

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

Case No: 32323/22

In the matter between:

ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA Applicant

In re:

HELEN SUZMAN FOUNDATION Applicant

**CONSORTIUM FOR REFUGEES AND
MIGRANTS IN SOUTH AFRICA** Intervening Party

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR-GENERAL OF HOME AFFAIRS Second Respondent

**HSF'S HEADS OF ARGUMENT:
RESPONSE TO INTERVENTION APPLICATION**

Contents	
INTRODUCTION.....	2
THE RELEVANT BACKGROUND.....	2
NO DIRECT AND SUBSTANTIAL INTEREST.....	5
INTERESTS OF JUSTICE	8
CONCLUSION	9

INTRODUCTION

- 1 All Truck Drivers Forum and Allied South Africa (Truck Drivers Forum) has applied for leave to intervene as the third respondent in an application brought by the Helen Suzman Foundation (HSF).
- 2 The HSF objects to the intervention application on two main grounds:
 - 2.1 First, the Truck Drivers Forum has failed to demonstrate any direct and substantial interest warranting their joinder in the main proceedings; and
 - 2.2 Second, the interests of justice do not support its admission.
- 3 Before addressing these issues, a summary of the main application and the Truckers Drivers Forum's intervention is necessary.

THE RELEVANT BACKGROUND

- 4 The main application concerns the rights of over 178,000 Zimbabwean nationals who are holders of Zimbabwean Exemption Permits (ZEPs).¹
- 5 For almost fifteen years, the Minister of Home Affairs has granted exemptions to qualifying Zimbabwean nationals under section 31(2)(b) of the Immigration Act, 13 of 2002, affording them the rights to live and work in South Africa.²
- 6 In reliance on these permits, Zimbabwean nationals have established lives, families, and careers in South Africa, which have now been placed in jeopardy.³

¹ HSF FA (main application): p 001-24 p 4.

² HSF FA (main application): p 001-24 p 5.

7 The Minister has now decided to terminate the ZEP programme and to refuse any further extensions beyond 30 June 2023.⁴

8 The HSF seeks to review and set aside this decision, in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), the constitutional principle of legality, and the Bill of Rights, on five main grounds which are fully canvassed in the main application:

8.1 First, the decision was procedurally unfair and procedurally irrational, in the absence of any prior consultation process with affected ZEP-holders, civil society and the public at large.

8.1 Second, it is a breach of the constitutional rights of ZEP-holders and their children.

8.2 Third, it was taken without any regard to the impact on ZEP-holders.

8.3 Fourth, 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.

8.4 Fifth, the decision is otherwise unreasonable and irrational.

9 The HSF seeks relief in three parts:⁵

9.1 A declaration that the Minister's decision is unconstitutional, unlawful and invalid.

³ HSF FA (main application): p 001-25 p 6.

⁴ HSF SRA (main application): p 022-3.

⁵ Amended NoM: p 001-228.

- 9.2 An order setting aside the decision and remitting it 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.
- 9.3 A temporary order, pending the Minister's further decision, preserving the Minister's previous directives that entitle ZEP-holders to remain in the country.
- 10 The Truck Drivers Forum filed an application for leave to intervene in this matter on 27 September 2022, just six days before the scheduled full court hearing on 5 October 2022. It did so despite the fact that its attorneys had access to the papers in the matter since 27 June 2022.⁶
- 11 The premise of its intervention is that it seeks to argue that the Minister's initial decision to grant ZEPs was unlawful and invalid.⁷
- 12 This is a completely different case to the relief sought by the HSF and CORMSA, that falls beyond the scope of the main application.⁸

⁶ HSF AA p 034-11 para 26.

⁷ Truck Drivers Forum FA (intervention application): p 026-8 para 7.

⁸ HSF AA (intervention application): p 034-9 para 19.

NO DIRECT AND SUBSTANTIAL INTEREST

13 An applicant for intervention must establish a direct and substantial interest in the relief sought. In ***SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others***⁹, the Constitutional Court stated the position as follows:

“[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought.”

14 It follows that a party can only be said to have a direct and substantial interest in the matter if the relief sought cannot be sustained and carried into effect without prejudicing their interests.¹⁰

15 The Trucker Drivers Forum has failed to satisfy this test.

16 First, the Truck Drivers Forum’s stated interest is its desire to prevent, “*illegal and undocumented truck drivers from being employed in the Republic*”.¹¹ Mr Khumalo, the deponent to their founding affidavit, records the Truck Drivers

⁹ *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC) paras 9, (recently applied in *Minister of Finance v Afribusines NPC* 2022 (4) SA 362 (CC) at para 23 where it was stated that: “A party is entitled to join and intervene in proceedings where they have a direct and substantial interest in the matter. A person is regarded as having a direct and substantial interest in an order if that order would directly affect that person’s rights or interests.”

¹⁰ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 653; *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 9; *Absa Bank Ltd v Naude* NO 2016 (6) SA 540 (SCA) at para 10.

¹¹ HSF AA (intervention application): p 034-8 para 18.

Forum's mission and vision as aiming "*to make sure that no undocumented workers are involved in the trucking industry*"¹².

17 The complete answer is that ZEP-holders are neither "illegal" nor are they "undocumented". They have lived and worked in South Africa lawfully for more than 13 years. The premise of the Truck Drivers Forum's alleged interest in the matter is therefore without any factual foundation.

18 Second, the Truck Drivers Forum has failed to demonstrate how their interests would be adversely affected by the relief sought by the applicants.

18.1 If the Minister's decision is remitted to the Minister for reconsideration, following a fair process, it would have ample opportunity to air its views during this reconsideration process.¹³

18.2 Furthermore, a temporary extension of existing ZEPs, pending the Minister's further decision, is an order preserving the *status quo*. It changes nothing and has no adverse impact on the rights of any party.

19 The high-water mark of its alleged interest is the claim that this relief would somehow "*perpetuate an illegality*". This is so, it argues, because the Minister's decision to create the ZEP programme and its predecessors was unlawful and invalid.¹⁴

¹² Truck Drivers Forum FA (intervention application):p 026-7 para 6.

¹³ HSF AA (intervention application): p 034-10 para 21.

¹⁴ Truck Drivers Forum's HOA p 038-14 para 33.

- 20 That argument is stillborn in the face of the ***Oudekraal / Kirland***¹⁵ principle: unless and until a decision is declared invalid and set aside by a court, it exists in fact, it must be treated as valid, and cannot be ignored.
- 21 The Trucker Drivers Forum has not brought any application to review and set aside Minister's decision to grant ZEPs, nor could it do so as a respondent in these proceedings. The result is that existing ZEPs must be treated as lawful and valid.
- 22 This attack on the ZEP-programme would require a standalone review application. The Truck Drivers Forum would also need to bring a properly motivated application to condone its delay in bringing this challenge, many years after the Minister issued ZEPs in 2017. Absent condonation, this Court cannot entertain such a challenge.¹⁶
- 23 In effect, the Truck Drivers Forum seeks to use this intervention application to bypass these legal and procedural obstacles. That is an abuse of the intervention procedure under Rule 12.

¹⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ("***Oudekraal***") at para 26; (See also *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd T/A Eye & Lazer Institute* 2014 (3) SA 481 (CC) ("***Kirland***") para 64 and 105, it was stated that the "... approval communicated to Kirland was therefore, despite its C vulnerability to challenge, a decision taken by the incumbent of the office empowered to take it, and remained effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat.")

¹⁶ *City of Cape Town c Aurecon South Africa (Pty) Ltd (Consulting Engineers South Africa as amicus curiae)* 2017 (6) BCLR 730 (CC) para 44; *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54.

INTERESTS OF JUSTICE

24 In **Gory v Kolver**,¹⁷ the Constitutional Court explained that in constitutional matters:

“Even if the applicant is able to show a direct and substantial interest, the Court has an overriding power to grant or to refuse intervention in the interests of justice. Other considerations that could weigh with the Court in this regard include the stage of the proceedings at which the application for leave to intervene is brought, the attitude to such application of the parties to the main proceedings, and the question whether the submissions which the applicant for intervention seeks to advance raise substantially new contentions that may assist the Court.”

25 The Truck Drivers Forum’s attempts to distinguish *Gory* are without merit. *Gory* stands for the proposition that in all constitutional matters, involving orders *in rem*, a court must ultimately decide whether or not to allow intervention by considering whether it is in the interests of justice to grant leave to intervene.¹⁸ Were that not so, the courts may be inundated with applicants insisting on their right to be heard. That reasoning, based on pragmatism and practicality, has as much, if not more, force in the High Court.

26 The interests of justice do not support the Truck Drivers Forum’s intervention in this case.

27 First, the Truck Drivers Forum’s application raises a completely different issue to the applications that are before this Court. Nothing in the joinder application

¹⁷ *Gory v Kolver* 2007 (4) SA 97 (CC) at para 13.

¹⁸ *Id* para 12.

is useful to assist the Court to determine the merits of the HSF and CoRMSA applications.¹⁹

28 Second, the attack on the validity of the ZEP programme constitutes a separate cause of action which requires a separate review application, for all the reasons just explained.

29 Third, as is documented in the HSF's answering affidavit, the Truck Drivers Forum failed to bring its application timeously,²⁰ it ignored court-ordered timelines for the filing of further affidavits,²¹ and its intervention would only cause further disruption and delay in these proceedings.²²

30 The hearing of the main matter is set down for the week of 11 April 2023 and it is essential that the matter be finalised and decided well before ZEPs are due to expire on 30 June 2023. Any further delays or disruptions would cause the most extreme prejudice to tens of thousands of ZEP-holders.

CONCLUSION

31 Accordingly, it is submitted that this application stands to be dismissed with costs, including costs of three counsel.

¹⁹ HSF AA (intervention application): p 034-11 para 27.

²⁰ HSF AA (intervention application): p 034-11 para 26.

²¹ Court order: p 0-13 para 1.2. HSF AA (intervention application): p 034-6 paras 8 - 13.

²² HSF AA (intervention application): p 034-12 para 29.

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20 January 2023**