OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

[redacted]

28 June 2023
DATE

SIGNATURE

CASE NO: 32323/2022

In the matter between:

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

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Senior Judge's secretary. The date of this judgment is deemed to be 28 June 2023.

JUDGMENT

THE COURT

INTRODUCTION

[1] This application concerns matters both of great importance and of striking ordinariness. It concerns the rights of over 178,000 holders of Zimbabwean Exemption Permits ("ZEPs"), which are due to expire on 30 June 2023. On 2 September 2022, the Minister decided to terminate the ZEP programme and to refuse any further exemptions.

[2] Central to this application, therefore, is the legality of the decision to terminate the rights extended to 178 000 Zimbabwean Exemption Permit ("ZEP") holders, thereby bringing an end to the basis on which a multitude of these people have built their lives, homes, families and

businesses in South Africa. This is thus a case of considerable public significance, not only to all ZEP holders but to the Department of Home Affairs ("the Department") as well.

[3] While the Minister has recently extended the "grace period"by a further six months, until 30 June 2023,[1] his decision to end the ZEP programme remains unchanged. The applicant, the Helen Suzman Foundation ("HSF"), supported by the intervening party, CORMSA,[2] is challenging the Minister's decision.

[4] In terms of the said programme and for approximately the past fourteen years, qualifying Zimbabwe nationals have been granted permission by the Minister of Home Affairs to live, work and study in South Africa.

[5] As a consequence of being granted these permits, ZEP-holders have established lives, families, and careers in South Africa. The termination of this programme has placed all these in jeopardy which decision holds profound consequences for ZEP-holders. This much is common cause between the parties.

---

1 Directive 2 of 2022, published on 2 September 2022. See Supplementary Replying Affidavit, Annexure SRA 1.

2 Granted leave to intervene on 16 September 2022.

[6] It is further common cause that the decision so taken by the Minister to terminate the ZEP-programme, was taken without any prior notice to or consultation with ZEP-holders and the public; secondly, that an invitation for representations from ZEP-holders was only issued in January 2022, this after the Minister's decision had been announced.[3]

[7] Furthermore, the Minister has repeatedly made his intentions clear to the ZEP-holders and the public that he will not reconsider the decision to terminate the ZEP-programme. All that has changed is the "grace period", which will not be extended further.[4]

[8] The Minister has acknowledged that the decision has profound consequences for the lives of ZEP-holders, their children, and the broader society including an impact on national security, international relations, political, economic and financial matters.[5]

[9] It is this decision that is the subject of the current review proceedings and this challenge is taken primarily on four grounds, i.e.:

---

3 Answering Affidavit para 160 p 010-54-55.

4 Press Statement Annexure SRA1 P 022-13.

5 Annexure "FA28 " para 13 p 001-182.

9.1 firstly, the applicants contend that the decision is procedurally unfair and procedurally irrational, in the absence of any prior consultation process with affected ZEP- holders, civil society and the public at large;

9.2 secondly, it is a breach of the constitutional rights of ZEP-holders and their children;

9.3 thirdly, it was taken without any regard to the impact on ZEP-holders; and

9.4 fourthly, it reflects a material error of fact as to the present conditions in Zimbabwe, that bears no reasonable or rational connection to the information before the Minister.

[10] It is not the applicants' case that the Minister may not terminate the ZEP programme. Their case is that the decision so taken by the Minister should not fall short of any fundamental constitutional requirements; such as that when officials exercise public power, they ought to do so after having embarked on a fair process, with due consultation with affected parties and for clear reasons which demonstrate good cause for the decision made.

[11] It is therefore the gravamen of the applicants' that the First Respondent ("the Minister") has failed to meet this standard. Affected parties, including the Intervening Party ("CORMSA")[6] but also the holders of ZEPs themselves, were not afforded any fair right to make representations prior to the Minister making his decision and on this basis amongst others the decision so taken is reviewable. It should also be mentioned that in the present proceedings, All Truck Drivers Forum and Allied of South Africa ("ATDFASA") was also joined as an intervening respondent by order of the court.[7] They seek a declaratory order and if the court finds for them, an order which would allow ZEP-holders a period of 18 months within which they should be afforded an opportunity to apply for mainstream visas and enjoy the protection afforded by the Immigration Act.

THE PARTIES

[12] The first applicant, HSF, is a non-governmental organization with a long history promoting South Africa's commitments to democracy, constitutionalism, rule of law and human rights.

---

6 CORMSA's intervention application was granted on an unopposed basis on 16 September 2022.

7 See Judgment Davis J dated 10 February 2023 p 046A.

[13] The second applicant is the Consortium for Refugees and Migrants in South Africa ("CORMSA") a registered non-profit organization tasked with promoting and protecting the human rights of refugees, asylum seekers and international migrants in ways to promote the well-being of all in South Africa.[8]

[14] The first respondent is the Minister for Home Affairs, cited in his official capacity as the member of the executive responsible for granting exemptions under section 31(2)(b) of the Immigration Act.

[15] The second respondent is the Director-General of the Department of Home Affairs, in his official capacity as the departmental official responsible for the day-to-day operations of the DHA.

[16] The third respondent is All Truck Drivers Forum and Allied South Africa ("ATDFASA"). It is a non-profit organization which is registered as such with registration number: K2020760307. It is an organization whose mission and vision is, amongst others, to promote truck driving as a professional section to optimize and open job opportunities. It has as its aim to ensure that no undocumented workers are involved in the trucking industry.[9] Following an order granting leave to intervene as a

---

8 Founding Affidavit para 15 p 006-14 CORMSA Intervention Application.

9 Founding Affidavit para 5 & 6 p 026-7 ATDFASA Intervention Application.

respondent in the main application, ATDFASA delivered a counter-application in which it sought the following relief to declare unlawful and invalid: the dispensation of Zimbabweans Project ('DZP'); the ostensible extension of the DZP by the Minister in December 2014; the Zimbabwean Special Permit ('ZSP'); the ostensible extension of ZSP by the Minister in December 2017; the Zimbabwean Exemption Permit ('ZEP'); and the extensions of the current ZEP's by the Minister in December 2021 in December 2022.[10]

[17] The gist of their contention is, *inter alia*, that the Minister was not empowered to grant illegal foreigners an exemption in terms of section 31(2)(b) of the Immigration Act 13 of 2002 (the Act) and that the exemption in terms of the Act could not be granted on the basis of nationality. It further contends that the exemption was designed for an unlawful purpose and that the Minister has no power to extend a permit once it had lapsed by effluxion of time. Finally, that there were no special circumstances present for the Minister to grant exemptions.[11]ATDFASA abandoned its challenge to the DZPs and ZSPs.[12]

---

[10] Heads of argument filed by First and Second respondents
[11] Intervening respondents Replying affidavit of 2.2
[12] Supra paragraph 5.3

[18] It is common cause and was public knowledge that ZEP was implemented in 2017. In terms of 7 (1) of Promotion of Administrative Justice Act (PAJA), ATDFASA had 180 days within which to launch its review application. It did not since its inception in 2020. Having brought its application outside the 180 days, ATDFASA, in terms of section 9 (1), should have brought an application for condonation. Section 9(1)(b) provides that:

"90 days or 180 days referred to in Section 5 and 7 may be extended for a fixed period, by agreement between the parties or failing such agreement, by court or tribunal on application by the person or administrator concerned."[13] There is no application before this court for condonation, accordingly, ATDFASA has failed to comply with Section 7(1) of PAJA. Furthermore, this court is of the view that a period of over two years is an unreasonable delay, especially when there are no reasons justifying and explaining the delay. Accordingly, the ATDFASA does not comply with the test as set out in Khumalo and Another v MEC for Education, KwaZulu-Natal.[14]

---

[13] Promotion of Administrative Justice Act 3 of 2000.

[14] 2014 (5) SA 579 (CC) at para 49 "in Gqwetha[34] the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); [35] and if so (2) whether the court's

[19] This application, therefore, falls to be dismissed with costs.

[20] Prior to addressing the merits of the application, it will be apposite to set out the historical background which led to the present state of affairs.

THE HISTORY OF THE ZEP

The 2009 DZP

[21] In April 2009, the Minister of Home Affairs, in response to the political and economic instability in Zimbabwe which had caused an exodus to South Africa, created the Dispensation of Zimbabwean Project (DZP).[15]

[22] The result of this programme was that it allowed undocumented Zimbabweans in South Africa to apply for exemptions, provided that they possessed a valid Zimbabwean passport and had proof of employment, registration at an educational institution, or proof of running a business, among other requirements.[16]

---

discretion should be exercised to overlook the delay and nevertheless entertain the application."

15 FA 2 p 001-87 (Remarks by the Minister on 12 August 2014).

16 Answering Affidavit p 010-43 para 108.

[23] The programme had as its aim to regularise the legal status of Zimbabweans residing in South Africa illegally; curbing the deportation of Zimbabweans who were in SA illegally; reducing pressure on the asylum seeker and refugee regime, which was overwhelmed with Zimbabwean asylum seekers; and providing amnesty to Zimbabweans who obtained SA documents fraudulently.[17] To this end the Department approved 242,731 applications, granting qualifying Zimbabweans the rights to work, conduct a business, or study.[18] The process of issuing formal documentation under the DZP began in September 2010, with permits set to expire at the end of December 2014.[19]

The 2014 ZSP

[24] In August 2014, the former Minister, Mr Gigaba, announced that the DZP would be replaced by the Zimbabwean Special Permit ("ZSP"). Applications were exclusively opened to DZP-holders[20] and had to be submitted via Visa Facilitation Services Global ("VFS"), at a fee of between R800 to R1350,[21] together with the required documentation.[22]

---

17 Answering Affidavit p 010-42 para 105

18 Answering Affidavit p 010-43 para 110.

19 Founding Affidavit p 001-30 para 28.

20 Answering Affidavit p 010-46 para 127.

21 Answering Affidavit p 010-47 para 132.

22 Answering Affidavit para 131-134 p 010-47 – 48.

Eventually, some 197,790 ZSP permits were issued to successful applicants,[23] which were valid until 31 December 2017.[24]

[25] Minister Gigaba made a public statement at the time in which he set out in detail the rationale behind his decision not to abruptly terminate the DZP.[25] Amongst others, he noted that "*the approaching expiry date of the DZP has caused anxiety for many permit holders, particularly those who are not ready to return to Zimbabwe, as they contemplate their next steps.*" He further acknowledged that Zimbabwe's recovery would be fraught with challenges. He stated that "*We are aware that it will take time for her to fully stabilise.*" The ZSP was therefore part of South Africa's commitment to Pan-Africanism and its role in supporting "*Africa's stability, security, unity and prosperity*."

[26] The current Minister's predecessor had noted the positive contribution that Zimbabweans had made to South Africa's economic and social life. In particular, he observed that "*Zimbabweans have made notable contributions in our education and health sectors and also in many other sectors*". He further acknowledged the need to "*continue the productive engagement [with] stakeholder formations during the DZP*

---

23 Answering Affidavit para 136 p 010-48.

24 Founding Affidavit para 31 p 001-32.

25 Founding Affidavit para 32 p 001-32 – 33.

process four years ago" and expressed a willingness to *"work with new stakeholders that have emerged since"*.

The 2017 ZEP

[27] The ZSP era was followed by the ZEP programme. This was announced in September 2017, by the then Minister of Home Affairs, Ms Mkhize.[26] This programme was confined to holders of the ZSP,[27] who were again required to apply for exemptions through VFS, at a fee of R1090, together withthe necessary proof of employment, study, or business.[28] The permits so obtained were granted for a further four years and were initially due to expire on 31 December 2021.[29]

[28] Like her predecessor, Minister Mkhize made a public statement at the time in which she too set out in detail the rationale behind the decision to not terminate the exemption programme, but to create the ZEP instead.[30] She framed the reasons for replacing the ZSP with the ZEP with reference to Oliver Tambo's concerns for *"international solidarity,*

---

26 Annexure FA 5 p 001-92.

27 Answering Affidavit p 010-49 para 141.

28 Answering Affidavit p 010-49 para 142.

29 Founding Affidavit p 001-34 para 33.

30 Founding Affidavit p 001-34 para 34. Annexure FA 5 p 001-92.

conscious of the political imperative to build peace and friendship in the continent and in the world as a whole."

[29] Similarly, as with her predecessor, Minister Mkhize, maintained "*that migrants play an important role in respect of economic development and enriching South African social and cultural life*". Moreover, she emphasized the importance of special dispensations as part of a well-functioning immigration system that serves South Africa's national security. She noted that "*these dispensations have assisted in enhancing national security and the orderly management of migration*".

[30] These exemption programmes provided Zimbabwean nationals with a streamlined application process to obtain permits, provided that they satisfied the requirements and paid the necessary fees. ZEPs were exclusively made available to those who held the original DZP in 2009.[31]

The 2017 White Paper

[31] The 2017 White Paper saw the day of light during that year. In essence it was the national policy of the ZEP programme. The 2017 White Paper

---

31 Answering Affidavit para 141 p 010-49.

on International Migration Policy (White Paper) framed the value of exemption programmes as follows,[32] namely, to provide *"National security and public safety depend on knowing the identity and civil status of every person within a country. In addition, the presence of communities and individuals who are not known to the state but for whom the state has to provide, puts pressure on resources and increases the risk of social conflicts. Vulnerable migrants pay bribes and are victims of extortion and human trafficking. This increases levels of corruption and organised crime. Regularising relationships between states, however, improves stability, reduces crime and improves conditions for economic growth for both countries."*[33]

[32] The 2017 White Paper remains government policy and has not been withdrawn. Its justification for exemption programmes such as the ZEP – including reasons of national security, resource constraints, the protection of vulnerable groups, and economic growth – remain unchanged and it recognizes the importance of these exemption programmes: they advance national security, prevent corruption, and protect vulnerable migrants from exploitation and harassment.

---

32 Founding Affidavit p 001-34 para 34.4. (See annexure FA6).

33 Annexure FA6 p 001-94.

LEGAL FRAMEWORK

[33] Section 1(c) of our Constitution provides as follows:

> *"The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
>
> *(c) Supremacy of the constitution and the rule of law."*[34]

[34] Section 1 of PAJA, defines "administrative action", *inter alia*, as:

> *"...any decision taken, or any failure to take a decision, by –*
>
> *(a) an organ of state, when –*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) which adversely affects the rights of any person and which has a direct, external effect....."*[35]

[35] Section 31(2)(b) of the Immigration Act 13 of 2002 gives the Minister the power to grant individuals or categories of non-citizens the rights

---

34 The Constitution Act 108 of 1996.

35 Promotion of Administrative Justice Act 3 of 2000.

of permanent residence for a specified or unspecified period. Section 31 provide, in relevant part, as follows:

> *"31. Exemptions*
>
> ...
>
> *(2) Upon application, the Minister may under terms and conditions determined by him or her –*
>
> ...
>
> *(b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided thatthe Minister may -*
>
> *(i) exclude one or more identified foreigners from such categories; and*
>
> *(ii) for good cause, withdraw such rights from a foreigner or acategory 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 termsof this section."*

[36] Given the various exemption programmes set out above, the successive Ministers determined that "special circumstances" existed

which justified the creation of exemption programmes for Zimbabwean nationals under section 31(2)(b). The various programmes amongst others, established streamlined procedures for Zimbabwean nationals to apply for exemption permits under section 31(2)(b), if they satisfied the eligibility criteria, and followed the steps prescribed by the Minister.

TERMINATION ANNOUNCEMENT

[37] On 19 November 2021 the Department made its first public statement on the fate of the 2017 ZEP – just over a month before ZEPs were due to expire. The decision to terminate the ZEP programme was made in September 2021, behind closed doors and without any public consultation.[36] The reasons for the decision by the Minister were revealed to the public some months later and set out to be the following:

37.1 The Minister's decision was prompted by submissions from the Director-General, dated 20 September 2021 and prominently headed "WITHDRAWAL AND/ OR NON-EXTENSION" of ZEPs.[37]

---

36 Founding Affidavit p 001-36 para 36. Answering Affidavit (African Amity) p 018-132 para 90.3.

37 Annexure FA 8 p 001-96.

37.2 The Director-General recommended that the Minister "*exercise his powers in terms of section 31(2)(d) of the Immigration Act to withdraw and/or not extend the exemptions granted to the Zimbabwean nationals.*"[38]

37.3 While the Director-General recommended the eventual termination of the ZEP programme, he left it to the Minister to determine the duration of any further extension. The Director-General recommended that the Minister "*should consider imposing a condition extending the validity of the exemptions for* a period of three years, alternatively a period of 12 *months and any other period which the Minister deems appropriate*".[39]

37.4 The Minister approved these submissions, with the handwritten addition that he chose an extension period of only 12 months, without providing reasons for doing so.[40]

[38] What followed was that on 24 November 2021, Cabinet released a statement reflecting its decision *"to no longer issue extensions to the Zimbabwean special dispensations"*. This was accompanied by the rider

---

38 Id p 001-100 para 5.

39 Id p 001-100 para 6.

40 Id p 001-102.

that Cabinet had *"decided on a 12 months grace period at the expiry of the current ZEP."*[41] The respondents remain adamant that this decision was the Minister's alone and that Cabinet merely gave its approval.[42]

[39] Soon thereafter on 29 November 2021, the Department, then issued Immigration Directive 10 of 2021[43] directing that ZEP-holders were to be granted a 12-month *"grace period"* following the expiry of their ZEPs. The Directive further suggested that banks and other service providers should discontinue provision of services to ZEP-holders as from 1 January 2022, unless ZEP-holders could produce receipts of their applications for mainstream visas. On 13 December 2021 this Directive was however withdrawn by the Department.[44]

[40] Thereafter, on 5 January 2022, the Department published a notice in several newspapers headed *"non-extension of exemptions"*, which informed all ZEP-holders that *"the Minister of Home Affairs has exercised his powers in terms of section 31(2)(d) of the Immigration Act 13 of 2002 not to extend the exemptions granted in terms ofsection 31(2)(b) of the Immigration Act"*.[45] This notice repeated that ZEP-

---

41 Annexure FA 9 p 001-108 para 6.3.

42 Answering Affidavit (African Amity) p 018-114 para 58.2.

43 Founding Affidavit p001-37para 38. (See annexure FA10).

44 Founding Affidavit p 001-37para 39 (See annexure FA11).

45 Annexure FA 13 p 001-122.

holders were afforded a 12-month grace period, solely for purposes of obtaining alternative visas. Identical language was used in the letters that were emailed to ZEP-holders at the time.[46]

[41] On 7 January 2022, the Minister published Immigration Directive 1 in the *Government Gazette* (Directive 1 of 2021).[47] The directive stated that the Minister had decided to extend ZEPs for a period of 12 months "*to allow the holders thereof to apply for one or other visas provided for in the Immigration Act that they may qualify for*".[48] The Minister further directed that no action may be taken against ZEP-holders during the 12-month period.

[42] The directive was accompanied by a press statement from the Minister to "*set the record straight*" and elaborate on the Minister's reasons for his decision.[49] In this statement, the Minister indicated that he had "*decided to approve the recommendation made by the Director-General not to extend the exemptions to Zimbabwean nationals.*"[50]

---

46 Annexure AA 4 p 010-145 – 147

47 Annexure FA14 p 001-123.

48 Annexure FA14 p 001-127.

49 FA p 001-3 para 44.

50 Id p 001-131 para 11.

[43] Both the notice in newspapers and the letters to ZEP-holders concluded by stating that: *"Should any exemption holder have any representations to make regarding the non-extension of the exemptions and the 12 months period, you may forward such representations to Mr. Jackson McKay: Deputy Director General: Immigration services ZEPenquiries@dha.gov.za"*.[51]

[44] Directive 1 was eventually followed up by Directive 2 of 2022. The latter Directive was issued on 2 September 2022, together with an accompanying press statement, extending the grace period for a further six months, until 30 June 2023. The press statement concludes by stating that *"[t]here will be no further extension granted by the Minister"*.

[45] As mentioned in para 9 *supra*, the decision to terminate the ZEP programme and to refuse any further exemptions is primarily being challenged on four grounds. We will proceed to deal with these grounds individually.

---

[51] Annexure FA 14 p 001-127.

FIRST GROUND: IS THE MINISTER'S DECISION TO TERMINATE THE ZEP PROGRAMME PROCEDURALLY UNFAIR UNDER PAJA AND OR PROCEDURALLY IRRATIONAL AND THUS REVIEWABLE UNDER THE PRINCIPLE OF LEGALITY?

REVIEW UNDER PAJA

[46] In this regard it was the argument of the applicants that the Ministers' decision to terminate the ZEP programme and to refuse further exemptions is an administrative action and reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the principle of legality inherent in section 1(c) of the Constitution of the Republic of South Africa, 1996 ("the Constitution").[52]

[47] In *Motau*, the Constitutional Court identified seven elements of an administrative action:

> *"There must be: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has*

---

52 CORMSA also concurs with HSF [HSF HOA: 20-37, para 87.3] that to the extent that any constitutional rights are limited, such limitation must be reasonable and justifiable under section 36 of the Constitution.

a direct, external legal effect; and (g) that does not fall under any of the listed exclusions".[53]

[48] The above criteria for an administrative action are all fulfilled herein as follows:

48.1 the Minister made a decision to terminate the ZEP system (with transitional provisos) and to refuse further extensions beyond 30 June 2023;

48.2 the decision was taken by the Minister, a natural person;

48.3 who was acting in furtherance of a public function, being the control and management of South Africa's immigration and asylum systems;

48.4 the Minister took his decision in terms of empowering provisions in a statute, i.e. section 31(2)(b) and (d) of the Immigration Act;

48.5 the Minister's decision adversely affected the rights of ZEP holders;

---

53 *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) ("Motau") at para 33.

48.6 in direct, external and legal manner; and

48.7 the impugned decision does not fall within the listed exclusions.

[49] Section 3 of PAJA, sets out that administrative action which materially and adversely affects an individual's rights or legitimate expectations must be procedurally fair, requiring, at minimum:

49.1 a clear statement of the administrative action;

49.2 adequate notice of any right of review or internal appeal; and

49.3 a reasonable opportunity to make representations

[50] Section 4(1) of PAJA stipulates that where administrative action *"materially and adversely affects the rights of the public"* an administrator owes a duty of procedural fairness to the public at large.

[51] This is achieved by the administrator either holding a public inquiry (which includes a public hearing on the proposed administrative action, and public notification of the inquiry); followed a notice and comment procedure (which involves publishing the proposed action for public comment and written representations on the proposal); follow both the public inquiry and notice and comment procedures; follow a fair but

different procedure in terms of an empowering provision; or follow another appropriate procedure which gives effect to the right to procedural fairness in section 3 of PAJA (for example, granting hearings to the entire group affected by the proposed action).

[52] Apart from observing the dictates of procedural fairness under PAJA, the Minister was also obliged to take a decision that was rational.

[53] This requirement of rationality demands that the decision itself and the process by which it was taken must be rational.[54] In *Simelane*, the Constitutional Court emphasized:

> *"[W]e must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality."*[55]

REVIEW UNDER THE PRINCIPLE OF LEGALITY

[54] In determining a review under the principle of legality section 1(c) of our Constitution quoted above finds applicability.

---

54 *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) at para 64.

55 *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (Simelane) at para 37.

[55] It encompasses law or conduct which not rational offends the principle of legality inherent in the Constitution, and must be held to be invalid.[56]

[56] In order to succeed with this ground of review the applicants must meet the requirements of procedural fairness and procedural rationality.

[57] In *Albutt*,[57] the Constitutional Court further confirmed that there are circumstances in which rational decision-making outside the ambit of PAJA requires specific interested parties to be invited to make representations. Whether this is so depends on the nature and effect of the decision at issue and the expertise or experience of those contending that they had a right to be heard.[58]

[58] Our Constitutional Court held recently in *e.tv (Pty) Limited v Minister of Communications and Digital Technologies* that, where a decision is *"not a mechanical determination"* and *"important interests are at*

---

56 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 85 and 90.

57 *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC).

58 *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) paras 68 – 69, citing Albutt id.

stake", it is not procedurally rational to take a decision without notice to affected parties to obtain their views on the matter.[59]

EVIDENCE

[59] In turning then to the evidence presented before this court the deponent to the founding affidavit sets out that ZEP holders, civil society, and the general public were not notified of the Minister's intended decision nor were they afforded a meaningful opportunity to make representations before the Minister took his decision.[60] Given the grave and lasting impact of the extension decision on the rights of ZEP-holders both individually and as a group, a rational and procedurally fair decision to extend the ZEP until 31 December 2022 would require at the very least that ZEP-holders and civil society organizations representing their interest be afforded an opportunity to make representations on the proposed extension before it was approved.[61]

---

59 *e.tv (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa and Another v e.tv (Pty) Limited* [2022] ZACC 22 (28 June 2022) at para 52.

60 Founding Affidavit para 114 p 001-58 and The Minister and Director General admission that the invitation for representations on which they rely was communicated in notices that communicated the decision not to extend in January 2022. Answering Affidavit pp 010-54-57 paras 159 - 169.

61 Founding Affidavit para 120 p 001-60.

[60] Instead, the Minister's press statement of 7 January 2022 refers to internal discussions between the Minister and *"affected units within the DHA"*[62] but is silent on the participation of ZEP holders and the public in the decision-making process. It follows thus, that no participation by ZEP holders occurred before the decision by the Minister was taken.

[61] This much is conceded by the Minister himself where he admits that the only *"inputs"* into his decision regarding the extension of ZEPs in September 2021 were provided by DHA officials and a September 2021 submission from the Director General of the DHA.[63]

[62] The only engagement received from the Minister to the matter at hand took the form of letters being sent to two civil society organizations representing Zimbabwean nationals, this after the Minister had already taken a decision. The respondents in turn can point to no any other engagement with civil society or the public at large.

[63] It is on this basis that counsel for the applicants had refuted the Minister's and Director-General's claims that there was an *"extensive public process implemented to seek comment from every affected ZEP holder and from civil society organizations representing the interests*

---

62 Annexure "FA28" para 9.

63 Founding Affidavit para 115 p 001-59.

of ZEP holders".[64] The Minister and Director-General went so far as to suggest that they provided an opportunity for ZEP holders to apply for individual exemptions, something the Minister has expressly stated he would not do.[65]

[64] In response hereto, the Director-General, the deponent to the answering affidavit[66] sets out that ZEP holders have been given an opportunity to make representations with regard to both their individual circumstances and as to whether the exemption regime should be extended for a further period. In these representations they were entitled to raise any issue which they consider relevant to their personal circumstances of ZEP holders generally and if they required more time, they may also raise this in their representations. The same invitation was also extended to two civil society organizations claiming to represent the interest of Zimbabweans living in South Africa.

[65] In the same answering affidavit, the Director-General has further denied that the Minister made a decision to terminate the ZEP programme. In fact therein, he claims that there was "*no decision*

---

64 Answering Affidavit p 010-62 - 63 para 180.

65 Replying Affidavit pp 018-9 - 11 paras 16 - 22

66 Answering Affidavit para 176 p 010-59.

taken to terminate all ZEPs"[67] and that *"no decision has been taken not to grant further exemptions to ZEP-holders"*.[68] He has further suggested that the Minister may grant individual extensions to ZEP holders under section 31(2)(b), stating that *"further extensions [are] available based on the individual circumstances of ZEP holders."*[69]

[66] This stance adopted by the Director-General who deposed to the Answering affidavit insisting that no final decision had been taken is unsustainable, more so is circumstances where the concerned Minister failed to depose to a confirmatory affidavit. It flies in the face of Directives and press statements which have been issued previously. Consequently, this Court accepts that a decision has been taken to terminate the ZEP programme.

[67] Furthermore, the deponent sets out that the impugned decisions so taken are supported by the Government of Zimbabwe and any mass unemployment and or impending economic upheaval should have been raised through diplomatic channels between South Africa and Zimbabwe, which has not occurred.

---

67 Answering Affidavit p 010-14 para 16; p 010-91 para 274.

68 Answering Affidavit p 010-14 para 18.

69 Answering Affidavit p 010-75 para 220.

[68] He contends further that as circumstances in Zimbabwe have significantly improved since 2008 when the hyperinflation and economic crisis occurred, Zimbabwe has since seen a positive growth in GDP which makes it favourable for Zimbabwean nationals to return.

[69] The deponent further sets out that it is for ZEP holders themselves to speak on how the impugned decision impacts them and that they have been given the opportunity to do so. It is not for civil society to do so, as no rights of civil society bodies is at risk of being breached. Where individual ZEP holders require more time to regularize their stay they should seek such time in individual representations which they make.[70]

[70] From the reply set out in the Answering affidavit it is apparent that the first call for representations was made after-the-fact, after the Minister's decision had already been taken and communicated. There was no attempt made by the Minister to solicit representations from ZEP holders before the Minister took his decision. This attempt so made belatedly after the decision had been taken was also not a genuine consultation, as illustrated in an exchange between a ZEP-holder, Ms Maliwa, and the Minister's attorneys in January 2022. By way of illustration, Ms Maliwa sent an email to the designated address,

---

[70] Answering Affidavit para 176.7 p 010-62.

imploring the Minister to "*Please consider giving us another 4 years. We have nowhere to stay in Zim and no work*".[71]

[71] To this email the Minister's attorneys responded stating that: "*due to the circumstances and reasons advanced in the letter that you have received, the Minister is unable to reverse the decision.*"[72]

[72] The response illustrates that the invitation for representations was vague and not designed to elicit meaningful representations from either ZEP holders or the public. This is so as the invitation was meaningless. It did not indicate the nature and purpose of the representations it intended to elicit from ZEP holders and the public. In his engagements with the Scalabrini Centre of Cape Town, the Minister was clear that he had decided to terminate ZEPs and that he will not entertain any further exemption applications from ZEP-holders, on either a blanket or individual basis.[73]

[73] Prior to a scheduled meeting with the Minister on 18 February 2022, Scalabrini circulated a proposed agenda. On the proposed item "*Scope for discussion and reconsideration*", the Minister responded that "*the*

---

71 Annexure RA 7 p 018-152.

72 Id p 018-153.

73 Supporting Affidavit from Scalabrini p 018-290.

attorneys for the Minister and DHA received representations for reconsideration of the decision that I have made from affected Zimbabweans. They were informed that there is no scope for reconsideration as the decision was taken after careful consideration and supported by the National Executive (Cabinet). It has become practically impossible to continue with the exemption regime".[74]

[74] Following the meeting with the Minister, Scalabrini addressed a letter to the Minister specifically asking whether he would consider individual exemption applications from ZEP-holders under section 31(2)(b).[75] To this the Minister replied, *"I do not intend to grant exemptions in terms of section 31(2)(b) anymore."*[76]

[75] Throughout the Answering affidavit, there is a notable disdain for the value of public participation.[77] Indeed, it is presumed that ZEP holders are capable only of making representations on why the Minister's decision should not apply to them personally and not on the merits of

---

74 Supporting Affidavit from Scalabrini p 018-294 para 10; Annexure SCCT 1 p 018-303 para 8.

75 Annexure SCCT 2 p 018-326 paras 36 – 38.

76 Annexure SCCT 3 p 018-337 para 47.

77 See, AA p 010-61 para 176.5; AA p 010-60 para 176.3; and AA p 010-62 para 176.7.

the decision itself. While the views of civil society and the public are deemed unnecessary altogether.[78]

[76] To the matter at hand, the respondents accept that the right to a fair hearing is breached *"when an administrator has already made a decision and then contends that any participation process would have made no difference to the ultimate outcome."*[79]

[77] In this regard, counsel for the respondents argued that the September 2022 decision to extend the grace period by 6 months is evidence that the Minister retains an open mind.

[78] This argument, however, the Court cannot accept as it is inconsistent with the existing facts as the engagements embarked upon by the Minister did not affect his decision to terminate the ZEP-programme. What changed was the grace period afforded to ZEP-holders which had been extended until that expiry takes effect.

[79] The invitation for representation after the decision had been taken by the Minister, further runs counter to the very purpose of procedural fairness and procedural rationality which are intended at ensuring that

---

78 See, AA pp 010-61-2 paras 176.5 and 176.6.

79 Respondents Heads of Argument para 172 p 028-54.

before a decision is taken an open mind is kept until a complete picture of the facts and circumstances bearing on a decision is placed before the decision-maker. Here the decision was taken behind closed doors, without prior notification or consultation. The accompanying press statement made it clear that *"[t]here will be no further extension granted by the Minister"*.[80]

[80] As in the *e.tv (Pty) Ltd*-judgment *supra* the Minister's failure to conduct any prior consultations, before announcing the decision to terminate the ZEP programme, rendered the decision procedurally irrational given the far-reaching implications of the decision and that "*important interest are at stake*".[81]

[81] Furthermore, the fact that it was notionally possible for affected organizations and individuals to make representations before the decision could be taken, renders the decision so taken as procedurally unfair and irrational. The Minister not only failed to invite representations but also failed to consider any representations, before taking the decision.

---

80 Press Statement Annexure SRA1 p 022-13.

81 Id at para 51 to 52.

[82] This view we further find support for in *Esau*, where the Supreme Court of Appeal recognized that where a decision's "*effect, potential or real, on the rights, lives and livelihood of every person subject to them is drastic*", that decision cannot rationally be taken without affording affected persons an opportunity to make representations.[82]

[83] Our view is also supported by Hoexter who aptly puts it:

> *"[T]he opportunity to make representations should ideally be offered before any decision is taken, and thus before there is any question of a 'clear statement of the administrative action'. There are good reasons for this. As Baxter points out, in a subsequent hearing one has to do far more than present a case and refute an opposing case: one actually has to convince the decision-maker that he or she was wrong."* [83]

[84] The author continues:

> *"The ideal, of course, is a hearing beforehand – and this ideal seems to be reflected in the structure of s3(2) [of PAJA], which envisages notice of the proposed action and a reasonable opportunity to respond before any administrative action id actually taken and a 'clear statement' of the action becomes necessary. It is ideal because, as Corbett CJ noted in Attorney- General, Eastern Cape v Blom, there is a 'natural human inclination to adhere to a decision once taken'. It is easier to sway a decision-maker who has not yet decided, and harder to persuade a decision-maker to change a decision that has already been made. In*

---

82 *Esau v Minister of Co-Operative Governance and Traditional Affairs* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) at para 103.

83 Hoexter Administrative Law in South Africa (Juta: 3rd ed.) at 521.

practice, a hearing after the decision has been taken will seldom be as advantageous as a hearing beforehand."[84]

SECOND GROUND: FAILURE TO CONSIDER THE IMPACT ON ZEP-HOLDERS AND THEIR CHILDREN (CONSTITUTIONAL INFRINGEMENTS)

[85] As per the founding affidavit, the deponent sets out that the Ministers public statements, indicate that no attempt was made to assess the impact on ZEP-holders and their children before a decision to terminate the ZEP programme was made.[85]

[86] As a decision of this consequence impacts over 178 000 ZEP-holders, it would have required proper information on who would be affected, to what degree and what measures were in place to ameliorate this impact. It further required a careful assessment of the current conditions in Zimbabwe.[86]

[87] In response to the above, the deponent to the Answering Affidavit denies that the impact on ZEP-holders' children and families were not

---

84 Hoexter at 530, referring to *Attorney-General, Eastern Cape v Blom* at 668E. See also *South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another* 2007 (2) SA 461 (C) at paras 23-24.

85 Founding Affidavit para 157 p 001-74.

86 Founding Affidavit para 158 p 001-74.

considered. As the Minister did call for representations reference to specific information in relation to children and the families of ZEP-holders, if placed before the Minister, would have been considered. The deponent specifically denies that the relevant considerations would have been ignored and sets out that representations would have been considered on an individual basis.[87]

[88] In as far as the conditions in Zimbabwe are concerned, it is denied by the Director-General that the situation in Zimbabwe has not improved since 2008/2009. Furthermore, he sets out that in exercising his discretion that it falls on the Minister to decide whether or not to grant an exemption and whether or not the circumstances in Zimbabwe have improved.

[89] Furthermore, he asserts that the ZEP-programme saw the light of day as a result of profound political instability in Zimbabwe at the time and there is now a need for Zimbabwean nationals to be encouraged to return to Zimbabwe and to build a new and prosperous Zimbabwe.[88]

[90] In respect of this ground of review, the applicant had argued that the respondents have provided no evidence at all on the impact of this

---

87 Answering Affidavit para 253-256 p 010-68.

88 Answering Affidavit para 257-262 p 010-87.

decision on the ZEP-holders and their families or that it was considered by the Minister when the decision was taken. This is more so, as the Minister did not depose to the Answering Affidavit himself, but instead the affidavit was deposed to by his Director-General. In the present instance the Minister further made no Confirmatory Affidavit to confirm the allegations attributable to him as the decision maker as set out by his Director-General in the said Answering Affidavit.

[91] This omission the applicant had argued is significant as the decision-maker in this case was the Minister and not the Director-General and therefore it is the Minister who can testify to what material and considerations he took into account at the time when he made his decision. In the absence thereof, it was therefore argued that the Director-General was not best suited to depose to an affidavit on behalf of the Minister on this score.

[92] In this regard, counsel appearing for CORMSA had argued, that decision-makers must stand or fall by the reasons that they give for a decision at the time of the decision. *Ex post facto* reasons or amendments are impermissible.[89]

---

[89] See *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27.

[93] Furthermore, that no person can give evidence on behalf of another as in the present instance and in the absence of any suggestion that the Minister himself was unable to do so, no basis exists to relax the rule against hearsay in terms of section 3 of the Law of Evidence Amendment Act 45 of 1998. Support for this submission is found in the decision of *Gerhardt v State President* 1989 (2) SA 499 (T) at 504G to the effect that it is not permissible for one State official to make an affidavit for another State official. As Goldstone J (as he then was) put it:

> *"Clearly one person cannot make an affidavit on behalf of another and Mr. Hattingh, who appears on behalf of the three respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his own knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible."*

[94] In contrast, counsel for the Minister had argued that the Minister *"could do no more than state that he considered such effect"*.[90] Counsel had further argued, that if the Court was to accept that the Minister's decisions are reviewable for these reasons, the Minister would in effect be precluded from ever deciding to terminate the exemption regime, because ZEP holders have lived and worked in South Africa since 2010

---

90 Respondents' HOA p 028-62 para 205.

alternatively 2014, and as a consequence any decision not to grant them an indefinite extension would be rendered unlawful by virtue of the fact that they have made lives for themselves and their families in the country for several years.[91]

[95] Before this Court, there is simply no admissible evidence from the Minister on whether he took these considerations into account and how. This view taken by us is supported by the following:

95.1 Firstly, the Director-General's submissions to the Minister on 20 September 2021, which formed the basis of his decision, were entirely silent on the impact on the ZEP-holders' families and their children.[92]

95.2 On the Director-General's own version, the Minister simply approved the Director-General's submissions on the same day they were handed to him, without any further interrogation.[93]

95.3 In addition, the Minister's 7 January 2022 press statement, which sought to explain his decision, was entirely silent on this

---

91 Respondents' HOA.

92 HSF HOA p 020-75 para 196.1 and Annexure FA 8 p 001-96.

93 African Amity AA p 018-132 para 90.3 (African Amity Caselines p 004-47).

question of impact. The press statement did not call on ZEP-holders to address the specific impact of the decision on their families and children.

95.4 Furthermore, in the Answering affidavit, the Director-General was content to make the bold allegation that *"the question of the impact on children and families weighed heavily in the deliberations of the Department and the Minister"*, without any form of substantiation. No details were provided as to what information was considered, by whom, and when.[94]

95.5 The September 2022 Departmental Advisory Committee's report to the Minister again made no reference to the impact of the decision on ZEP-holders and their children.[95]

95.6 In addition to the above reasons, the Minister flatly refused to engage with these representations with an open mind. This is supported by his stance taken against the Scalabrini Centre in February 2022, where he said *"there is no scope for reconsideration"*.[96]

---

94 Answering Affidavit p 010-86, para 255.

95 Annexure SA 4 p 010-354 – 372.

96 Minister's letter to Scalabrini p 018-303.

[96] On the totality of the evidence presented before this Court, the inescapable conclusion that must be drawn is that the Minister failed to consider the impact of his decision on ZEP-holders, their families and their children.

[97] Consequently, the Minister's decision must be reviewed and set aside, on the grounds that he further failed to take into account relevant information under section 6(2)(e)(iii) of PAJA.

[98] The Minister's decision is also found to be further unreasonable under section 6(2)(h) of PAJA. As in the *Bato Star*-decision the guiding principles on reasonableness were summarized specifically as to require an assessment of the *"nature of the competing interest involved and the impact of the decision on the lives and well-being of those affected."* [97]

THIRD GROUND OF REVIEW: THE DECISION UNJUSTIFIABLY LIMITS CONSTITUTIONAL RIGHTS

[99] As per the founding affidavit, the deponent sets out that in granting the exemption permits to Zimbabwean nationals, the Ministers'

---

[97] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC) at para 45.

predecessors recognized that these permits were necessary to protect the rights of vulnerable people. Therefore, the decision taken by the Minister to terminate the ZEP programme as from 31 December 2022, amounts to an unjustified limitation of such rights.[98]

[100] The rights affected by the termination of the ZEP-programme is the right to dignity which encompasses the right to the enjoyment of employment opportunities, access to health, education and protection from deportation. The termination of the ZEP-program the deponent asserts also impacts on the right of dependent children of ZEP-parents,[99] which is guaranteed by section 28(2) of our Constitution.

[101] The termination of the ZEP-programme affects several established principles underpinning the best interests of a child. For example, it is not in the best interest of a child to be undocumented for extended periods of time, it violates the principle that individualized decision-making in all matters concerning children should be made and the termination violates the duty to ensure that all children should be heard in matters concerning their interest.

---

98 Founding Affidavit para 134 p 001-65.

99 Founding Affidavit para 139-143 p 001-67 to 68.

[102] In response, the deponent to the Answering affidavit set out that the rights challenged by the termination of the ZEP-programme will amount to a claim that ZEP-holders are entitled to permanent exemptions. This is denied, as the exemption regime for qualifying Zimbabweans was never meant to be permanent.[100] In fact as counsel for the respondent had argued, the Minister's decisions never constituted a deprivation of rights of ZEP-holders but rather the granting of rights to them.

[103] In the Answering Affidavit, the deponent refutes the applicant's argument that the termination of the ZEP-programme will result in a violation of the holders right to dignity as it would mean that no termination of the programme can ever occur.[101]

[104] In addition, the deponent asserts that it would amount to an egregious breach of the separation of powers by a 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

---

[100] Answering Affidavit para 190 p 010-65.

[101] Answering Affidavit para 209 p 010-70.

whether or not to grant such regime and the conditions under which such regime is to be implemented.[102]

[105] Furthermore, that ZEP-holders have no more rights afforded to them than any other foreigners in South Africa in terms of the Immigration Act and it cannot be asserted that when a visa or permit expires to a foreigner that a violation of a Constitutional right has occurred.[103]

[106] On this basis, the deponent denies that the impugned decisions have breach the ZEP-holders right to dignity.

[107] On behalf of the applicant, it was argued that the Minister's decision is subject to the two-stage limitation analysis. Firstly, a determination should be made as to whether the decision limits fundamental rights and secondly, whether the respondents have demonstrated that the limitation is reasonable and justifiable under section 36 of the Constitution.

[108] On the limitation of rights, the respondent carries the onus to demonstrate that any limitation of rights is reasonable and justifiable

---

[102] Answering Affidavit para 194 p 010-66.

[103] Answering Affidavit para 196 p 010-66.

in an open and democratic society based on human dignity, equality and freedom,[104] and which is context-sensitive.

[109] Section 36(1) of the Constitution dealing with the limitation of rights calls for a proportionality analysis.[105] This requires a Court to balance the nature and severity of the limitation of ZEP- holders' rights, on the one hand, with the importance of the Minister's purposes, the extent to which the limitation achieves the purpose, and the availability of less restrictive means to achieve the purpose, on the other.[106]

[110] In assessing a section 36 justification would require an analysis of the nature of the rights which have been limited because *"the more profound the interest being protected. . . the more stringent the scrutiny"*.[107]

[111] O'Regan J wrote in *S v Manamela* that: *"The level of justification required to warrant a limitation upon a right depends on the extent of*

---

104 *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.

105 *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) para 35; *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC) at para 18.

106 *Esau* (n 112) at paras 108 – 111.

107 *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) para 45.

the limitation. The more invasive the infringement, the more powerful the justification must be." [108]

[112] The applicants contend that the rights in question which are being infringed are the right to dignity, rights of children, the right to remain gainfully employed and economically viable to mention but a few.

[113] In determining the limitation to any of such rights, one would have to look at what justifications have been offered by the Minister under oath.

[114] In his press statement on 7 January 2022, accompanying Directive 1 of 2022, the Minister advanced his primary justifications for the decision to terminate the ZEP programme. As per the Answering Affidavit the Director-General firstly asserts that conditions in Zimbabwe have improved, justifying the termination of the ZEP programme, secondly, he asserts that the termination of the ZEP programme will alleviate pressure on the asylum system and lastly he appeals to budget and resource constraints as a reason for terminating the ZEP-programme.

---

[108] *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 69.

[115] Before considering the putative justifications put forward by the Minister and Director-General, it is important to remember the weighty duty they bear to place material before the court to sustain their recourse to factual and policy considerations.

[116] In *Teddy Bear Clinic*, the Constitutional Court explained that:

> *"As a starting point, it is important to note that where 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'."* [109]

[117] The evidence of an alleged improvement that the Director-*General* can point to is a minor uptick in GDP between 2021 and 2022, which took place as a result of a single bumper harvest, after the economy contracted the year before.[110]

[118] The Director-General also makes a number of claims, including that hyper-inflation has abated and that unemployment in Zimbabwe has

---

[109] *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

[110] See AA p 010-76-7 paras 223-4; RA p 018-43 para 99.1.

fallen to 5.2%.[111] In fact, headline inflation shot up to 256.9% in July 2022[112] and, according to the World Bank report annexed to the Director-General's own affidavit, the unemployment rate is 19.1% (excluding those who have given up looking for work)".[113] Applying an expanded definition, which includes discouraged job seekers, the unemployment rate is in over 44%.[114]

[119] Apart from these assertions on claims of improvements in the economy of Zimbabwe, no facts were placed before the court presenting clear and compelling evidence to support them.[115] The respondents have failed to disclose any information or documents that the Minister consulted on the conditions in Zimbabwe before reaching his decision. Neither has the Minister deposed to an affidavit explaining his decision-making process and what information he considered.

[120] The Minister has also suggested that the exemptions were initially introduced, in part, to alleviate the burden on the refugee status determination system, as thousands of Zimbabwean nationals had

---

111 Answering Affidavit p 010-84 para 247.

112 Replying Affidavit p 018-45 para 100.2 (See annexure RA10).

113 Annexure AA 9 p 010-163.

114 Annexure RA11.

115 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1165.

applied for asylum. The suggestion is that this backlog has cleared, thus obviating the need for the ZEP programme.

[121] In this regard, the Director-General further asserts that *"there is no basis to contend that the changes effected to the exemption regime will significantly increase pressure on the asylum system"*.[116]

[122] The Director-General further does not dispute that the asylum system is plagued by systemic backlogs and delays.[117]

[123] In his press statements, the Minister referred to unspecified budgetary constraints within the DHA and stated that a decision has been taken to "prioritise" services for South African citizens. In his answering affidavit, the Director-General further makes the bold allegation 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.[118] No further details are forthcoming or expanded upon by the Director-General.

---

116 Answering Affidavit p 010-79, para 230.

117 Founding Affidavit pp 010-49 – 50 paras 74 – 77. Noted in AA p 010-102 – 103 paras 350-2.

118 Answering Affidavit p 010-82, paras 234 – 240.

[124] In this regard, the decision of Rail Commuters Action Group is instructive where, the Constitutional Court said the following regarding the evidentiary requirements that must be met before an organ of state can successfully invoke budgetary or resource constraints as a justification for limiting rights:

> *"...In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."* [119]

[125] In relying on budgetary constraints, the Director-General and Minister should therefore have taken this Court into their confidence and placed the details of the precise character of the resource constraints before this Court, which they have failed to do.

[126] As a result, and in the absence of any transparency on the part of the respondents, in circumstances where the respondents have a duty to

---

[119] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 88.

take this Court into their confidence but have not, we must conclude that the Minister failed to prove a justification based on facts which is rational between the limitation of rights on the one hand and a legitimate governmental purpose or policy on the other.

[127] Consequently, in the absence of factual evidence we therefore find that the Minister's decision is an unjustified limitation of rights, which is unconstitutional and invalid in terms of section 172(1) of the Constitution and must be reviewed and set aside in terms of section 6(2)(i) of PAJA.

[128] Given our findings on the first three grounds on review, we hold the view that to express our opinion on the remaining ground of review will be superfluous.

COSTS

[129] In respect of costs the applicants seek costs of three counsel in the event of being successful in accordance with the Biowatch principle.[120] We find no reason to depart from this principle but in the circumstances we deem it fit only to award costs of two counsel.

---

[120] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

REMEDY

[130] In as far as an appropriate remedy is concerned, the applicant seeks three forms of relief in terms of this Court's remedial powers under section 172(1) of the Constitution and section 8 of PAJA.

[131] Firstly, the applicant seeks a declaration that the Minister's decision is unconstitutional, unlawful and invalid and whenever a Court finds that conduct is inconsistent with the Constitution, such Court is bound to declare the conduct invalid under section 172(1)(a) of the Constitution. That is a mandatory duty that cannot be avoided.[121]

[132] The order so sought is not intended to interfere with the legal validity of the existing extensions of ZEP permits until 31 December 2022 and again until 30 June 2023, or the further protections afforded by the Minister's Directives 1 of 2021 and 2 of 2022.

[133] This order sought is solely directed at the Minister's decision to terminate the ZEP programme and not to grant any further exemptions or extensions beyond 30 June 2023.

---

[121] *Rail Commuters Action Group* (n 186) at paras 107 – 108.

[134] In addition, the applicant seeks an order to set aside the decision of the Minister as it is just and equitable to do so and to remit the decision back to the Minister to make a fresh decision, following a proper, procedurally fair process that complies with the requirements of sections 3 and 4 of PAJA.

[135] In addition, the applicant seeks an order to grant an appropriate temporary order, to protect the rights of ZEP-holders while the Minister conducts a fair process and makes a fresh decision.

[136] This temporary relief would entail that within a period of (12) twelve months, pending the conclusion of a fair and lawful process and the Minister's further lawful decision that:

136.1 For a period of (12) twelve months from date of this judgment, the existing ZEPs will remain valid;

136.2 ZEP-holders will continue to enjoy the protections afforded by Directive 1 of 2022, 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 / 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."*

[137] On behalf of the applicants, it was argued that the above remedy falls within the scope of this Court's just and equitable remedial discretion under section 8 of PAJA and section 172(1)(b) of the Constitution. Both provisions empower this court to grant "any" just and equitable remedy. Section 8(1)(e) of PAJA specifically empowers the Court to grant temporary relief.

[138] Our Constitutional Court has further stated that, *"Once a ground of review under PAJA has been established there is no room for shying away from it.* Section 172(1)(a) of the Constitution requires the decision to be declared unlawful".[122]

[139] The remedies granted by courts under section 172 of the Constitution must further be just, equitable and effective. As stated in Steenkamp:

> *"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to preempt or correct or reverse an improper administrative function. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."*[123]

---

[122] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) ("Allpay") at para 25.

[123] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 29.

[140] Support for the above relief is found in the decisions of the Constitutional Court where it has emphasized that the phrase "any order" in section 172(1)(b) of the Constitution is "as wide as it sounds",[124] serving as an injunction to do "practical justice, as best and as humbly as the circumstances demand".[125]

[141] The respondents on the relief sought by the applicant had argued that the granting of such a relief will amount to a substitution order as oppose to temporary relief in that such an order will replace the Minister's decision with a decision of the Court.

[142] Furthermore, that the power to grant and/or terminate a temporary exemption from the provisions of the Immigration Act, is a power granted to the Minister alone. The determination as to the circumstances in which it is permissible to exercise that power is quintessentially a policy laden and polycentric one. It is well established that Courts should show due deference to the competent authority in disputes involving matters of a policy nature, to avoid violating the separation of powers.[126] The Constitutional Court in *International Trade*

---

[124] *Corruption Watch NPC v President of the Republic of South Africa* 2018 (10) BCLR 1179 (CC) at para 68.

[125] *Mwelase v Director-General, Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) at para 65.

[126] *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at paras [21]-[22].

Administration Commission v SCAW South Africa (Pty) Limited,[127] stated:

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

[143] In addition, counsel had argued that a determination of the duration of an extension of a temporary dispensation that lies solely within the field of the executive, calls for judicial deference and warrants interference only in the clearest of cases.[128] Where there is a strong legal principle that admits of only rare exception, the proper standard is 'the clearest of cases'. The high standard ensures courts only depart from these principles when it is '*substantially incontestable*' that departure is required. The present case is not such a case.

---

[127] *International Trade Administration Commission v SCAW South Africa (Pty) Limited* 2012 (4) SA 618 (CC) at para [195].

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

[144] Counsel for the respondent had further argued that the applicants have asked the Court to extend the ZEP-programme after the lapsing date of 30 June 2023. This, counsel had argued is a decision for the Minister to make, if circumstances require it. It would amount to clear judicial overreach for this Court to intervene in circumstances where the Court is ill-equipped to make such a decision and there is no urgent need for it to do so.

[145] We disagree with the above assertions made on behalf of the respondents for the following reasons:

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

145.2 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.

145.3 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.

[146] As to the relief sought, the respondents further assert that the granting of such relief will infringe on the separation of powers doctrine. We also disagree with this assertion. This Court carries a constitutional responsibility when a finding has been made of constitutional infringement to grant just and equitable remedies,[129] and in ordering same will not amount to an encroachment on the separation of power doctrine. In the present matter this is what is called for.

ORDER

[147] In the result the following order is made:

147.1 The First Respondent's decision to terminate the Zimbabwean Exemption Permit (ZEP), to grant a limited extension of ZEPs of only 12 months, and to refuse further extensions beyond 30 June 2023, as communicated in:

---

[129] *Mwelase* (n 215) at para 51.

147.1.1 the public notice to Zimbabwean nationals on 5 January 2022;

147.1.2 Directive 1 of 2021, published as GN 1666 in Government Gazette 45727 of 7 January 2022 (Directive 1 of 2021);

147.1.3 the First Respondent's press statement on 7 January 2022; and

147.1.4 Directive 2 of 2022, published on 2 September 2022, and the accompanying press statement

is declared unlawful, unconstitutional, and invalid.

147.2 The First Respondent's decision referred to in paragraph 147 is reviewed and set aside.

147.3 The matter is remitted back to the First Respondent for reconsideration, following a fair process that complies with the requirements of sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

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 / 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."*

147.5 First Respondent, and any other parties opposing this application, are directed to pay the costs, jointly and severally,

the one paying the other to be absolved, including the costs of two counsel, where so employed.

[redacted]

C COLLIS
JUDGE OF THE HIGH COURT
PRETORIA

[redacted]

G MALINDI
JUDGE OF THE HIGH COURT

[redacted]

M MOTHA
ACTING JUDGE OF THE
HIGH COURT PRETORIA

APPEARANCES:

Counsel for the Applicant:	Adv S Budlender SC Adv C McConnachie Adv Z Raqowa Adv M Kritzinger
Counsel for Intervening Party:	Adv D Simonsz
Counsel for the Respondents:	Adv I Jamie SC Adv S Rosenberg SC Adv M Adhikari Adv M Ebrahim
Counsel for Intervening Party:	Adv MM Mojapelo Adv D Mtsweni

Date of Hearing: 11 and 12 April 2023

Date of Judgment: 28 June 2023

000-67