REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2022-006386

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

28 June 2023

DATE SIGNATURE

In the matter between:

V[redacted] M[redacted]	First Applicant
ZIMBABWE IMMIGRATION FEDERATION	Second Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
MINISTER OF POLICE	Third Respondent
NATIONAL COMMISSION OF THE SOUTH AFRICAN POLICE SERVICE	Fourth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
THE BORDER MANAGEMENT AUTHORITY	Sixth Respondent

THE SOUTH AFRICAN NATIONAL DEFENCE FORCE Seventh Respondent

JUDGMENT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 June 2023.

THE COURT

Introduction

[1] At the commencement of the hearing, counsel for the applicants made the following remark: "[w]hat happened in Uganda with the expulsion of Indians under Idi Amin's regime will appear to be a picnic compared to the catastrophe that is coming on 1 July." Counsel for the respondents retorted: "[c]ounsel for the applicants' rhetoric took flight when we were told that what will happen on the termination from the 1st of July will make some of the horrific historical scenes of forced evacuation and flight from Uganda pale into insignificance. With great respect this is not an appropriate analogy at all."

[2] Before this Court is an application, under Part A, for an interim interdict pending the review relief sought under Part B. As per their Notice of Motion, the applicants seek the following:

a) An order interdicting and restraining the respondents from arresting, issuing an order for deportation or detaining any holder of the Zimbabwe Exemption Permit ("ZEP") for the purposes of deportation in terms of section 34 of the Immigration Act 13 of 2002 ("Immigration Act") for any reason related to him or her not having any valid exemption certificate in his or her passport;

b) An order directing that any holder of ZEP may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act solely for the reasons that they are a holder of the ZEP; and

c) An order directing that the holder of the ZEP 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 reasons of not having a valid permit indicated in his or her passport.

[3] The main application under Part B is brought in terms of Rule 53 of the Uniform Rules of Court. Even though this Court is not seized with Part B, it must take a judicial peek into the grounds of review which are raised in the main application and assess the strength.[1] The applicants anchor their review application on the following five grounds:

(a) It is beyond the Minister's power to withdraw the rights or exemptions that have been granted to the Zimbabwean nationals, and was therefore *ultra vires*. This is because such powers may only be exercised when there is good cause for withdrawing the rights or exemptions from the category of foreigners.[2]

(b) Even if the decision was not beyond his powers, it was the product of an irrational and procedurally unfair process during which materially interested persons were never given an opportunity to be heard at all.[3]

(c) The Minister failed to take into account relevant considerations in making the impugned decisions.[4]

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[1] *Economic Freedom Fighters v Gordhan and Others* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at paras 48 and 53.
[2] Founding Affidavit at para 46.1.
[3] Id at para 46.2.
[4] Id at para 46.3.

(d) The Minister took into account irrelevant considerations in making the impugned decision.[5]

(e) In making the decision the Minister was materially influenced by errors of law.[6]

The Parties

[4] The first applicant is an adult male citizen of Zimbabwe who has lived in South Africa for 12 years; also, a Director and member of the second respondent. In bringing this application, he states the following: "I act in my own interest as a holder of Zimbabwean Exemption Permit ("ZEP"), in the interest of the Zimbabwean Immigration Federation and its members, and in the public interest."[7]

[5] The second applicant is a voluntary association of the Zimbabwean Exemption Permit holders and their family members, whose role is to safeguard the constitutional rights of its members and ensure that they can continue to reside in South Africa lawfully. It represents over one thousand holders of the Zimbabwe Exemption Permit, who have been in South Africa for over ten years.[8]

[6] The first respondent is the Minister of Home Affairs who is cited in his official capacity as the public official responsible under section 31(2) of the Immigration Act. The second respondent is the Director-General of the Department of Home Affairs who compiled the answering affidavit. He is also cited in his official capacity.

[7] The third, fourth and fifth respondents are all cited in their official capacities and are the Minster of Police, National Commissioner of South African Police Service and President of the Republic of South Africa respectively. The sixth respondent is the Border Management Authority which is headed by a Commissioner.

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[5] Id at para 46.4.
[6] Id at para 46.5.
[7] Id at para 13.
[8] Id at para 14.2.

Its duty is to facilitate and manage the movement of people in and out of ports of entry into South Africa. Finally, the seventh respondent is the South African National Defence Force[9].

Preliminary Objection

[8] At the commencement of these proceedings the applicants sought to move for a final interdict. Counsel for the applicants submitted that the applicants are entitled to move for a final relief if the papers establish a clear right where they had brought an application for an interim relief. In advancing this argument, he relied on the matter of *Majake v Commission of Gender Equality and Others*,[10] in which the Court stated:

> "Although the applicant seeks interim relief, she is entitled to final relief if she can establish a clear right as opposed to a *prima facie* right. If the applicant is to be granted a final order she has to establish not only a clear right, but also an injury actually committed, and the absence of an alternative remedy."[11]

[9] Focusing on this issue, the Court in the matter of *National Gambling Board v Premier, KwaZulu-Natal, and Others*[12] held:

> "Ordinarily, an interim interdict is appropriate when the facts which establish a right to a final order are in dispute. It has been held in some cases that an interim interdict is not appropriate when the facts relating to a final order are not in dispute. In such a case the court will proceed to decide the legal issue pertaining to the main dispute. It will then issue or refuse a final order. In other cases it has been held that there may be circumstances in which the court will issue an interim interdict even if the facts pertaining to the main dispute are not in dispute. Mr Prinsloo contended that the former proposition is correct.[13]

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[9] Id at paras 18-23.
[10] [2009] ZAGPJHC 27; 2010 (1) SA 87 (GSJ); (2009) 30 ILJ 2349 (GSJ).
[11] Id at para 95.
[12] [2001] ZACC 8; 2002 (2) SA 715; 2002 (2) BCLR 156 (*National Gambling Board*).
[13] Id at para 52.

[10] It bears mentioning that this principle operates where it appears from the answering affidavit that the rights are not in dispute and the facts are common cause. In the present instance, this is not the case.

[11] The respondents vehemently opposed this application. Counsel for the respondents submitted that it is abundantly clear that:

> "This affidavit deals only with the interim relief sought in Part A, as Part B of the review application is to be launched within 15 days of the grant of an order in terms of Part A."[14]

[12] Underscoring his submission, he referred to the applicants' replying affidavit in which the following is stated:

> "The applicants in this matter also still enjoyed a right under Rule 53 to amend, add or vary the terms of this notice of motion and supplement supporting affidavit in its review application of the Minister's decision."[15]

[13] He further contended that at all times the parties were working within the confines of Part A and that the papers were crafted accordingly. Therefore, the respondents would be prejudiced if Part B was to be heard on the papers before Court, and the proper course would be to afford the respondents time to supplement their papers. This of necessity would result in a postponement of the matter.

[14] Waiving their right to the record, which they are entitled to in terms of Rule 53 of the Uniform Rules of Court, counsel for the applicants argued that there is "no other document that would come from the Department. The document they relied upon; they mentioned that in the HSF case, Mr. Rosenberg repeated it today that the Minister's decision is based on the recommendation of the Director-General. There is no other document. That is the only document. We have it in front of us." I will refer to this point later in this Judgment.

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[14] Answering Affidavit at para 10.
[15] Replying Affidavit at para 42.

[15] In support of this argument, the applicants referred to the matter of *Jockey Club of South Africa v Forbes*,[16] in which the Court, when examining Rule 53 of the Uniform Rules of Court, stated:

> "The primary purpose of the rule is to facilitate and regulate applications for review. On the face of it the rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the rule, slavishly – and pointlessly – to adhere to its provisions. After all: "(R)ules and not an end in themselves to observe for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts..."[17]

[16] Following a short adjournment, the Court ruled that Part A had to be proceeded with.

Historical Background

[17] With the advent of democracy, the new South Africa was and is still confronted with a high number of illegal immigrants, asylum seekers and refugees. Most of these migrants come from the neighbouring countries including Zimbabwe. In 2008 approximately 200 000 people arrived in South Africa seeking asylum, a vast number of whom were Zimbabwean nationals. Again in 2009 another 207 000 arrived also seeking asylum. Similarly, many of them were Zimbabwean nationals.[18] The large detention and deportation of Zimbabwean nationals in South Africa, as a means of deterring illegal immigration and illegal stay, proved to be ineffective and costly; since many deportees simply returned to South Africa within a few days or months after their deportation.

DZP Era

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[16] [1992] ZASCA 237; 1993 (1) SA 649 (AD); [1993] 1 All SA 494 (A).
[17] Id at para 30.
[18] Director-General letter of 31 December 2021 (CaseLines at 001-181).

[18] In April 2009, South Africa implemented the Dispensation of Zimbabwe Project ("DZP") "to regularise the large number of Zimbabweans nationals residing in South Africa irregularly. The extraordinarily high number of applications under the Refugees Act that were lodged by Zimbabwean nationals who had fled to South Africa exceeded the capacity that the Department of Home Affairs had to properly consider and, where appropriate, issue asylum and refugee permits. This raised the need for a special response to the undocumented Zimbabwean migrants in South Africa to reduce the severe pressure on the South African asylum and refugee system."[19]

[19] The DZP was also meant to curb the deportation of Zimbabweans who were in South Africa illegally; and provided amnesty to Zimbabweans who had obtained South African documents fraudulently. Approximately 295 000 Zimbabweans applied for the permit. Just over 245 000 permits were issued and the rest were denied due to the lack of passports or non-fulfilment of other requirements.[20]

[20] It is noteworthy that:

> "74 In order to obtain a permit under the DZP regime, a Zimbabwean national in South Africa was required to prove that:
>
> 74.1 They were Zimbabwean national; and
> 74.2 They were gainfully employed in the Republic.
>
> 75 Applicants for DZPs were also required to provide their fingerprints, surrender their asylum or refugee status, and hand over any fraudulent immigration documents which they possessed."[21]

ZSD Era

[21] The DZP permit- holders were legally allowed to work, conduct businesses and study in South Africa, for the duration of the permit. The DZP was valid from 2010 to 2014. Announcing the closure of the DZP and the creation of the new

[19] Founding Affidavit at para 71.
[20] *Statement by the Home Affairs Minister on the New ZSP*, Founding Affidavit (CaseLines at 001-148).
[21] Founding Affidavit at paras 74-5.

Zimbabwean Special Dispensation ("ZSD") permit of 2014, Minister Gigaba remarked that "[t]his was a significant gesture of support and solidarity with our neighbouring country of Zimbabwe in response to the large number of Zimbabweans residing illegally in South Africa due to political and economic instability there."[22]

[22] The DZP permit holders who wished to remain in South Africa after the expiry of their DZP permits were eligible to apply for the Zimbabwe Special Permits ("ZSP"), which existed for three years. However, they were subject to certain conditions including:

> "79.1 Possessing a valid Zimbabwean passport;
>
> 79.2 Providing evidence of employment, business or accredited study;
>
> 79.3 Having a clear criminal record. All Applicants were required to submit Police clearance both from Zimbabwe and South Africa;
>
> 79.4 Make payment of a prescribed fee of R850.00 to a private company, VFS Visa Processing (SA) Pty Ltd (VFS);
>
> 79.5 Providing their biometric information to VFS.
>
> 80 Permit-holders under the ZSP dispensation were entitled to live, work, conduct business and study in South Africa, for the duration of the permit. Holders of ZSPs could not apply for permanent residence; irrespective of the duration of their stay in South Africa. They were also prohibited from amending their immigration status."[23]

ZEP Era

[23] On 8 September 2017, Minister Mkhize announced that 31 December 2017 would see an end to the ZSP regime, which started in 2014. Having confirmed that the total number of ZSP permits issued was 197 941, he announced a new dispensation called the Zimbabwean Exemption Permit ("ZEP"). The ZEP was due to commence on 15 September 2017 and terminate on 31 December 2021.[24]

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[22] See n 20 above.
[23] Founding Affidavit at paras 79-80.
[24] *Statement by Minister Mkhize on the Closure of the Zimbabwean Special Permit (ZSP) and the Opening of the New Zimbabwean Exemption Permit (ZEP)*, 8 September 2017 (CaseLines at 001-152).

[24] Minister Mkhize confirmed that migrants play an important role in respect of economic development and in enriching social and cultural life. Following his remarks that these efforts would assist in addressing the throes of labour from our neighbours in the SADC region, he concluded that "the ZEP will go a long way in assisting Zimbabweans to rebuild their lives as they prepared, at work, in business and in educational institutions, for the final return to their sovereign state – Zimbabwe – in the near future."[25]

[25] The general conditions for the ZEP were:

> "87.1 the ZEPs holder could work and be employed in the Republic;
> 87.2 the holder could not apply for permanent residence, irrespective of the duration of their stay in South Africa;
> 87.3 the permit was not renewable or extendable; and
> 87.4 the holder could not change the conditions of the permit in South Africa.
>
> 88 Applicants for ZEPs were required to pay an administrative fee of R1092 to VFS and submit the following documents using an online portal administered by VFS:
>
> 88.1 A valid Zimbabwean passport;
> 88.2 Evidence of employment - in the case of an application for work rights;
> 88.3 Evidence of business - in the case of an application for business rights; and/or
> 88.4 Evidence of admission letter from a recognised learning institution - in the case of an application for study rights."[26]

The Dispute

[26] On 31 December 2021 approximately 178 000 ZEP permits were due to expire. The Respondents state, in their answering affidavit and heads of argument, that:

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[25] Id (CaseLines at 001-153).
[26] Founding Affidavit at paras 87-8.

"In September 2021 the Minister decided **not** to extend the exemption regime, as had hitherto taken place. This was communicated to the public in November 2021.

On 29 December 2021, the Minister issued Immigration Directive No.1 of 2021 (Directive 1) extending the validity of the ZEPs to 31 December 2022. Directive 1 of 2021 was gazetted on 7 January 2022.

Directive 1 recorded the Minister's decision to extend the validity of the current ZEPs for a period of 12 months to 31 December 2022 and that ZEP holders had the opportunity to apply for visas... ."[27] (Emphasis added.)

[27] On 2 September 2022, the Minister issued Directive No. 2 of 2022 extending the validity of the ZEPs from 31 December 2022 to 30 June 2023 and granting the same protection to ZEP holders during this further period, as those granted to ZEP holders by Directive 1.[28]

[28] This extension was for the purpose of allowing the ZEP holders to apply for one or other visas provided for in the Immigration Act that they may qualify for. This was made clear on 29 November 2021 when the Director-General issued Immigration Directive 10 of 2021 in which he confirmed that:

"[Cabinet had decided to no longer] issue extensions to Zimbabwean nationals who are holders of the Zimbabwean Exemption Permits (ZEP), but 12 (twelve) month grace period following the expiry of the current ZEP on 31 December 2021 within which these ZEP holders need to regularise their status within South Africa in terms of the Immigration Act, 2002 (Act No. 13 of 2002); ("the Immigration Act") and the Immigration Regulations, meaning 31 December 2022.

During the said 12 (twelve) month period, holders of the ZEP should apply for mainstream visas that they qualify for and ensure that their applications comply with the provisions and requirements of the Immigration Act and Immigration Regulations. At the expiry of this 12 (twelve) month period, those who are not successful will have to leave South Africa or be deported."[29]

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[27] Respondents' Heads of Argument paras 9-11.
[28] Id at para 12.
[29] Founding affidavit at paras 93-4.

[29] On 7 January 2022, the Director-General issued a notice to all Zimbabwean nationals, which was published in the Star and Sowetan newspapers. At paragraph 2 of the notice, he wrote the following:

> "Kindly note 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 of section 31(2)(b) of the Immigration Act from 2017."[30]

[30] The Minister of Home Affairs issued a press statement dated 7 January 2022. On 9 January 2022, the press statement was published in the City Press, Sunday Times and Sunday World. At paragraph 11 of the press statement, he wrote:

> "In or about September 2021 I decided to approve the recommendation made by the Director-General not to extent the exemptions to the Zimbabwean nationals."[31]

[31] On 31 December 2021, the Director-General, L.T. Makhode, addressed a letter to one of the stakeholders. At paragraph 2 of the letter, he stated:

> "Kindly note 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 exemption granted to you in terms of section 31(2)(b) in 2019."[32]

[32] The Minister's powers under Section 31(2) (b) of the Immigration Act of 13 of 2002 are as follows:

> "**31. Exemptions**
>
> ....
>
> (2) Upon application, the Minister may under terms and conditions determined by him or her–
>
> ....

[30] Answering Affidavit at para 144.1, Annexure AA5 (CaseLines at 003-92).
[31] Id at para 144.3, Annexure AA6 (CaseLines at 003-93).
[32] Id at para 144.4, Annexure AA7 (CaseLines at 003-96).

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

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

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

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

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

[33] It is this decision that is the *raison dêtre* of this case. However, the main battle is reserved for the Part B hearing.

Legal Framework

[34] When dealing with an interim interdict, it is trite that one focuses on the four requirements, namely:

(a) *prima facie* right, albeit open to some doubt;
(b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;
(c) the balance of convenience must favour the granting of the interdict and
(d) the applicant must have no alternative satisfactory remedy.[33]

[35] Examining these four requisites, the Court in the matter of *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*[34] stated:

> "An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a

[33] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*National Treasury v OUTA*) at para 41.
[34] [2008] ZASCA 78; 2008 (5) SA 339 (SCA).

continuing nature or there must be a reasonable apprehension that it will be repeated. The requisites for the right to claim an interim interdict are:

(a) A *prima facie* right. What is required is proof of facts that establish the existence of a right in terms of substantive law;

(b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) The balance of convenience favours the granting of an interim interdict;

(d) The applicant has no other satisfactory remedy.

The test in regard to the second requirement is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of 'reasonable apprehension' was quoted with approval in *Minister of Law and Order and Others v Nordien and Another*:

> 'A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.'

If the infringement complained of is one that *prima facie* appears to have occurred once and for all, and is finished and done with, then the applicant should allege facts justifying a reasonable apprehension that the harm is likely to be repeated."[35]

[36] An interim interdict is concerned with the preservation or restoration of the *status quo* pending the final determination of litigants' rights. To this end we refer to the matter of *National Gambling Board* in which it was held:

> "An interim interdict is by definition

[35] Id at paras 20-2.

'a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.'

The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has the jurisdiction to decide the main dispute"[36]

[37] It bears mentioning that in a proper exercise of one's discretion the four elements must be considered in conjunction with one another, not in isolation.[37]

[38] Having examined the *Setlogelo* test, the Court in *National Treasury v OUTA*[38] held the following:

"It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."[39]

[39] When considering an interim interdict, it is also prudent to be mindful of what was stated in *Pikoli v President and Others.* The Court said:

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[36] *National Gambling Board* above n12 at para 49.
[37] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E – F.
[38] *National Treasury v OUTA* above n 33 at para 41. The High Court relied on the well-known requirements for the grant of an interim interdict set out in *Setlogelo* and refined, 34 years later, in *Webster*. The test requires that an applicant that claims an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy.
[39] Id at para 45.

"When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief."[40]

Prima Facie Right

[40] Firstly, the applicants need to show that there is a *prima facie* right, albeit open to some doubt, to the relief they seek in the main application. As already hinted this Court will sneak a glance at the main action.

[41] Counsel for the applicants submitted that his clients challenged the Minister's decision primarily on *ultra vires.* He submitted that the Minister's decision is inconsistent with Section 31(2)(b) of the Act.

[42] He relied on the matter of *Minister of Education v Harris*[41] in which the Court said:

"In this case, there is no suggestion in the affidavits filed by the Minister of an administrative error. On the contrary, the notice in the present matter not only cites section 3(4)(i) of the National Policy Act three times as the source of its authority, it identifies itself with the Act by means of its heading 'Draft Age Requirements For Admission to an Independent School *Policy*' (my italics). There can be little question then that the provision was deliberately chosen. It might well be that those responsible for drafting the notice had doubts about whether the powers under section 5(4) of the Schools Act could be used in respect of independent schools, a matter which I have expressly left open. They might have had other reasons for choosing to issue the notice under section 3(4) of the National Policy Act. It is not necessary to speculate. What is clear is that they consciously opted to locate the notice in the framework of section 3(4) of the National Policy Act. The result is that it is not now open to the Minister to rely on section 5(4) of the Schools Act to validate what was invalidly done under section 3(4) of the National Policy Act. The otherwise invalid notice issued under the

[40] [2009] ZAGPPHC 99; 2010 (1) SA 400 (GNP) at para 6.
[41] [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).

National Policy Act can therefore not be rescued by reference to powers which the Minister might possibly have had but failed to exercise under the Schools Act".[42]

[43] He further referred to *Langa v Premier, Limpopo and Others.*[43] In this case the Court reiterated the principle as follows:

> "In this matter, the Premier could therefore have derived the power to implement the decision of the Kgatla Commission from sections 13(1)(c) and 30 of the Limpopo Act, read with sections 25 and 26 of the Framework Act. Instead, the Premier purported to issue the withdrawal notice in terms of section 13(3)(b) of the Limpopo Act. This is significant. In *Harris*, the Minister of Education issued a notice in terms of section 3(4) of the National Education Policy Act, which purported to require independent schools to enforce an age requirement for admission of learners to grade 1. This Court concluded that section 3(4) did not give him the power to do this. The Minister attempted to argue that even if the notice was not valid under section 3(4), it was valid under section 5(4) of the South African Schools Act (Schools Act), and therefore that the mistaken reference to section 3(4) did not render the notice *ultra vires*. This Court rejected that argument and held that it was not open to the Minister to rely on section 5(4) of the Schools Act 'to validated what was invalidly done under section 3(4) of the National Education Policy Act.' Thus the decision of the Minister could 'not be rescued by reference to powers which the Minister might possibly have had but failed to exercise under the Schools Act.'
>
> Thus, if a functionary purports to exercise under one Act a power that that Act does not confer upon him or her, that exercise of power is unlawful even if there is another Act that confers such power on the functionary. In this case, the Premier published a notice in the Provincial Gazette in which he purported to remove the applicant 'in terms of section 13(3)(b)' of the Limpopo Act. There is no suggestion of an administrative error in the affidavits filed by the Minister. When this apparent misquote in the Premier's notice was raised at the hearing of this matter, counsel for the fifth respondent attempted to argue that the Premier had exercised his power in terms of section 30 of the Limpopo Act and only had 'regard to'

[42] Id at para 18.
[43] [2021] ZACC 38; 2022 (3) BCLR 367 (CC); 2021 JDR 3152 (CC).

section 13. Following this Court's approach in *Harris*, it is not open to the Premier to now place reliance on section 30."[44]

Ultra Vires Challenge

[44] In a nutshell, counsel for the applicants submitted that the Minister relied on Section 31(2)(b) to not extend the ZEP. The ineluctable question is: does this section grant the Minister the right not to extend? If the answer is no he acted *ultra vires*, because he acted outside the provisions that he purported to be relying upon. However, if one equates the Minister's action to a withdrawal, the inescapable question is: was his action informed by good cause, as required by the section?

[45] On a proper reading of section 31(2)(b), the Minister is, when special circumstances exist which justify his decision, afforded powers to grant a foreigner or a category of foreigners the right of permanent residence for a specified or unspecified period. Using this section, this court is of the view that the Minister cannot terminate, extend or not extend the exemptions.

[46] However, in terms of section 31(2)(b)(i) the Minister is empowered to exclude one or more identified foreigner from such categories. In terms of section 31(2) (b)(ii) for good cause, the Minister is empowered to withdraw such rights from a foreigner or a category of foreigners. To arrive at a conclusion that there is good cause a court must evaluate the evidence objectively.

[47] In rebuttal, respondents' counsel submitted that before 31 December 2021 there was no intention or consideration to withdraw any rights or terminate the permits, because that would be a pre-mature termination before they lapse. He further submitted that when there was reference to a decision to terminate the permits, his *ipsissima verba* was: "one must recognise that as being perhaps loose talk or talk that is not anchored in the provisions in this context of section 31(2)." This Court does not share these sentiments. In matters of national importance and of

[44] Id at paras 45-6.

life and death for over 178 000 souls, if one includes the children, there is no room for loose talk. Loose lips sink ships.

[48] He urged the Court to conclude based on objective evidence, no matter what the Director-General said. In fact, he said it may not matter what the Minister might have said at any time. However, the objective evidence confirms that the Minister decided not to extend the exemptions. It is impossible to shut our eyes to the various statements, press releases and communications made by the Director-General and Minister.

[49] Respondents' counsel submitted two propositions to navigate what he called a difficult problem. Firstly, the Court must accept that there was no termination of ZEPs by any act of the Minister. There was no power exercised in terms of section 31(2). This Court views this proposition as being tantamount to rewriting the history of this case. The Minister did exercise powers in terms of section 31(2), he said so, whether he was empowered do so or not is another question.

[50] The second proposition is that on 20 September 2021 the Minister extended ZEPs by one year, the argument goes. He argued that "that is the first and in fact the only exercise in the context of this matter of a section 31(2)(b) power". He then urged the Court to bear in mind that there was no termination of the ZEP permits, not one single permit was terminated. Each of those permits was extended. This Court holds the view that, nothing could be further from the truth, the ZEP permits were terminated. ZEP permit holders were afforded an opportunity to regularise their stay in South Africa.

[51] On 20 September 2021, the argument further goes, the Minister was considering options that were placed before him. The respondents' counsel further submitted that one of those options could have been to extend the permits by 36 months (3 years) or by 48 months (4 years). He argued that this is a policy decision and could have been arrived at by means of a new ZEP scheme, setting in place a fresh exemption regime. Therefore, he submitted, with ZEP shortly to lapse, the Minister was faced with a decision whether to extend it and for how long.

[52] He mentioned that in law, no matter how it is described, ZEP was extended for 12 (twelve) months and 6 (six) months. These are the two administrative acts which stand and there could have been no termination except by the effluxion of time, he submitted. He mentioned that the Minister was aware of the looming termination and the possible dislocation that would involve over 178 000 people. He made a decision on the length of the extension, he maintained.

[53] Indeed, this Court concurs, the Minister was confronted with a variety of options, but he opted not to extend ZEP on the recommendation of the Director-General, he stated so himself. Responding to a question from the Court about what happens post 30 June 2023, counsel for the respondents made common cause with the Minister's decision. Following the three regimes, the ZEP was now coming to an end, he argued. He further stated that when the permits come to an end "there is dislocation and there are arrangements to be made. Twelve months is granted on the basis that is considered a reasonable extension in the circumstances. The Minister said within that twelve months' parties are advised to make the necessary applications for mainstream visas, to make the necessary applications for exemptions, to make the necessary applications for any waivers and equally to make representations."

[54] In our view, counsel is engaged in an effort to rescue the Minister's decision, the fact of the matter is that ZEP has come to an end. However, we are in total agreement with respondents' counsel that the twelve (12) and subsequently six (6) month extensions conferred rights to ZEP holders. These rights are akin to the ones found under ZEP. Where we part company is on his insistence that the Minister did not make a decision in terms of section 31(2)(b).

[55] He submitted that the applicants' arguments are misconceived, because under the notice of motion they describe the decision as the decision not to extend and under the founding affidavit they describe it as the decision to terminate without good cause. According to him there was never any termination or withdrawal of the ZEP permits.

Lack of Rationality and Good Cause Challenges

[56] Applicants' counsel submitted that the Minister failed to show good cause when exercising his decision. He submitted that good cause is not the same thing as reasonableness and rationality. Indeed, it is a much wider standard which invites the Court to make a value judgment based on the facts. In the matter of *eTV (Pty) Ltd and Others v Judicial Service Commission and Others*[45] the Court held:

> "[I]t is not sufficient that 'good cause' should exist purely in the mind of the decision-maker: the decision must, in addition, be objectively justifiable or survive objective scrutiny. Put differently, 'good cause' in the mind of the decision maker alone is simply not 'good enough. If questions such as the one in issue were to be interpreted purely against a subjective test, we might as well begin to put out the lights for any role for the courts as protectors and defenders of our constitutional order."[46]

[57] In his statement dated 7 January 2021, the Minister of Home Affairs stated his reasons for not extending ZEP, *inter alia*, they are:

> "It is documented that South Africa's unemployment rate increased by 1.8% bringing the overall rate to 34%. This rate is the largest since the start of Quarterly labour Force Survey in 2008.
>
> Approximately 1900 Zimbabwean nationals' exemptions holders applied for waivers in terms of the Immigration Act and their applications were rejected. These applications were in violation of the conditions of the exemption… ."[47]

[58] The applicants attacked these reasons and submitted that it is a "constellation or a random assemblage of justifications that have no bearing to the justification of introducing the scheme in the first place."

[59] Counsel for the applicants had argued that if the Minister was minded to terminate the ZEP scheme, he had to demonstrate the connection between the decision to terminate and the improvement in the economic and political situation

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[45] [2009] ZAGPJHC 12; 2010 (1) SA 537 (GSJ).
[46] Id at 544H-I.
[47] Founding Affidavit at para 99, Annexure FA7 (CaseLines 001-174).

in Zimbabwe. Therefore, the Minister's decision was worse than irrational in that it was arbitrary, he submitted. The primary justification for the introduction of the Dispensation Zimbabwean Project, later called ZEP, was the decline of the political and economic situation in Zimbabwe, he continued. Therefore, it means that this dispensation can only be withdrawn for reasons that are related to the political and economic stability of Zimbabwe, the argument goes.

[60] This Court does not share this view because of its polycentric nature. In the matter of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[48] the Court held:

> "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."

Constitutional Rights

[61] Applicants' counsel submitted the Minister's decision adversely affected ZEP holders' rights. First to be implicated are the constitutional rights which exist whether there is ZEP or not, he argued. These are rights which flow from the Bill of Rights of the Constitution and protect any person who is in South Africa unless the Constitution specifically limits the protection only to citizens and these are the higher order rights of ZEP holders, he submitted.

[62] This Court concurs that the Minister's decision will implicate the following rights: the right to human dignity (section 10 of the Constitution); right to life (section 11 of the Constitution); right to equality (section 9 of the Constitution); right to freedom and security of the person (section 12 of the Constitution);

[48] [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 95.

right to freedom of movement (section 21 of the Constitution); right to a basic education (section 29 of the Constitution); right to property (section 25 of the Constitution); and children's rights (section 28 of the Constitution).

[63] Continuing in the same vein, applicants' counsel maintained that there is a second order of rights. These are rights conferred to ZEP holders. In short, he submitted, ZEP transforms a person who would have been treated as an illegal immigrant into a person recognised by law as being in the country lawfully and the consequences that flow from being in the country lawfully are that one can work, study or conduct a business. The respondents' counsel conceded that the rights that will be implicated by the termination of ZEP include *inter alia* the rights to freedom of movement and residence. Both these rights are adversely impacted by the Minister's decision to terminate the ZEP.

[64] There was contestation about the nature of the decision. This decision was taken by a member of the executive, and it is also endorsed by Cabinet. The question is, does this decision fall under the exclusions mentioned in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")? Applicants' counsel submitted that it is an implementation of a legislative authority to an administrative fiat. Therefore, it is closer to the field of administration.

[65] This concept of policy can manifest itself in many ways, he argued. The policy may be in a statute, constitution or in an administrative decision, he continued. He submitted that the mere fact that an administrative decision is informed by policy consideration does not on its own transform the decision or take it out of the realm of administrative review. The only debate that we should entertain is whether the decision that has been taken fits the definition of an administrative decision under PAJA and if it does then it is vulnerable to challenge under PAJA, he submitted. The respondents view the decision as a policy decision.

[66] This Court is of the view that because of high policy content, the Court might view it as an executive decision. Even if policy is invoked, the decision still needs to

comply with the Constitution. In *Affordable Medicines Trust and Others v Minister of Health and Another*[49] the Court held:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.' In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."[50]

[67] This Court does not have to adjudicate this issue. This debate is better left for the correct forum, which is Part B.

[68] As already stated, the applicants anchor their case on five grounds. This Court is convinced that the applicants have established facts on a *prima facie* basis, if proved finally, will entitle them to a relief sought in the main application. The applicants have put forward a serious question to be tried as constitutional issues are involved.[51]

Irreparable Harm

[69] Secondly, the applicants must establish that there is a well-grounded apprehension of irreparable and imminent harm. As already stated the test for a reasonable apprehension of irreparable and imminent harm is an objective one.

[70] Having lived in South Africa for years, ZEP permit-holders have built families and businesses. Referring to family life, the Court in *Nandutu and Others v Minister of Home Affairs and Others*[52] held:

> "The right to family life is not a coincidental consequence of human dignity, but rather a core ingredient of it. This judgment grapples with the intertwined

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[49] [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).
[50] Id at para 49.
[51] *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell* NO and Others [1995] ZACC 13; 1995 (2) SA 813 (W); 1996 (1) BCLR 1 at 825C.
[52] [2019] ZACC 24; 2019 (5) SA 325; 2019 (8) BCLR 938 (CC).

relationship between human dignity and familial rights and how they function alongside notions of state security and legislative regimes that seek to protect persons within the borders of the Republic."[53]

[71] Some of the ZEP permit-holders have married South African nationals and have children who hold South African identification and travel documents. These children's entire livelihoods and existence have been in South Africa. These children will be uprooted in the middle of the academic year to begin afresh in a new education system. Any reasonable person confronted with these facts would apprehend the probability of irreparable and imminent harm to these children if their parents were to be uprooted and sent back home without proper engagements.

[72] The interest of a child is paramount and protected under section 28 of the Bill of Rights. The end of ZEP threatens to break up families. In the matter of *Centre for Child Law and Others v Media 24 Limited and Others*[54] the Court said:

> "The best interests of the child principle enshrined in section 28(2) of the Constitution is a right in and of itself and has been described as the 'benchmark for the treatment and protection of children'"[55]

[73] The respondents correctly conceded that ZEP permit-holders possess constitutional rights.[56] Even though they deny that there is a reasonable apprehension of breach of those rights. The respondents' main argument is that an interim interdict is not a viable relief in view of HSF and CORMSA review applications. They contend that at the heart of the litigation between *HSF/CORMSA v The Minister*,[57] on the one hand, and *ZIF v The Minister*, on the other hand, are the same issues.

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[53] Id at para 1.
[54] [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC).
[55] Id at para 37.
[56] Answering Affidavit at para 56.
[57] *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 75.

[74] The Respondents submitted that the review relief sought by ZIF would be met by an objection of *res judicata* and issue estoppel. They referred to a matter of *Smith v Porritt and Others.*[58] In this matter the Court indicated that each case will depend on its own facts and any extension of the defence will be on a case-by-case basis.[59] Indeed, this Court is alive to the danger of the multiplicity of judgments which may be conflicting. However, *in casu*, the applicants rely mainly on *ultra vires.* None of the parties in both *HSF/CORMSA* and *African Amity* canvasses the issue of *ultra vires.* Moreover, these applicants do not seek the same relief. For instance, African Amity seeks permanent residency status. It is our view that members of ZIF are entitled to ventilate their *ultra vires* argument under their Part B.

[75] Most of the Zimbabwean Immigration Federation members are unlikely to qualify for mainstream visas under the Immigration Act, namely the general work visa, the critical skills visa and the business visas. This was one of the reasons the exemption permit was conceived. We pause to mention that this Court is sensitive to the separation of powers and understands the prerogative that the Minister enjoys in deciding to end ZEP, if he is so minded. However, he must still comply with the Constitution of the Republic.

[76] A proper engagement with ZEP holders involves, *inter alia*, adequate staff to deal with a sudden surge in visa applications. At paragraph 159 of the answering affidavit the following is stated: "the Department was thus required to prioritize its budget, as it was unable to employ more staff members in immigration

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[58] [2007] ZASCA 19; 2008 (6) SA 303 (SCA).

[59] Id at para 10. The court held:
"Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank BPK* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata.* The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis. (*KBI v Absa Bank supra* at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others".

services."[60] The Department does not deny that Zimbabwean Immigration Federation members have experienced severe delays in processing their applications for mainstream visas.

[77] We are told by no less a person than the Minister that "the DHA has now limited capacity to deal with the extension of the exemptions by virtue of its constrained budget. The outbreak of COVID-19 and other economic factors facing South Africa resulted in the budget of the DHA being cut twice in the amount of R1.8 billion in 2020/21 and 2020/2022 financial years.... This resulted in the insufficient funds to cover the existing staff compliment..."[61] Therefore, to expect over 178 000 people to be processed in the system before 30 June 2023 is both irrational and unreasonable.

[78] On their deportation, ZEP permit-holders stand to lose their homes, businesses and jobs. Furthermore, if the applicants go on to be victorious in the Part B application, it will be a hollow victory. Clearly, that is not only unjust but also threatens the rule of law and visits irreparable harm on the applicants.

[79] The respondents' submission that section 34(1) confers a discretion on the immigration officer whether or not to effect an arrest or detention of an illegal foreigner is cold comfort. Even though the immigration officer must approach the exercise of his or her discretion in *favourem libertatis* when deciding whether or not to arrest or detain a person, the applicants will be at the mercy of the officer's discretion. In *S v Zuma and Others*[62] the Court held:

> "Even if there is such a discretion and even if it could be exercised so as to overcome a statutory presumption (surely a doubtful proposition) that gives rise to no more than a possibility of an acquittal; the possibility of a conviction remains. The presumption of innocence cannot depend on the exercise of discretion."[63]

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[60] Answering Affidavit at para 159.
[61] Founding Affidavit at para 99, Annexure AA7 (CaseLines 001-173).
[62] [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA).
[63] Id at para 28.

[80] Moreover, Cabinet told the applicants that if they were not successful in their visa applications they should leave South Africa or be deported, as stated in paragraph 28 above.

[81] For all the reasons stated, we hold the view that there is a well-grounded reasonable apprehension that the applicants will suffer irreparable harm if the interim interdict is not granted.

The Balance of Convenience

[82] Thirdly, the balance of convenience must favour the granting of a temporary interdict to the applicants. Under this rubric, the Court in *National Treasury v OUTA* held that:

> "A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant if interim relief is not granted as against the harm a respondent will bear, if the interdict is granted. Thus a court must assess all relevant factors carefully in order to decide where the balance of convenience rests."[64]

[83] It goes without saying that the constitutional rights of ZEP permit-holders are under serious threat of infringement come 30 June 2023. In particular, the fundamental rights of ZEP holders such as the right to human dignity; right to life; right to equality; right to freedom and security; right to freedom of movement; rights to a basic education; right to not be deprived of property; and the best interest of the child as contained in the Bill of Rights stand to be violated.

[84] This Court is enjoined to uphold the Constitution and must ensure that laws promote the spirit, purport and objects of the Bill of Rights. Accordingly, the stronger the prospects of success, the less the need for a balance of convenience to favour the applicants and the opposite is true. The weaker the prospects of success, the greater the need for a balance of convenience to favour

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[64] *National Treasury v OUTA* above n 33 at para 55.

them. We are of the view that the applicants have made out a case with strong prospects of success because of the following.

[85] Firstly, section 31(2) (b)(ii) does not cater for what the Minister did. In our view his conduct is *ultra vires*. Secondly, he did not show good cause for his decision. In the matter of *National Credit Regulator v Opperman and Others*[65] the Court held:

> "But we know that no rights flow from or exist under an unlawful and void agreement. The provision would be 'inoperative, a patently regrettable result', ineffectual and in fact meaningless. It would be a patent 'drafting error'."[66]

[86] Finally, the constitutional rights of the applicants need to be protected from being trampled upon. We cannot conceive of any harm that will be visited on the Department if the interim interdict is granted. Especially, when counsel for the respondents told us that the extensions are not cast in stone. The Minister has not closed his mind to the possibility of a further extension. The Departmental Advisory Council advises him. It was argued that the "Minister did not exclude the possibility of granting a further extension(s) in the future, should the need arise and should this be appropriate."[67]

[87] The same cannot be said about ZEP holders. They stand to lose their assets, businesses, and jobs, to mention but a few. Moreover, in our view the two extensions of ZEP holders' rights are an indication that the respondents can accommodate the applicants while they exhaust all their legal rights as provided for in an open and democratic society based on human dignity, equality and freedom.

[88] This court is persuaded that this matter falls within the ambit of the clearest of cases as adumbrated in the judgment of DCJ Moseneke in *OUTA*[68]. As already

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[65] [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC).
[66] Id at para 36.
[67] Respondents' Heads of Argument at para 14.3.
[68] *National Treasury v OUTA* above n 33.

stated, we are mindful of the need to respect the separation of powers, as the court in *OUTA* cautioned when it said:

> "Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.
>
> The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases". However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case."[69]

[89] We are of the view that the balance of convenience favors the applicants, especially since the decision implicates the Bill of Rights as already ventilated above.

Alternative Remedy

[90] Lastly, the applicants must have no satisfactory alternative remedy. Firstly, both the twelve and six month extensions were designed to afford the ZEP holders an opportunity to regularise their stay in South Africa. This is in the face of a largely depleted and financially challenged Immigration Office. This much the respondents have conceded. Therefore, a submission that ZEP holders have other remedies cannot hold.

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[69] Id at paras 46-7.

[91] Secondly, the decision to end ZEP is a *fait accompli.* There cannot be any form of consultation to talk of. The Court in *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others*[70] held that:

> "The learned judge said, with support from various cases decided mainly in the English courts, that seeking approval for a decision already made is not consultation. He said that consultation entails 'a genuine invitation to give advice and a genuine receipt of that advice', it is 'not to be treated perfunctorily or as a mere formality', and that engagement after the decision-maker has already reached his decision, or once his mind has already become 'unduly fixed', is not compatible with true consultation."[71]

[92] Rebutting this point, the respondents relied on *Mamabolo v Rustenburg Regional Local Council*[72] in which the Court stated:

> "The appellant's main complaint seems to be that when he was invited to make representations on 28 May 1996, a decision had already been taken to dismiss him. As a general proposition the expectation of procedural fairness gives rise to a duty upon the decision maker to afford the affected party an opportunity to be heard before a decision is taken which adversely affects his rights, interests or legitimate expectations and a failure to observe this rule would lead to invalidity - Baxter - Administrative Law 3rd ed at 587. This Court has said that a right to be heard after the event, when a decision has been taken, is seldom an adequate substitute for a right to be heard before the decision is taken *Attorney-General, Eastern Cape v Blom and Others* 1988(4) SA 645 (A) at 668D.
>
> I am entirely in agreement with the dictum in the *Blom* case (supra). However this case stands on a different footing. The decision taken on 14 May 1996 was in substance provisional and not final. This was made clear to the appellant and that is why he was invited to address the Council on 28 May 1996, if he so wished. Besides, the decision to consider the confirmation or termination of his appointment is not something that was suddenly sprung upon him; he knew that

[70] [2013] ZASCA 134; 2013 (6) SA 421 (SCA).
[71] Id at para 42.
[72] [2000] ZASCA 45; 2001 (1) SA 135 (SCA).

at the end of his probationary period this issue would arise. He would have applied his mind to it and, if so advised, would have even sought legal assistance."[73]

[93] It is clear to us that the Minister has not given the extensions in order to engage in consultation with ZEP holders. The extension is simply for the ZEP holders to apply for visas. In the minutes of the meeting with the Scalabrini Centre it is recorded:

> "The Minister responded to indicate that there will be no further extension that will be given to ZEP holders. The Minister added that at a meeting with Freedom Advocates, he indicated that the ZEP holders have been given sufficient time to move to a main stream visa and if they do not they must leave SA by the 31 December 2022."[74]

[94] The Director-General sent two identical letters to the Zimbabweans Diaspora Association and African Amity. The letter stated the following:

> "Kindly note that the Minister of Home Affairs has exercised his powers in terms of section 31(2)(b) of the Immigration Act 13 of 2002 not to extend the exemption granted to Zimbabwe nationals in terms of section 31(2)(b) in 2019.
>
> In order to avoid unnecessary prejudice, the Minister has also imposed a condition giving you a period of 12 months in order to apply for one or more of the visas provided for in the Immigration Act.
>
> You are therefore acquired to make use of the 12 months period to apply for one or more of the visas set out in the Immigration Act."[75]

[95] The conspectus of evidence indicates with certainty that the applicants do not have an adequate alternative remedy. It is our view that an interim interdict pending the judgment in the main application under Part B is justified.

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[73] Id at paras 20-1.
[74] Answering Affidavit at para 152; Annexure AA11 (CaseLines 003-108).
[75] Applicant's Heads of Argument at para 96.

Costs

[96] It is trite that the Court's discretion on costs is wide and unfettered but must be exercised judicially. I am mindful of the dictum in the matter of *Biowatch Trust v Registrar Genetic Resources and Others.*[76] However, we are of the opinion, and in exercising our discretion, that the costs should be cost in the main application. The main application should be proceeded with forthwith, especially since the applicants' counsel submitted that they already have the documents in terms of Rule 53. As mentioned under paragraph 15 above, the applicants' counsel relied on the *Jockey Club* case to jettison the benefits of Rule 53. It is safe to conclude that the matter will be finalised in less than twelve months.

Order

1. Pending the judgment of this Court in the main application under Part B, the respondents are:

    a) Interdicted and restrained from arresting, issuing an order for deportation or detaining any holder of the Zimbabwe Exemption Permit ("ZEP") for the purposes of deportation in terms of section 34 of the Immigration Act 13 of 2002 ("Immigration Act") for any reason related to him or her not having any valid exemption certificate in his or her passport;

    b) Directed that any holder of the ZEP may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act solely for the reasons that they are a holder of the ZEP; and

    c) Directed that the holder of the ZEP 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

[76] [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

2002 ("Immigration Act") for any reason related to him or her not having any valid exemption certificate in his or her passport;

b) Directed that any holder of the ZEP may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act solely for the reasons that they are a holder of the ZEP; and

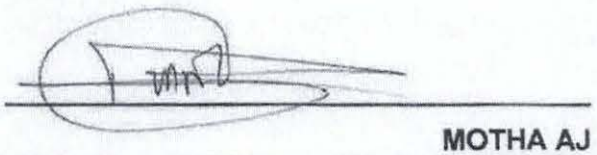
c) Directed that the holder of the ZEP may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for reasons of not having a valid permit indicated in his or her passport.

2. The applicants are ordered to set down the main application within twelve months from date of this order, failing which this order will lapse.

3. The costs of this application (PART A) shall be costs in the main application. (PART B)

C. COLLIS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

G. MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA



MOTHA AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Date of hearing:	13 April 2023
Date of judgment:	28 June 2023

Appearances:

For the Applicants:	Adv. T. Ngcukaitobi SC
Instructed by:	Mabuaza Attorneys
For the Respondents:	Adv. S. Rosenberg SC
Instructed by:	Office of the State Attorneys