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**

FIRST AND SECOND RESPONDENTS' HEADS OF ARGUMENT: APPLICATION FOR INTERIM ENFORCEMENT

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INTRODUCTION

1. In order for this court to truly appreciate the essence of this application by the HSF, it ought to have regard to paragraphs 147.4 and 147.4.1 of its order and the prayers sought in the HSF notice of motion.

2. Paragraph 147.4 of the order states as follows:

> *"147.4 Pending the conclusion of a fair process and the First Respondent's further decision within 12 months, it is directed that:*
>
> *147.4.1 existing ZEPs shall be deemed to remain valid for the next (12) twelve months;"*

3. The relief sought by the HSF in this application is couched in the following terms:

> *"2. The operation and execution of paragraph 147.4 (including sub-paragraphs) of the order of the Full Court, dated 28 June 2023, under case number 32323/22, is not suspended by any application for leave to appeal or any appeal, and these paragraphs of the order continue to be operational and enforceable and will be executed in full until the final determination of all present and future leave to appeal applications and appeals.*
>
> *3. It is accordingly directed that until the final determination of all present and future leave to appeal applications and appeals:*
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> *3.1 Existing ZEPs shall be deemed to remain valid;*

3.2 ZEP holders will continue to enjoy the protections afforded by Immigration Directive 1 of 2021 and Immigration Directive 2 of 2022, namely that:

"1. No holder of the exemption may be arrested, ordered to depart or be detained for purposes of deportation or departed in terms of section 34 of the Immigration Act for any reason related to him or her not having any valid exemption certificate (i.e. permit label/sticker) in his or her passport. The holder of the exemption permit may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act.

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

3. No holder of exemption should be required to produce –
(a) a valid exemption certificate;
(b) an authorisation letter to remain in the Republic contemplated in section 32(2) of the Immigration Act when making an application for any category of the visas, including temporary residence visa."

4. The order of this court in paragraphs 147.4 and 147.4.1 made the existing ZEPs remain valid for a period of 12 months from the date of its order. The essence of this order is that despite the Minister's directive determining the validity of the existing ZEPs to expire on 31 December 2023, their validity would endure until June 2024.

5. Paragraphs 3 and 3.1 of the notice of motion to the HSF application seek to extend the validity of the existing ZEPs *"until the final determination of all present and future leave to appeal applications and appeals."* (Emphasis added)

6. The relief sought in this prayer by the HSF is contrary to what this court ordered in paragraphs 147.4 and 147.4.1.

7. This relief is sought in circumstances where a substantive application for its variation has not been made. Even if an application for variation was to be made by the HSF, it would not succeed because the order sought to be varied is clear. It is unambiguous; and has no patent error or an omission. It is not susceptible to variation.

8. These heads of argument on behalf of the respondents are structured as follows:

8.1 First, we deal with the declaratory relief sought;

8.2 Second, the stated necessity of launching this application by the HSF;

8.3 Third, the enforcement of execution in terms of section 18;

8.4 Fourth, the personal costs order sought against the Minister;

8.5 Fifth, costs against the HSF; and finally

8.6 Urgency

PARAGRAPH 147.4 OF THE ORDER IS FINAL

9. The HSF seeks declaratory relief, if section 18(2) of the Superior Courts Act applies, on the basis that if granted such relief would resolve the contradictory positions adopted by the respondents and *"to dispel the frightening uncertainty which the ZEP holders now face"*.

10. The declaratory relief sought by HSF amounts to soliciting legal advice from the court. Either the order appealed against is interim or final. If it is interim, it is nevertheless appealable but not suspended pending appeal. If it is final, it is automatically suspended by the lodging of leave to appeal in terms of section 18(1) of Superior Courts Act. The HSF has applied in terms of section 18(3) to this court to have paragraph 147.4 of the order put into operation pending the leave to appeal and any subsequent appeals. This application is brought on the basis that HSF correctly understands that paragraph 147.4 is a final order which has been suspended by the lodging of the leave to appeal.

11. Also, it is significant to state that the interim nature of the order of the court is not determined by the opening words "pending" in the order itself, but it is the nature and effect of the order which renders it interim or final. The order of the court which is made "pending" the occurrence of an event which is not within the judicial control of the court is final, irrespective of the words "pending" to it. The order in paragraph 147.4 is final and not subject to judicial control.

12. Also, an order which is time bound, like paragraph 147.4 of the order is final. The mere fact that the order is made to be limited to a specific duration does not render the order interim. It remains a final order that is limited to a fixed duration and lapses automatically on the expiry of that period, unless on proper application to court, the time period is extended. As such, paragraph 147.4 is such an order, and it is in all permutations a final order.

13. The respondents have filed a supplementary answering affidavit, the purpose of which is to correct the incorrect legal submission made in the answering affidavit wherein the proper context of the order that is appealed against and its enforceability were not taken into account.

14. The supplementary answering affidavit explains that the order of this court in paragraph 147.4 is not interim but final and that when this court adjudicates this application it should do so under the precipice that the order sought to be enforced is final.

15. This, we submit, is the very reason why the HSF has approached this court to seek an enforcement order pending the finalization of the leave to appeal or appeal, otherwise, it would not have approached this court because, in terms of section 18(2) of the Superior Courts Act, an appeal against an interim order does not suspend its operation.

16. A court is not bound by a party's incorrect concession of a legal point. It is still within the court's rights to make the right decision. It is not bound by an error of law made by a party especially if that party corrects it within a reasonable time.[1]

17. The respondents' position with regard to this court's order is clear and does not require declaratory relief to resolve it. We submit that it is not up to the HSF to approach this court seeking declaratory relief, under the pretext of being forced to do so by the respondents, who are alleged to be confused as to their legal obligations, when the statutory provisions of section 18 are unambiguous.

18. We submit therefore that the court should exercise its discretion against granting declaratory relief for the following reasons:

18.1 The statutory provisions of section 18 are unambiguous and the legal position has already been clearly laid down by statute;[2]

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1 *Motokonya v Minister of Police* 2017 (11) BCLR 1443 (CC) para [183]; *Paddock Motors (Pty) Ltd v Ingesund* 1976 (3) SA 16 (A) at p 23 para F – G; p 24 para A - D

2 *Ex Parte Noriskin* 1962 (1) SA 856 (D)

18.2 In view of the clear provisions of section 18, there is no live dispute between the parties as to whether the order of this court is binding on the respondents pending the conclusion of the appeal process;

18.3 The respondents are certain as to the binding effect of the order of this court;

18.4 The HSF seeks to impermissibly, with this declaratory relief, extend and/or vary the order of this court under the guise that the respondents are pursuing a contradictory and inconsistent approach in their engagement with ZEP holders;

18.5 It is common cause that the ZEP regime has always been temporary in nature since its inception.

19. We submit further that the seeking of declaratory relief in the section 18(2) enforcement proceedings is not competent. The court considering the enforcement application ought to concern itself with the order that it granted that is sought to be enforced and nothing else.

THE NECESSITY OF THIS APPLICATION ACCORDING TO THE HSF

20. According to the HSF this application is necessitated by the Minister's initial insistence that the order of this court is not subject to section 18(2) and his refusal of HSF's request for an undertaking that he would abide by the court's order pending the finalization of his application for leave to appeal and any subsequent appeals.[3]

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3 HSF's heads of argument para 3 – 4

21. The HSF sought to impermissibly extend the order in the HSF judgment beyond the 12-month period to such time that the application for leave to appeal and any subsequent appeal processes are finalized. In essence, the HSF is seeking further substantive orders, not germane to the order granted by this court in these proceedings. This is evident from the HSF's letter dated 12 September 2023 in which it seeks to "bully" the respondents to withdraw their opposition to the section 18 application and to consent to an order in terms of prayers 1 to 3 of its notice of motion.[4]

22. The effect of prayers 2 – 3 of the HSF notice of motion is that the operation and execution of paragraph 147.4 of the HSF order including its subparagraphs, is not suspended by an application for leave to appeal or any appeal and that the said order continues to be operational and enforceable in full until the final determination of all present and future leave to appeal applications and appeals.

23. We submit that regard being had to annexure **"HSF5"** and the applicant's notice of motion, it is clear that this application is simply a ruse to have paragraph 147.4 of the HSF extended and/or varied beyond the 12-month period ordered by this court and nothing else.

24. There is nowhere in the HSF's application where it has been alleged nor evidence tendered of the respondents' non-compliance with the order of this court. The HSF is well aware of the remedies at its disposal in the event that the respondents do not comply with the order of this court.

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4 Annexure "RA1" paras 7 – 8

ENFORCEMENT IN TERMS OF SECTION 18(3)

25. Sections 18(1) and (3) of the Superior Courts Act provides that:

> *"(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 matter of an application for leave to appeal or of an appeal, a suspended pending the decision of the application or appeal.*
>
> *(2)*
>
> *(3) A court may only order otherwise as contemplated in subsections (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."*

Exceptional circumstances

26. The HSF lists what it alleges to be exceptional circumstances justifying the deviation from the norm that the operation and execution of a decision which is the subject of an application for leave to appeal and appeal is suspended pending the decision for leave to appeal or appeal, in paragraph 22 of its heads of argument.

27. We submit that the circumstances listed by the HSF are not exceptional at all for the following reasons:

27.1 First, no ZEP holder faces deportation or arrest. In fact, to date, no ZEP holder has been arrested for deportation purposes and they continue to travel in and out of the country freely;

27.2 Second, section 34(1) of the Immigration Act confers a discretion on an immigration officer whether or not to effect an arrest or detention of an *"illegal foreigner"*. 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 such person is subject to immediate arrest and deportation in terms of section 34 of the Immigration Act;

27.3 Third, 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 aware that the regime would come to an end at some point in the future. This was an express condition of the ZEP which ZEP holders accepted;

27.4 Fourth, the coming to an end of an exemption regime which was always temporary in nature does not render this matter extraordinary;

27.5 Fifth, the Minister's decision to terminate the ZEP program only affects a specified category of persons which is the 178,000 ZEP holders and not the broader public. Public participation was not necessary; and

27.6 Sixth, no allegation nor evidence of non-compliance with the order of this court by the Minister has been made and presented by the HSF. On the contrary, the Minister took effective legal steps by way

of directives to protect the rights and privileges enjoyed by ZEP holders. Furthermore, the Minister has not closed his mind to issuing further directives.

Alleged irreparable harm to ZEP holders and the public

28. We have already submitted above that the Minister's decision to terminate the ZEP program only impacts a specific category of persons being the ZEP holders and not the broader public.

29. It is common cause that the ZEP program has from inception been temporary in nature and that the ZEP holders have at all times been aware that it is temporary and as such at some point, it will come to an end.

30. The Minister may extend the protections beyond 31 December 2023 and no ZEP holder faces arrest and/or deportation.

31. There is no risk that the 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.

32. The taking of any judgment and order of any court on appeal does not constitute irreparable harm. In fact, it demonstrates the upholding of the rule of law in any constitutional democracy. It also strengthens the public's confidence in the judicial process in that it demonstrates that litigants respect the rule of law as opposed to resorting to self-help in the event that unfavourable judgments are made against them.

Irreparable harm to the respondents

33. The immediate execution of the order will without doubt result in irreparable harm to the respondents.

33.1 In cases of rejection of visa applications respondents will not be in a position to enforce the immigration laws. This scenario will persist even after all the internal remedies provided for in the Immigration Act and Regulations have been exhausted. ZEP holders who have unsuccessfully applied for other forms of visas and were rejected will not be dealt with in terms of the relevant provisions of the Immigration Act.

33.2 The overall administration pertaining to ZEP holders will be disrupted and the Executive and the Department of Home Affairs would be rendered ineffective as they would not be in a position to exercise the statutory powers bestowed upon them.

PERSONAL COSTS ORDER AGAINST THE MINISTER

34. The HSF seeks a personal order of costs against the Minister in his personal capacity on the basis that the Minister's conduct indicates bad faith, recklessness, and gross negligence in the face of a *"pending humanitarian disaster"*.

35. It alleges the Minister's conduct to be in bad faith because its interim enforcement application has been necessitated by the Minister's refusal to respect this court's judgments and orders pending the outcome of the appeal process; the Minister having expressed contempt of the court judgment and orders describing them in disrespectful and disdainful terms; the Minister having shown utter disregard for the rights of the ZEP holders and their children and in circumstances where this court has already held that the Minister failed to give any consideration to the impact of his decision to the rights of the ZEP holders and their children.

36. The relief sought by the HSF ought not to succeed because:

36.1 First, the Minister has not been cited in his personal capacity. It is trite law that *"joinder as a formal party to the proceedings and knowledge of the basis from which the risk of personal costs order may arise is one way and the safest to achieve this"*.[5] To order costs against the Minister in his personal capacity under such circumstances would be inimical to principles fundamental to judicial adjudication in a constitutional order. These principles were reaffirmed by the Constitutional Court in *Lushaba*[6] where the court, per Jafta J, restated them as stated by Ackerman J in *De Lange*.[7] In *De Lange,* the Constitutional Court held that:

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5 *Black Sash Trust v Minister of Social Development and others (Freedom Under Law NPC as Intervening Party) (Corruption Watch (NPC) and another as amicus curiae)* 2017 (9) BCLR 1089 (CC) para [4]; *Pheko and others v Ekurhuleni Metropolitan Municipality and another* 2015 (6) BCLR 711 (CC) paras [14] – [15]; *Matjhabeng Local Municipality v Eskom Holdings Ltd and others; Mkhonto and others v Compensation Solutions (Pty) Ltd* 2017 (11) BCLR 1408 (CC) para [92]

6 *Member of the Executive Council for Health, Gauteng v Lushaba* 2016 (8) BCLR 1069 (CC) para [15]

7 *De Lange v Smuts* 1998 (7) BCLR 7 7 9 (CC) para [31]

"Fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that … the other side should be heard [audi alteram parterm], aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion there is anything than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation."

36.2 Second, the Minister's Directives, dispels the notion of a *"pending humanitarian disaster"* and the alleged disregard for the rights of the ZEP holders and the children.

36.3 Third, the Minister has not shown any disdain or disrespect for the court's judgment and orders as alleged. The Minister criticized the judgment and orders of the Court and proffered his reasons for his criticism.[8] The courts are not immune to criticism in a constitutional democracy.[9] We submit that reasoned criticism, as opposed to the scurrilous attack of the court's judgement and orders, does not undermine the legitimacy of the judicial process. The HSF has failed to point out anywhere the Minister has shown disdain for orders of

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8 "HSF1" paras 3.1 – 3.3, 5

9 *Economic Freedom Fighters v Gordhan and others and a related matter* 2020 (8) BCLR 916 (CC) para [98]

the court nor has it provided any shred of evidence demonstrating that the Minister is in breach of the order of this court.

36.4 Fourth, the seeking of an undertaking from the Minister was simply a ruse to trigger the launching of this application. Compliance with an order of the court is not negotiable. It is either a party complies or it does not. In the event of non-compliance with an order of the court, an aggrieved party such as the HSF knows very well about the remedy at its disposal, which is to launch contempt of court proceedings.

36.5 Fifth, if the HSF's reasoning is to be accepted, that the Minister's denial of the alleged urgency of this application meant he took a stand against procedural expedience and thus being indifferent to his duty as a responsible state litigant to conserve precious judicial resources, this simply means that the Minister ought to have folded and not challenged the unfounded and self-created urgency by the HSF. The Minister's reasons for disputing the self-created urgency of this application are detailed.[10] In any event, this court dispatched a letter to the parties stating that it would not entertain this application together with the application for leave to appeal and it further said that the parties were at liberty to approach the DJP for a special allocation if they wished so, thus signifying that the application lacked urgency.

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10 AA paras 12 -20

36.6 Sixth, a further reason proffered by the HSF for holding the Minister personally liable for costs of this application is that the Minister has filed a *pro forma* confirmatory affidavit that provides no explanation for his conduct.[11] It says the Director General has no direct knowledge of one of the most important issues before this court, further that *"there is in fact no evidence from the decision maker before the court. This means, among other things, that there is no evidence as to whether and how the Minister applied his mind in making the impugned decision".*[12]

36.6.1 This proposition by the HSF is misconceived for the following reasons: (a) These are section 18 Superior Courts Act proceedings. The focus of the proceedings is on whether or not to grant the immediate execution of an existing court order and nothing else, (b) whether and how the Minister applied his mind in making the impugned decision, is not the subject of these proceedings. That has already been adjudicated by this court and (c) the insistence on the Minister to file a confirmatory affidavit in the manner contended for by the HSF is tantamount to a retry of the issues already decided by this court.

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11 HSF Heads of argument para 46.6
12 HSF Heads of argument para 46.9

COSTS

37. This application by the HSF falls to be dismissed for reasons proffered in these heads of argument. Not only must the application be dismissed, but the court must exercise its discretion[13] in favour of ordering costs against the HSF for the following reasons:

37.1 In *Biowatch Trust v Registrar, Genetic Resources and Others*[14]the court said that *"if there should be a genuine, non-frivolous challenge to the constitutionality of a law or State conduct, it is appropriate that the State should pay the costs if the challenge is good but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way, the responsibility for ensuring that the law and State conduct our constitutional is placed at the correct door."*.[15]

37.2 This principle is qualified that if a matter which otherwise falls within the principle is frivolous or vexatious or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunize it against an adverse costs award.[16] (Emphasis added)

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13 *The judicial discretion of a court on costs has not been abolished by the Biowatch principle: Helen Suzman Foundation v The Speaker of the National Assembly and Others* [2023] ZASCA 6 (03 February 2023) para [13]

14 2009 (10) BCLR 1014 (CC)

15 *Biowatch* at para 23

16 *Boiwatch* at para 24

37.3 In *Lawyers for Human Rights v Minister in the Presidency and Others*[17] the court held that:

> *"The Biowatch rule, of course, does not mean risk-free constitutional litigation. The court, in its discretion, might order costs, Biowatch said, if the constitutional grounds of attack are frivolous or vexatious – or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The high court controls its processes. It does so with a measure of flexibility. So the court must consider the "character of the litigation and [the litigants] conduct in pursuit of it", even where the litigant seeks to assert constitutional rights."*[18]

37.4 On 28 June 2023 this court granted an interim interdict against the Minister from arresting, issuing an order of deportation or detaining any holder of the ZEP for the purposes of deportation in terms of section 34 of the Immigration Act 13 of 2002, for any reason related to him or her not having any valid exemptions certificate in his or her passport. The Minister was 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. The court further 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 requirements for entry into and departure from the Republic, save

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17 2017 (4) BCLR 445 (CC)
18 *Lawyers for Human Rights* para 18

for reasons of not having a valid permit indicated in his or her passport.

38. We submit that this conduct by the HSF places it outside the realm of the *Biowatch* protection.

URGENCY

39. The point about the application being urgent has become moot. The court has already declined to adjudicate this application on an urgent basis and on the date that was elected by the HSF. In any event, this court has exercised its judicial powers to hear this application on 26 October 2023. The issue of urgency no longer arises because the court will determine the application on the merits and the law, and whether the requirements of section 18(3) have been met by the applicant. We submit they have not been met.

CONCLUSION

40. For reasons proffered in these heads of argument, we submit that the applicant has not made out a case for the relief it seeks in the notice of motion. Accordingly, the application should be dismissed with costs inclusive of costs of three counsel.

W R Mokhare SC
C Georgiades SC
K T Mokhatla
Counsel for the Respondents

Chambers
16 October 2023