and families weighed heavily in the deliberations of the Department and the Minister*", without any substantiation.[45] No details were provided as to what information was considered, by whom, and when.

40.4 To add to all of this, the HSF's Rule 35(12) notice afforded the respondents yet another opportunity to provide relevant evidence, as it called for any documents, including minutes, showing that the impact on ZEP holders, their children and their families was considered.[46] This was met with a blanket refusal.[47]

41 Thus, there is simply no evidence that the Minister applied his mind to this critical issue. And even if the Minister somehow gave it passing thought, there were no

[43] HSF / CORMSA Judgment p 000-42 paras 95.1 to 95.6.
[44] FA p 001-28 para 20.
[45] AA 010-86, para 255.
[46] RA 1 p 018-85 para 4.
[47] RA 2 p 018-89 para 8.

documents or information before him on which he could have formed a reasonable and rational assessment of the impact of his decision. The fact that the Minister failed to call for representations from affected ZEP-holders and civil society before taking a decision compounds the error.

42 Moreover, what is now passed off as evidence that the Minister considered the impact is no evidence at all. Hiring private attorneys to defend a decision, after it has already been made, is no substitute for rational, reasonable and humane decision-making.

Third ground: Unjustifiable limitation of rights

43 The respondents criticise this Court for allegedly failing to have regard to (1) the budgetary constraints, (2) the Minister's explanation that the conditions in Zimbabwe had improved, and (3) the fact that the exemption regime would overburden the asylum system.[48]

44 The respondents do not deny that the onus fell on the Minister to prove that the limitations of fundamental rights are reasonable and justifiable.[49]

45 Yet the respondents appear to suggest that this Court should simply have accepted their say-so, without any supporting evidence.

[48] Minister's NoA p 064-12 paras 30 - 30.2; Minister's HoA p 067-20 para 54.
[49] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 34.

46 This ignores the evidential burden in a section 36 justification analysis. This Court correctly relied on the Constitutional Court's judgment in *Teddy Bear Clinic*, which explained this burden as follows:

> *"[W]here a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law – usually the organ of state responsible for its administration – must put material regarding such considerations before the court. Furthermore, '[w]here the state fails to produce data and there are cogent objective factors pointing in the opposite direction the state will have failed to establish that the limitation is reasonable and justifiable'."*[50]

47 Moreover, in *NICRO*, the Constitutional Court emphasised that "*[w]here justification depends on factual material, the party relying on justification must establish the facts on which the justification depends".*[51]

48 In this light, it is unclear what more this Court could have done with the paltry evidence of budgetary constraints that the respondents presented. As this Court noted, the respondents were content to rely on "*unspecified budgetary constraints within the DHA*"[52] and in the answering affidavit "*the Director-General further [made] bold allegations that due to the impact of Covid-19 and increased demand for civic services for South African citizens and various budgetary cuts, a decision to prioritise services to citizens had to be made*"[53].

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[50] HSF / CORMS Judgment p 000-50 para 116. *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) at para 84.
[51] *NICRO* at para 36.
[52] HSF / CORMSA Judgment p 000-52 para 123.
[53] HSF / CORMSA Judgment p 000-52 para 123, see AA p 010-82 paras 234 - 240.

49 On the strength of *Rail Commuters*,[54] this Court correctly held the Director-General and Minister should have taken the Court into their confidence and placed the details of the precise character of the resource constraints before this Court, which they failed to do.[55]

50 In any event, the HSF demonstrated that, on the respondents' own evidence, the government had in fact profited from the ZEP programme and its predecessors. The Minister's press statement claimed that the total cost of exemption programmes to the state was over R188,7 million, between 2010 and 2020, suggesting that the Department could not afford to extend the programme. But the respondents' own evidence showed that the ZSP and ZEP-holders had paid approximately R366 million in application fees, more than double the alleged cost. These exemption programmes paid for themselves.[56]

51 There was also no admissible evidence before this Court that the Minister, as decision-maker, had properly applied his mind to the conditions in Zimbabwe. In any event, this Court dealt with the limited evidence presented by the respondents, noting that the only "*evidence of an alleged improvement that the Director-General can point to is a minor uptick in DGP between 2021 and 2022*"[57]. This Court went on to conclude that "*[a]part from these claims of improvements in the economy of Zimbabwe, no facts were placed before the court presenting clear and compelling*

[54] *Rail Commuters Action Group v Transnet Ltd t/ a Metrorail* 2005 (2) SA 359 (CC) para 88.
[55] HSF / CORMSA Judgment p 000-53 para 125.
[56] See tabulated estimations; RA p 018-50 para 109, 4
[57] HSF / CORMSA Judgment p 000-50 para 117.

evidence to support them. The respondents have failed to disclose any information or documents that the Minister consulted on the conditions in Zimbabwe before reaching his decision"[58].

52 Moreover, in considering systemic backlogs in the asylum system, this Court correctly took into account the Director-General's concessions that the asylum system is plagued by systemic backlogs and delays, and that there is no basis to contend that the changes effected to the exemption regime will significantly increase pressure on the asylum system.[59] If anything, the undisputed evidence demonstrated that the termination of the ZEP programme would exacerbate the backlogs.[60]

The just and equitable remedy

53 The respondents take issue with the temporary relief to protect the rights of ZEP-holders while the Minister conducts a fair process.[61] As we have already noted, no appeal court will interfere with this just and equitable remedy unless some clear misdirection is established. But the respondents fail to identify any misdirections.

54 The respondents wrongly characterise this temporary remedy as a substitution order, replacing the Minister's decision with a decision of the Court's own. They

[58] HSF / CORMSA Judgment p 000-51 para 119.
[59] HSF / CORMSA Judgment p 000-52 paras 121 and 122.
[60] RA p 018-47 para 105.
[61] Minister's NoA p 064-13 p 33.

further suggest that this is somehow a breach of the separation of powers. This is incorrect.

55 This Court provided the complete answer to these complaints:

55.1 Firstly, the effect of this temporary order is simply to preserve the *status quo* pending the outcome of a fair process and the Minister's further decision.[62]

55.2 Secondly, this temporary order retains the directives that the Minister published on 7 January 2022 and 2 September 2022. Far from imposing a new decision on the Minister, it keeps the Minister's existing directives in place until such time as the Minister has made a fresh decision.[63]

55.3 Thirdly, such relief falls squarely within this Court's powers under section 8(1)(e) of PAJA to grant "temporary relief", which is distinct from a substitution order under section 8(1)(c)(ii)(aa) of PAJA. In any event, the relief is plainly "just and equitable" in terms of section 172(1)(b) of the Constitution.[64]

56 The respondents' assertions on the separation of powers, without more, carry little weight. The Constitutional Court reminds us that "*the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility*" to grant just and equitable remedies.[65]

[62] HSF / CORMSA Judgment p 000-61 para 145.1.
[63] HSF / CORMSA Judgment p 000-61 para 145.2.
[64] HSF / CORMSA Judgment p 000-61 para 145.3.
[65] *Mwelase* at para 51.

57 In any event, this Court did nothing new in granting protective temporary relief. The Constitutional Court has often had to fashion wide-ranging temporary orders to protect vulnerable groups, pending further decisions and processes. For instance:

57.1 In *Allpay II*[66], the Constitutional fashioned an interim measure to protect vulnerable social grant beneficiaries. The Court invalidated the contract for payment of social grants, but suspended the invalidity, for a maximum period of five years until a new tender was awarded so as not to interrupt the payment of social grants.

57.2 In *Black Sash Trust v Minister of Social Development,*[67] the Constitutional Court fashioned a further interim order to protect the rights and interest of grant recipients, after the tender for payment of social grants was due to expire on 31 March 2017.

ATDFASA's appeal grounds

58 ATDFASA's application for leave to appeal is primarily focused on the question of delay. It contends that: (1) the 180 day deadline in PAJA did not apply to determining whether its challenge was out of time;[68] (2) this Court should have found that there was a reasonable explanation for the delay;[69] and (3) ATDFASA's application was not out of time.

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[66] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC).
[67] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* 2017 (3) SA 335 (CC).
[68] ATDFASA NoA p 065-2 para 2.1.
[69] ATDFASA NoA p 065-3 para 2.3.

59 We have addressed the PAJA point above. Ironically, in their response to ATDFASA, the Minister's counsel accepted that PAJA applies and took the point that the 180-day deadline had long since passed.[70]

60 Even if PAJA somehow did not apply, the ATDFASA's review still had to be launched without unreasonable delay.[71]

61 But ATDFASA failed to bring any application to condone its delays or to extend the 180-day time period under section 9 of PAJA. In the absence of a properly motivated application for an extension, this Court had no authority to entertain the review application at all.[72]

62 In any event, as we demonstrated to this Court, the substance of ATDFASA's counter-application was entirely without merit.[73] Even if it somehow succeeded in overcoming the delay, the counter-application would have gone nowhere.

63 To add to this, the counter-application was plainly an abuse, launched at the eleventh hour, and in breach of express undertakings made to this Court that ATDFASA's intervention would not disrupt the agreed timelines for the hearing. The adverse costs order was more than warranted in those circumstances.

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[70] See Respondents' HOA (Truckers) p 2 paras 9 – 15
[71] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC) at para 48.
[72] *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) at para 26.
[73] HSF HOA (Truckers) p 058-4 – 13.

CONCLUSION

64 In conclusion, we submit that the applications for leave to appeal ought to be dismissed with costs, including the costs of three counsel.

CAROL STEINBERG SC
CHRIS MCCONNACHIE
ZIPHOZIHLE RAQOWA
MICHAELA KRITZINGER
Counsel for HSF
Chambers, Sandton
11 September 2023

LIST OF AUTHORITIES

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