IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32323/2023

In the matter between:

THE HELEN SUZMAN FOUNDATION	**FIRST APPLICANT**
THE CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	**SECOND APPLICANT**

And

THE MINISTER OF HOME AFFAIRS	**FIRST RESPONDENT**
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**SECOND RESPONDENT**
ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA	**INTERVENING RESPONDENT**

RESPONDENTS' ANSWERING AFFIDAVIT TO APPLICATION FOR INTERIM ENFORCEMENT

I the undersigned

LIVHUWANI TOMMY MAKHODE

do hereby make an oath and state that:

BT LT.

1. I am the Director General of the Department of Home Affairs ("the DHA").

2. I am duly authorized to depose to this affidavit on behalf of the first and second respondents ("the respondents").

3. The facts deposed to in this affidavit fall within my personal knowledge and are true and correct. To the extent that I rely on facts that are not within my personal knowledge, I believe them to be true and correct.

4. Where I make submissions of a legal nature, I do so on the advice of the respondents' legal representatives.

5. I have read the founding affidavit deposed on behalf of the Helen Suzman Foundation ("the HSF") in support of an application for the enforcement of the interim order of this court ("the enforcement application").

6. This answering affidavit is filed in opposition to the relief sought by the HSF.

7. Before proceeding to answer *ad seriatim* the allegations in the *HSF* founding affidavit, I set out the respondents' basis for opposing this application.

BASIS OF OPPOSITION

Section 18 of the Superior Courts Act

8. Section 18 of the Superior Courts Act provides as follows:

> *"18 Suspension of decision pending appeal*

B·T K.T.

(1) *Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*

(2) *Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application appeal.*

(3) *A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party would not suffer irreparable harm if the court so orders."* (Emphasis added)

9. It is clear that the HSF Order does not fall within the purview of section 18 (2) of the Superior Courts Act.

The HSF order is interim

10. By virtue of the provisions of section 18(2) of the Superior Courts Act which provides that:

"*(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a*

B.Y WT.

decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application appeal.",

The *HSF* order is also not suspended pending the decision of the application for leave or of an appeal. In any event, the Minister of Home Affairs ("Minister") issued a Directive extending the validity of the ZEP permits to 31 December 2023. Should

a need arise to issue another Directive, the Minister will not shirk his statutory responsibility in this regard

11. This court lacks jurisdiction to grant the immediate enforcement of the interim order and on this basis, the court ought to dismiss the *HSF* application.

The application is not urgent

12. The applicants have been well aware of the application for leave to appeal since 13 July 2023. They took no steps to launch this application immediately upon knowledge of the pending application for leave to appeal.

13. It has taken the applicants over a month, since knowledge of the application for leave to appeal, to launch these proceedings.

14. ZEP holders are afforded protections by the Directives issued by the Minister. As indicated above, the Minister is not closed off to any future Directive(s) being issued should the circumstances dictate so.

15. It is not a foregone conclusion that securing of an opposed hearing date before 31 December 2023 would be extraordinarily difficult. This application is not voluminous as compared to the review application. The parties to the matter are also at liberty to approach the Deputy Judge President for a special allocation for the hearing of the matter.

16. ZEP holders have at all material times been aware that the ZEP regime is temporary and that at some point it would come to an end.

17. ZEP holders who have applied for waivers and visas are protected as long as their applications are pending.

18. The letter seeking an undertaking from the Minister was dispatched to the Minister's attorneys on 21 August 2023, more than a month since the applicants were aware of the Minister's application for leave to appeal. This letter was simply dispatched as a ploy to trigger non-existent urgency which is alleged in these proceedings.

19. The fact that the applicant's previous senior counsel has left the Bar to pursue a new career is no excuse rendering this matter to be urgent. It is not as if the applicant's previous senior counsel left the bar without any notice to the applicants. In fact, Mr Budlender appeared in the Constitutional Court on 28 August 2023 representing the Minister, the first respondent in these proceedings.

20. Moreover, the applicant refers to the Press Statement issued by the Minister on 29 June 2023. In the Press Statement, the Minister made it clear that the considered the judgment and took legal advice and intended to challenge the judgement on appeal.

Personal costs order against the Minister

B.Y K.T.

21. I submit that no case has been made for such an order and test laid down by the Constitutional Court has not been met.

22. The Minister has not been cited in his personal capacity.

23. On the basis of the opposition submitted above on behalf of the respondents, this application falls to be dismissed with costs.

24. I now turn to deal with the allegations in the founding affidavit *ad seriatim*. I will deal with only those allegations that merit an answer. Those allegations that have not been specifically answered and are inconsistent with what is stated in this answering affidavit should be construed as specifically denied.

SERIATIM RESPONSES

PARAGRAPH 3

25. I deny that the facts contained in the *HSF* affidavit are true and correct.

PARAGRAPH 5

26. I deny that this application is urgent.

27. I submit that the application has no basis and it ought to be dismissed in view of the fact that the order granted by the court in paragraph 147.4 is interim in nature and does not have the effect of a final order. The court, by virtue of section 18(2) of the Superior Courts Act, lacks the requisite jurisdiction to entertain this application.

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PARAGRAPH 6 (INCLUDING SUBPARAGRAPHS)

28. I admit the allegations in this paragraph (including its subparagraphs) insofar as they are consistent with the order of the court.

PARAGRAPH 7

29. I admit that the court gave as its reason when granting the interim order, to be the preservation of the *status quo*.

30. I however take issue with the court's reasoning for the granting of the interim order in that it amounted to a clear case of judicial overreach in circumstances where the court was ill-equipped to make such a decision.

31. The filing of an application for leave to appeal is in no way a breach of the protections afforded to the ZEP holders by the order of the court. The respondents are exercising their right of access to court as provided for in terms of section 34 of the Constitution.

PARAGRAPHS 8 AND 9

32. The undertaking sought by the *HSF* from the Minister is to the effect that the Minister ought not to exercise his executive functions as entrusted by the Immigration Act. The undertaking sought is tantamount to restraining the exercise of statutory power within the exclusive terrain of the executive branch of government.

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33. Not only is the undertaking sought tantamount to the restraining of the exercise of statutory power within the exclusive terrain of the executive branch of government, but it is also disruptive of the executive functions conferred by law on the Minister and implicates the tenet of the division of powers. The Minister cannot be expected to abide the order of Court in the circumstances in which he is aggrieved and on proper legal advice, decided to challenge the judgment and order issued by the Full Court. His decision is in the public interest.

PARAGRAPH 10

34. I dispute the conclusion sought to be drawn by the *HSF* in this paragraph.

35. Although the Minister has applied for leave to appeal the court's judgment and orders, such an application for leave to appeal is on a different footing in that it challenges the court's judgment and orders on the basis that it implicates the tenet of the division of powers and disrupts the executive functions conferred by law on the Minister.

36. It is trite law that merely because a foreign person is an *"illegal foreigner"* as contemplated by section 32 of the Immigration Act, this does not mean that they are *per se* subject to immediate arrest and deportation in terms of section 34. Section 34(1) of the Immigration Act confers discretion on an Immigration Officer whether or not to effect an arrest or detention of an illegal foreigner. There is no obligation to do so.

37. The Immigration Officer must approach the exercise of his/her discretion in favour of liberty when deciding whether or not to arrest or detain a person under section

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34(1). As the repository of discretionary power, the Immigration Officer is obliged to demonstrate that he or she has applied his or her mind to the matter, including a consideration of the Directives issued by the Minister and such future Directives as the Minister may issue.

38. The conclusion sought to be drawn by the *HSF* in this paragraph runs counter to settled law. It is tantamount to instilling fear in the minds of the affected Zimbabwean nationals.

PARAGRAPHS 11 TO 13

39. I deny that ZEP holders would be stripped of their existing rights, arrested, detained, and deported even if this court were to refuse an application for leave to appeal.

40. What is clear is that the Minister takes issue with the judgment of this court on the basis that it implicates the tenet of the division of powers and that it restrains the exercise of statutory power within the exclusive terrain of the executive branch of government. It is also disruptive of the executive functions conferred by law on the Minister.

41. The Minister merely criticized the judgment of the court and gave his reasons for his criticism, being:

44.1 The finding of the court on the applicability or otherwise of sections 3 and 4 of the Promotion of Administrative Justice Act is highly questionable, particularly the requirement for public participation when a decision of that nature is taken, affecting a specified category of persons only. In this instance the affected ZEP holders;

44.2 The decision he took not to extend the ZEP involves the weighing of policy considerations that fall within the domain of the executive; and

44.3 The judgment deals with matters relating to a sacrosanct principle of separation of powers.

42. The courts are not immune to criticism in a constitutional democracy. The Minister provided his reasons for taking issue with the court's judgment and orders.

43. The ZEP holders continue to enjoy the protections afforded by the Directives including those provided for in the Immigration Act. This includes the available internal appeals.

44. Even if the regulated appeal processes might be concluded long after 31 December 2023, the order of the court is interim. The *HSF* seeks impermissibly with this application to have that order varied and for it to operate in perpetuity. This is in circumstances when it has not appealed the said order or applied for its variation.

PARAGRAPH 14

45. I deny that there is any human catastrophe that needs to be averted by this application. If any, it is imaginary.

PARAGRAPH 15 (INCLUDING SUB-PARAGRAPHS) AND 16

B-Y KT.

46. I admit the requirements of section 18 of the Superior Courts Act.

47. I deny however that the *HSF* has made out a case therefore. Moreso the *HSF* seeks interim enforcement of an interim order and not a final order. The court lacks jurisdiction to grant that order by virtue of section 18(2) of the Superior Courts Act.

PARAGRAPH 18

48. It is correct that the *HSF/CORMSA* application concerned a challenge to the Minister's decision to terminate the ZEP program.

49. I however deny that the Minister has refused all future extensions of the ZEPs. The Minister has issued 3 Directives in all. Directive No. 1 of 2021 extended the validity of ZEPs to 31 December 2022. A further directive extending the validity of the ZEPs from 31 December 2022 to 30 June 2023 affording the same protections to the ZEP holders was issued by the Minister. The most recent one extended the validity of the ZEPs to 31 December 2023.

50. Given this history of the extensions, it is inconceivable that the Minister's mind is shut to possible future extension(s).

PARAGRAPH 19

51. I note the characterization of the *HSF/CORMSA* application by the court.

52. I however dispute that the applicants have asked nothing more from this court than to apply settled legal principles in reviewing the Minister's decision.

B.Y

53. The applicants seek to vary the interim order of this court. They are effectively seeking the restraint of the exercise of statutory power within the exclusive terrain of the executive branch of government in perpetuity. This is notwithstanding the express time limitation of the ZEPs from inception and the fact that ZEPs were issued with an express condition that holders were not eligible for permanent residence irrespective of their length of stay in the country. The ZEP program has always been temporary in nature.

54. The essence of the *HSF* application is to have ZEP holders accorded permanent residency in the country through the back door without any challenge to the Immigration Act and Regulations.

PARAGRAPH 20

55. I note the contents of this paragraph.

PARAGRAPHS 21 TO 22

56. The contents of these paragraphs are admitted.

PARAGRAPH 23 (INCLUDING SUB-PARAGRAPHS)

57. The contents of this paragraph including its sub-paragraphs are admitted.

PARAGRAPH 24

58. The contents thereof are not in dispute and the Magadzire judgment is a subject of an application for leave to appeal.

PARAGRAPH 25

59. It is correct that the Minister issued Directive 2 of 2023 further extending ZEPs to 31 December 2023, shortly before the judgements were delivered.

60. I deny that the announcement issued with the said Directive also made it clear that there will be no further extensions. The *HSF* and in particular the deponent to the founding affidavit are challenged to provide proof in reference to **"HSF4"** that there will be no further extensions. These allegations are false and are meant to mislead the court.

61. The Minister's decision to terminate the ZEP program is the subject matter of an application for leave to appeal. The latest extension by the Minister is not a subject matter of any litigation. If the *HSF* is quibbling with it, it ought to challenge it in proper proceedings and not in these proceedings.

62. With regard to the previous extensions that are the subject matter of an application for leave to appeal, the Minister heard the affected exemption permit holders albeit after the decision was taken. The court ignored binding authorities to the effect that fairness depends on the circumstances of each case and in particular the nature of the decision. Moreover, the Minister's decision not to call for public participation was justified in that the decision affected a specified category of persons and not the public and that such a decision was not administrative action and was voluntary.

PARAGRAPHS 26 TO 27

63. The contents of these paragraphs are admitted.

BY W.T.

PARAGRAPH 28

64. I fail to understand the basis upon which the *HSF* seeks to conclude that the Minister is not respecting and complying with the orders of the Court.

65. If this conclusion is drawn based on the Minister's applications for leave to appeal the Court's decisions and orders, then this simply means, according to the *HSF*, that the Minister is not entitled to challenge an order that restrains the exercise of statutory power within the exclusive terrain of the executive branch of government.

66. This cannot be countenanced, especially in the constitutional democracy that South Africa is.

PARAGRAPHS 29 TO 31

67. I admit that **"HSF5"** was dispatched to the Minister's attorneys.

68. The undertaking sought by *HSF* in particular, in paragraph 5 of **"HSF5"** is akin to asking the Minister to restrain himself from performing any statutory immigration functions in perpetuity.

69. The Minister was entitled to refuse such an undertaking.

70. I deny that the tone used in **"HSF6"** is disparaging.

PARAGRAPH 32

71. I deny that this matter is urgent.

B.Y

72. The *HSF* has been well aware of the Minister's application for leave to appeal since 13 July 2023.

73. The seeking of a personal costs order against the Minister is unwarranted and he has not been cited in his personal capacity.

PARAGRAPH 33

74. I admit the contents of this paragraph in so far as they are consistent with the provisions of section 18 of the Superior Courts Act.

PARAGRAPH 34

75. The interim interdict in *Magadzire* is appealable as it is in the interests of justice to do so. It encroaches on the exercise of statutory powers assigned to the Minister and it further implicates the doctrine of the separation of powers. Furthermore, its harm is serious, immediate, ongoing, and irreparable. It disrupts the enforcement of immigration laws.

PARAGRAPH 35

76. If the temporary order in the *HSF/CORMSA* matter is indeed suspended on the basis of section 18(2) of the Superior Courts Act as alleged by *HSF* then this application ought to fail.

BY L.T.

77. I submit that this court, despite being seized with remedial powers in terms of section 172(1)(b) of the Constitution, cannot vary the temporary order in the absence of a substantive application for variation.

PARAGRAPH 36 (INCLUDING SUB-PARAGRAPHS)

78. The statutory provisions of section 18 of the Superior Courts Act are clear.

79. The operation and execution of a decision that is an interlocutory order not having the effect of a final judgment which is a subject matter of an application for leave to appeal or an appeal is not suspended. There is therefore no need for this Court to declare such an order enforceable.

80. Section 18(3) provides for the enforcement of final orders that are suspended as a result of a pending application for leave to appeal or appeal if exceptional circumstances for interim enforcement are established. Not only must irreparable harm be established in the case of refusal to grant interim enforcement but also the applicant for interim enforcement must establish that the respondent will suffer no irreparable harm if the order is granted. The irreparable harm to be suffered by the respondents is immense. Those who have applied for visas and rejected may not be deported if the interim enforcement order is granted

81. I submit that the *HSF* has failed to meet these requirements.

PARAGRAPH 37

82. I deny that the ZEP holders are facing any extraordinary risks.

BY KT,

83. It boggles the mind as to how then the *HSF* concludes that ZEP holders are facing extraordinary risks. The DHA received 74 630 waiver applications and continues to do so. The Minister has approved 11 509 waiver applications of Regulation 18 (3) of the Immigration Regulations. The Minister considers waiver applications on a weekly basis. The Departmental Advisory Committee ("DAC") received approximately 9 500 visa applications. All the applicants for waivers and visas are protected. They face no risk of deportation until such time that they have exhausted their internal remedies and/or applied for the work visas.

PARAGRAPHS 38 TO 40

84. The court erred in concluding that the decision of the Minister required public participation. I have already stated above respects in which I contend so.

85. The allegations in these paragraphs give a false impression that come 31 December 2023 ZEP holders would be rounded up, arrested, and deported. This is despite the protections afforded by the Directives issued by the Minister to the effect that they may not be dealt with in terms of sections 29 and 30 of the Immigration Act solely for the reasons that they are ZEP holders.

86. No ZEP holder faces deportation or arrest. In fact, to date, no ZEP holder has been arrested for deportation purposes. They continue to travel in and out of the country freely.

87. I have already elaborated above that it is trite law that merely because a foreign person is an *"illegal foreigner"* as contemplated by section 32 of the Immigration Act, this does not mean that they are *per se* subject to immediate arrest and deportation in terms of section 34. Section 34 (1) of the Immigration Act confers a

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discretion on an Immigration Officer whether or not to effect an arrest or detention of an *"illegal foreigner"*. There is no obligation to do so.

88. The Immigration Officer must approach the exercise of his/her discretion in favour of liberty when deciding whether or not to arrest or detain a person under section 34 (1). As the repository of a discretionary power, the Immigration Officer is obliged to demonstrate that he or she has applied his or her mind to the matter including a consideration of the Directives issued by the Minister.

89. As to the livelihoods that have been nurtured and developed over many years: ZEP holders were at all times aware that the ZEP program was temporary. It was made clear at all relevant times to those who applied for exemptions that the exemption regime for qualifying Zimbabwean citizens was never meant to be permanent. All ZEP holders were forewarned that the regime would come to an end at some point in the future. This was an express condition of the ZEPs, which all ZEP holders accepted as is evident from the fact that no challenge was brought to the temporary nature of the ZEPs or its predecessors by those who sought to benefit from the regime at the time.

90. I submit that the coming to an end of an exemption regime which was always temporary in nature does not render this matter extraordinary.

PARAGRAPH 41 (INCLUDING SUB-PARAGRAPHS)

91. I dispute that the circumstances under which the *HSF* application was brought, the interests at stake in the litigation as well, as the alleged egregious shortcomings in the Minister's decision-making render the matter exceptional.

B.Y

92. While I admit that the matter implicated the rights of 178,000 ZEP holders and their children, it has been made clear at all relevant times to the ZEP holders that the exemption regime was never meant to be permanent.

93. I further dispute and take issue with the finding by the court that the Minister demonstrated a disdain for the value of public participation. As mentioned above in this answering affidavit the court erred in coming to this conclusion, firstly on the basis that the decision affected a specified category of persons and not the public and secondly that the decision is not administrative action and is voluntary.

94. I also deny and contend that the court erred in finding that the rights of the children were not considered before the decision was made. I stated under oath, that the rights of the children were considered. The *HSF* only tendered a bare denial to this evidence. The court simply ignored this and insisted that such evidence ought to have appeared in the record. This is in circumstances where the *HSF* waived its right to a Rule 53 record.

PARAGRAPH 42

95. I deny that the Minister is disdainful of this court judgment.

96. The Executive is also accorded rights of access to court in terms of section 34 of the Constitution. This right is not only limited to ZEP holders. A sensible thing for the Minister to do was to if taking issue with the judgment and orders of the court, apply for leave to appeal the said orders and judgments.

B.Y

97. The Minister as a member of the Executive respects the decisions and orders of the court. Respect for decisions and orders of the court does not and cannot imply that a litigant who takes issue with such judgments is precluded from having such judgments and orders appealed against, especially in circumstances where such judgments and orders implicate the separation of powers and have a disruptive effect on the executive function conferred by law.

PARAGRAPH 43

98. I dispute that this matter is exceptional as contended for by the *HSF*.

99. The order in paragraph 147.4 of the judgment does not clothe this court with jurisdiction to entertain this application by the *HSF*.

PARAGRAPH 44

100. I dispute that the ZEP holders and the public would be irreparably harmed if the interim enforcement is not granted.

101. Firstly, as mentioned above the Minister's decision which is the subject matter of an application for leave to appeal, only impacted a specific category of persons being ZEP holders and not the public. The *HSF* has not even attempted to substantiate or demonstrate the manner in which the public will be irreparably harmed if the application is refused. The court is left to speculate on this aspect.

102. Secondly, the Directives issued by the Minister to ZEP holders offer protections and it is clear from the said Directives that no ZEP holder faces arrest and/or deportation.

B-Y

PARAGRAPH 45 (INCLUDING SUBPARAGRAPHS)

103. I dispute the interpretation of the judgment as contended for by the *HSF* in this paragraph including its subparagraphs as the court having acknowledged the irreparable harm that would be occasioned by the termination of the ZEPs.

104. The court said:

> *"[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 ZEP holders but to the Department of Home Affairs ("the Department") as well."*

105. The court was simply acknowledging the significance of the case and nothing else.

106. As already mentioned above and as a matter of law ZEP holders will not face mass deportation solely on the basis that their ZEPs may have expired rendering them *"illegal foreigners"*.

107. The exemption regime for qualifying Zimbabwean citizens was never meant to be permanent. This was made clear at all relevant times to all who applied for exemptions. ZEP holders were forewarned that the regime would come to an end at some point in the future. This was an express condition of the ZEPs. ZEP holders accepted this condition, as is evident from the fact that no challenge was

BY H.T.

brought to the temporary nature of the ZEPs or its predecessors by those who sought to benefit from the temporary exemption regime at the time. Beneficiaries of a temporary exemption regime cannot on the one hand accept the benefits of the temporary regime and when the regime comes to an end, complain that the temporary nature thereof violated their rights.

108. I further dispute that the court acknowledged that the termination of the ZEP would cause irreparable harm to ZEP holders in that the Minister's decision to terminate the ZEP will *"compromise national security, international relations, politics as well as economic and financial matters"*.

109. In paragraph 8 of the *HSF* judgment, the court acknowledged that the Minister's decision had 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. It did not find or rule that the Minister's decision compromises national security, international relations, politics as well as economic and financial matters as contended by the *HSF*.

110. Furthermore, I dispute that the court, in paragraphs 31 – 32 of the *HSF* judgment found that the Minister's decision will scupper important policy objectives, including crime reduction, reducing exploitation of vulnerable migrants in human trafficking and economic growth, as alleged by the *HSF*.

111. What the court did in those paragraphs of the judgment, was to set out the provisions of the 2017 White Paper on International Migration Policy which framed the value of exemption programs.

112. I have already submitted that in both the *HSF/MAGADZIRE* matters that the interests of the children were considered by the Minister and continue to be considered.

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113. There is no risk that children whose parents are ZEP holders whose permits will come to an end on 31 December 2023 will be uprooted and separated from their parents unless the children have an independent right to remain in the country. It stands to reason that representations to the effect that the parents of those particular children ought to have their ZEPs extended are likely to succeed.

114. If the parents of the children in question are genuine asylum seekers, they are entitled to apply for asylum and will not be separated from the children. If children are studying in South Africa, there is nothing to preclude them from seeking to regularise their status on this basis.

115. Those ZEP holders who have chosen not to take advantage of the regime that allows them to regularise their status will likely become undocumented on 31 December 2023. However, that will be their own choice. The issue of children is just a red herring.

116. I further submit that the deportation of the child's parents cannot as a matter of law preclude the child from obtaining citizenship in circumstances where the child has a legal entitlement to citizenship in terms of the Citizenship Act 88 of 1995.

PARAGRAPH 46

117. I deny the allegations in this paragraph.

118. For reasons already addressed above there is no threat whatsoever of mass deportation and/or arrest of ZEP holders as sought to be contended for by the *HSF*.

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PARAGRAPHS 47 AND 48

119. I note what the court acknowledged in the *Magadzire* application.

120. I however as set out in the Minister's application for leave to appeal, take issue with the court's finding that the applicants would suffer irreparable harm if the interim interdict was not granted.

121. I submit so because there was and there is still no threat of any breach of the constitutional rights of the ZEP holders. The Minister took active steps by issuing Directives that protect the constitutional rights of the ZEP holders, their families, and the rights of children. Furthermore, there was and there is still no threat of mass deportation and loss of their homes. Since the Minister's decision, ZEP holders continue to engage in their day-to-day activities such as work, education, business and others in the Republic of South Africa.

122. Likewise in this application, the applicants on whose behalf the *HSF* acts and by virtue of them being ZEP holders enjoy the same rights and protections as accorded by the Minister in terms of the Directives issued.

PARAGRAPH 49

123. I have already stated above that it is clear from the Directives that no ZEP holder faces arrest and/or deportation.

124. The Minister is not closed off from considering and issuing further Directives should circumstances dictate so.

PARAGRAPH 50

125. I deny that the Minister is using his considerable legal resources to avoid consequences of his unlawful and unconstitutional conduct as alleged in this paragraph.

126. The Minister is entitled to appeal against judgements and orders of the court which he views as incorrectly arrived at particularly as in this case, those that implicate the separation of powers and have an effect of disrupting executive functions entrusted to the Minister by the law.

PARAGRAPHS 51 AND 52

127. I dispute that the order in the *HSF* judgement confers protections pending the conclusion of the appeal process. If that was so, the *HSF* would not be launching this application.

128. I submit that in any event the order of the court, in particular, paragraph 147.4 is not final in effect and thus it does not entitle the *HSF* to launch these proceedings.

PARAGRAPHS 53 TO 55

129. I deny the allegations in these paragraphs.

B.T

130. The Minister and the Department of Home Affairs will suffer irreparable harm by the granting of this interim enforcement order. In cases of rejections of visa applications, the DHA would not be in a position to enforce the immigration laws and promoting lawlessness. That constitutes irreparable harm. Thus far, six business visa applications have been rejected, once all the remedies are exhausted, those applicants will have to subjected to enforcement mechanisms provided for in the Immigration Act.

131. The interim enforcement order would no doubt disrupt the executive functions conferred by law on the Minister and the Department. It will also disrupt the enforcement of immigration laws.

132. ZEP holders who have unsuccessfully applied for other visas and rejected would not be dealt with in terms of the relevant provisions of the Immigration Act. This includes deportation after the internal appeal and judicial processes are exhausted.

133. The overall administration of the matters relating to ZEP holders will be disrupted by the granting of the interim enforcement order. In simple terms, the Minister's and the Department of Home Affairs' hands would be tied as they will not be able to exercise the statutory powers bestowed upon them.

PARAGRAPH 56

134. I deny the allegations in this paragraph.

135. The application for leave enjoys reasonable prospects of success. These have been elaborated upon in the application for leave to appeal and submissions thereto.

BT KT

AD PARAGRAPHS 57 TO 62 (INCLUDING SUBPARAGRAPHS)

136. I deny that this matter is urgent for reasons advanced above under the heading: *matter not urgent.*

PARAGRAPH 63 (INCLUDING SUBPARAGRAPHS)

137. The application ought to have been brought as soon as the applicants were aware of application for leave to appeal which was served on them on 13 July 2023.

138. As stated above the dispatch of the letter to the Minister's attorney was simply a ploy to trigger the non-existent urgency in this matter.

139. For reasons already advanced above, I maintain that the application is not urgent.

PARAGRAPHS 64 TO 65

140. I dispute the allegations in these paragraphs.

141. The respondents are severely prejudiced. The applicants initially afforded the respondents only 3 days within which to file an answering affidavit after the filing of the notice of intention to oppose and afforded themselves 4 days within which to file their reply.

142. The Minister's attorneys wrote a letter to the applicants expressing the prejudice visited upon the respondents as a result of insufficient time given to file the answering affidavit given the fact that consultations between the Minister and his

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new legal team including the relevant officials from the Department for purposes of preparing an answering affidavit was extremely important and necessary.

143. The respondents proposed to file the answering affidavit by no later than close of business on or before Wednesday, 13 September 2023, and that the applicants deliver their replying affidavit on or before Tuesday, 9 September 2023. This was sought in order to allow the parties to put up all relevant facts before the court.

144. The *HSF* attorneys were only prepared to grant the respondents an indulgence to file their answering affidavit by close of business on Monday, 11 September 2023. This is still insufficient for purposes sought to be achieved as stated above. The respondents are still prejudiced, more so that the matter is not urgent and in view of the *Magadzire* order.

PARAGRAPH 66 (INCLUDING SUBPARAGRAPHS AND 67)

145. I deny the allegations in this paragraph including it subparagraphs.

146. I deny that any case has been made out for the Minister to be held personally liable for the costs of this application. The test for personal costs has not been met. First, the Minister has not acted in bad faith. On the contrary, the Minister is acting in the public interest. Second, the Minister has not been reckless nor did he exhibits gross negligence.

147. I have already stated above that the Minister respects the judgment and orders of the court and he is simply exercising the Executives' and the Department's right of access to court by applying for leave to appeal. More so since the judgement

BY

implicates the separation of powers and has an effect of disrupting the statutory functions of the executive as well as the Department in enforcing immigration laws.

148. The Minister has not expressed any contempt for court judgement. What the Minister has done is to criticise the judgement and provide his reasons for criticising the judgement. Courts are not immune to criticism.

149. It would further not be appropriate to hold the Minister personally liable for costs of this application in circumstances where he is not even cited in his personal capacity.

PARAGRAPH 68

150. The applicants are not entitled to the order that they seek and this application ought to be dismissed with costs, including the costs of three counsel.

DEPONENT

THUS, SIGNED AND SWORN TO BEFORE ME AT Cape Town **ON THIS THE** 11th **DAY OF SEPTEMBER 2023, THE DEPONENT HAVING ACKNOWLEDGED THAT THE DEPONENT KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THAT IT IS BOTH TRUE AND CORRECT TO THE BEST OF THE DEPONENT'S KNOWLEDGE AND BELIEF, THAT THE DEPONENT HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND THAT THE PRESCRIBED OATH WILL BE BINDING ON THE DEPONENT'S CONSCIENCE.**

BY hT.

COMMISSIONER OF OATHS

C.T.I.A. 2023.09.11 19:40

BRETTON YOUNG

AIRPORT APPROACH ROAD C.T.I.A

CAPE TOWN

SERGEANT

SOUTH AFRICAN POLICE SERVICE
OPERATIONAL SUPPORT SERVICE
11 SEP 2023
CAPE TOWN
SOUTH AFRICAN POLICE SERVICE

B.Y L.T