




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

CASE NO: 32323/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
<u>06th November 2023.</u>	
DATE	SIGNATURE

In the matter between:

HELEN SUZMAN FOUNDATION

First Applicant

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

Second Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR-GENERAL OF HOME AFFAIRS

Second Respondent

**ALL TRUCK DRIVERS FORUM AND
ALLIED SOUTH AFRICA**

Intervening
Respondent

Delivered: This judgment was prepared and authored by the Judges whose names are 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 of the judgment is deemed to be 6 November 2023.

JUDGMENT

THE COURT

INTRODUCTION.

[1] The first and second applicants are the Helen Suzman Foundation (HSF) and the Consortium for Refugees and Migrants in South Africa (CORMSA) (the Applicants). They seek relief against the Minister of Home Affairs (the Minister) and the Director-General of the Department of Home Affairs (the Director-General) who are first and second respondents, respectively. The first applicant's notice of motion is headed NOTICE OF MOTION: APPLICATION FOR INTERIM ENFORCEMENT and prays for the following relief:

- "1.1 To the extent necessary, the forms, time limits and service provided for in the Rules of Court are dispensed with and the matter is to be heard on an expedited basis in terms of Rule 6(12) of the Rules of this Court.
- 1.2 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 all 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.

[2]. It is accordingly directed that until the final determination of all present and future leave to appeal applications and appeals:

- 2.1 Existing ZEPs shall be deemed to remain valid;
- 2.2 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 deported in terms of the section 34 of the Immigration Act for any reason related to him or her not having any valid exemption certificate (i.e permit label / sticker) in his or her passport. The holder of the exemption permit may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act.

2. The holder of the exemption may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read

together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for the reason of not having valid permit indicated in his or her passport; and

3. No holder of exemption should be required to produce –

(a) a valid exemption certificate;

(b) an authorisation letter to remain in the Republic contemplated in section 32(2) of the Immigration Act, when making an application for any category of the visas, including temporary residence visa.

[3] The first respondent is, in his personal capacity, ordered to pay 50% of the costs of this application, including the costs of three counsel.

[4] Any party opposing this application is ordered to pay the balance of the costs of this application, jointly and severally, including the costs of three counsel.

[5] Further and/or alternative relief.”

[6] CORMSA filed a supporting affidavit.

[7] The issues for determination as set out by the applicants are:

ISSUES FOR DETERMINATION

[8] Whether the temporary order is interlocutory in nature as contemplated by section 18(2) of the Superior Courts Act¹. If so, whether this Court should issue a declarator that provides certainty as to the legal position, that is, that the order is suspended by operation of law, pending the final determination of the appeal;

[9] Alternatively, if this Court reverses its characterisation of the order as temporary and agrees with the respondents that it is final, whether the requirements for interim enforcement under section 18(3) have been satisfied. HSF did not pursue the alternative relief; and

[10] Whether the court's interim order has the effect of a final judgment and therefore suspended pending the decision of the application for leave to appeal or appeal as contended by the Minister as contemplated in section 18(1) of the Act.

[11] Section 18(2) of the Act reads as follows:

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

¹ Act 10 of 2013

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 or appeal.**" (Emphasis added)

[12] This application is preceded by an application for leave to appeal by the first and second respondents. That application was launched on 13 July 2023, heard on 18 September and dismissed on 16 October 2023. The enforcement application was filed on 1 September 2023, to be heard on the same day as the application for leave to appeal on 18 September 2023, alternatively, on a day to be determined by the Court. The court decided to hear the applications on different days, that is on 18 September and 26 October 2023, respectively. In dismissing the Minister's application for leave to appeal the Court said the following:

"[19] The rest of the Minister's grounds for leave to appeal are not necessary to traverse. It is enough to conclude by pointing out that the court was at pains to explain that its order under section 8(1)(e) of PAJA was temporary relief which is distinct from a substitution order under section 8(1)(c)(ii)(aa) of PAJA, and is just and equitable remedy in terms of section 172(1)(b) of the Constitution. The submission by the Minister to the contrary is in this regard is flawed. The Minister's powers under section

31(2)(b) of the Immigration Act have not been interfered with through the temporary orders granted against him.

[20] For the reasons stated above, the Minister's application for leave to appeal falls to be dismissed."

MINISTER'S CONDONATION APPLICATION TO FILE A SUPPLEMENTARY ANSWERING AFFIDAVIT.

[13] The Minister sought condonation to file a supplementary affidavit in order to introduce a new legal argument to the effect that the court order is of a final nature. Counsel for the Minister explained the confusion that prevailed in the Minister's office, and in regard to conflicting legal advice he received. Condonation was granted by the court. In the supplementary answering affidavit, the deponent thereto, the Director - General, seeks to correct the wrong legal position adopted in the answering affidavit. In the answering affidavit the Minister had accepted that the court's order is of an interim nature and that it fell within the purview of section 18(2) of the Act. In the supplementary affidavit the Director-General adopted a different stance, that is, the order of the is final in nature.

SUBMISSIONS IN THE ENFORCEMENT APPLICATION.

[14] Ms Steinberg, for HSF, whose submissions are supported by CORMSA, submitted that the three sources for the declaratory orders sought are in the Act and the Constitution.

[15] Firstly, the first source advanced for a declaratory order is Section 21(1) of the Superior Courts Act which states:

“(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

(a) ...

(b) ...

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.”

[16] Secondly, reliance was placed on Section 38 of the Constitution of the Republic of South Africa, 1996 (“Constitution”) which states:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members."

[17] Thirdly, reliance was placed on section 172(1)(b) of the Constitution for a declaratory relief which relates to any law or conduct that has been declared invalid. It reads:

"(1) When deciding a constitutional matter within its powers, a court –

- (a) Must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; ...”

[18] In this case the applicants seek a declaratory order in respect of an existing right which they obtained in the judgment delivered by this Court on 28 June 2023. The right being that the ZEP holders are not to be arrested or deported, among other protections, for a period of 12 months while the Minister reconsiders his decision to terminate the ZEP dispensation. The interim order reads 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;

147.4.2 ZEP-holders will continue to enjoy the protections afforded by Immigration Directive, 1 of 2021, namely that:

1. No holder of the exemption may be arrested, ordered to depart or be detained for purposes of deportation or deported in terms of the section 34 of the Immigration Act for any reason related to him or her not having any valid exemption certificate (i.e permit label / sticker) in his or her passport. The holder of the exemption permit may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act.
2. The holder of the exemption may be allowed to enter into or depart from the Republic of South Africa in terms of section 9 of the Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into and departure from the Republic, save for the reason of not having valid permit indicated in his or her passport; and
3. No holder of exemption should be required to produce –

- (a) a valid exemption certificate;
- (b) an authorisation letter to remain in the Republic contemplated in section 32(2) of the Immigration Act, when making an application for any category of the visas, including temporary residence visa.”

[15] In support of the applicants’ argument it was submitted that the declarator is not only necessary but required in that the declarator will give certainty as to the protections granted to the ZEP holders in respect of the homes and livelihoods they have built over years; their businesses and jobs; lasting impact on children who will be uprooted and potentially miss academic years if uprooted in the middle of the academic year; and an adverse impact on national security, international relations as well as economic and financial matters.

[16] It is further submitted that the Minister’s defiant stance against the court order and his vacillation on the meaning of the order pending any appeals in response to this application has added to the anxiety that he will not abide by the court’s order and implement it pending any applications for leave to appeal and consequent appeals if granted. In this regard reference is made to the media statement emanating from the Department of Home Affairs on 29 June 2023, a day after the

judgment wherein the spokesperson for the Minister states that "(t)he two judgments cannot go unchallenged as they set a dangerous precedent" in that, among others:

16.1 They call for public participation where the Minister's decision only affected a specific category of people and that it infringes the principle of separation of powers, among other reasons;

16.2 In addition to the above reasons in respect of the ZIF (Vindiren Magadzire matter), it was stated that the interdict served no purpose as the Minister had issued a directive protecting the ZEP holders until December 2023; and

16.3 Instructions to appeal both judgments have been given.

[17] Correspondence by the applicants' attorneys on 21 August 2023 sought an undertaking that the Minister will comply with the temporary order as envisaged in section 18(2) of the Act as the order is not suspended pending any appeals. The Minister's attorneys' response on 29 August was to deny the interpretation of section 18(2) and alleged that the HSF order was granted "through the backdoor",

suggesting that a just and equitable order in terms of section 172(1)(b) of the Constitution is of final effect.

[18] Furthermore, in regard to the Magadzire matter, the letter stated that "the interim interdict cannot be allowed to stand as it disrupts the enforcement of immigration laws by the respondents.

[19] After the dismissal of the Minister's application for leave to appeal the HSF's attorneys sought an undertaking that the Minister would not be pursuing any further appeals on 17 October 2023 and that he will comply with the order. In a letter dated 17 October 2023 the Minister's attorneys responded that no undertaking would be made. The HSF's attorneys were berated for despatching their letter of 17 October 2023 at 9h00 and demanding such an undertaking by 14h00 which did not give them sufficient time to consult with their clients. The attorneys for the Minister responded that a consultation with their clients was scheduled for 20 October 2023 to obtain further instructions and would revert on or before 27 October 2023.

[20] The applicants aver that failure to make the undertaking that the Minister will comply with the order and its non-suspension in terms of section 18(2) necessitates the application for enforcement with added guarantees that its characterisation under section 18(2) will prevail beyond the 12 months' period until all appeal processes have been exhausted. It is submitted that such a declaration would be of practical

effect to putting an end to further anxiety about the nature of the interim order.

[21] In the replying affidavit ² HSF refers to contradictory stances that have been taken by the Minister in correspondence and the answering affidavit on the interpretation of the order as interim or final. And this, it is contended, leaves the HSF with no option but to persist in seeking relief in the form of a declaratory relief in order to eliminate the uncertainty created whether there will be compliance with the order. The contradictory stance was elevated when the Minister sought leave to, and filed a supplementary affidavit indicating his new stance to argue that the court order is of final effect.

[22] Mr Simonsz, for CORMSA, submitted that if the Court does not safeguard the integrity and enforceability of its judgment and interim order ZEP holders who have not obtained alternative visas would in the eyes of the Department of Home Affairs become illegal immigrants and subject to immediate deportation. He submitted that great uncertainty would be caused regarding the ZEP holders' future employability in the country, schooling, and other rights which they otherwise enjoy in the Republic. The real question is whether the ZEP holders will face any of the calamities that Mr Simonsz enumerated in argument. In short, the question is whether at the expiry of the 12-

² CaseLines: 066-361, paras 7-16

month period stipulated in the interim order there would be so much confusion as to the meaning or understanding of the interim order's continued operation as to cause the ZEP holders loss of jobs, schooling placements and other rights that they were afforded by the ZEP dispensation, such as their business ventures.

THE MINISTER'S CONTENTION.

[23] Mr Mokhare, for the Minister and Director-General, emphatically denied that the Minister considers himself not bound by the decisions of the court. He disputed further the applicants' contentions that the ZEP holders would be exposed after 31 December 2023. He submitted that the contemplated 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 it disrupts the exclusive functions conferred by law on the Minister. It is further contended that the applicants seek impermissibly to have the interim order varied and for it to operate in perpetuity.³

[24] However, he insisted that the court's order is final in nature and that the Minister is entitled to appeal it. The Minister's opposition to the enforcement application is on the basis that although the order is couched as an interim order, its effect is that of a final order as

³ Ibid, Caselines 066-174, para 44.

envisaged in section 18(1). The case of *Zweni v Minister of Law and Order*⁴ was relied upon for their proposition that this Court's order in terms of paragraph 147.4 is final for the reasons that the Minister's decision has been set aside by the Court; that it cannot be altered by a Court later; and that it is definitive of the rights of the parties.

REASONS BY THE COURT.

[25] It is not correct that the requisites for a final order apply in respect of this court's interim order. The judgment made it clear that the order that is being granted is aimed at preserving the *status quo*. The requisites for a final order as stated in the *Zweni* judgment do not apply to the judgment and order given by this Court. The rights of the ZEP holders as stated in the order are not definitive, firstly, in that they are subject to the determination by the Minister and may be altered when the Minister has conducted a fair hearing as contemplated in the interim order; secondly, the existing ZEPs shall be deemed to remain valid for the next (12) twelve months pending the conclusion of a fair process; thirdly, the Minister's decision has been set aside temporarily until he concludes a fair process within 12 months; and fourthly, the Minister's powers to act in terms of section 31(2)(b) of the Immigration Act⁵ have not been usurped.

⁴ 1993 (1) SA 523 (A) at 536A-C.

⁵.Act 13 of 2002

[26] For these reasons, it is found that the Minister's contention that the interim order has the effect of a final judgment is rejected. We consider below whether a declarator compelling the Minister to comply with the interim order pending any appeals contemplated by the Minister should anyway be granted.

[27] The order is self-evidently of an interim nature. The wording of the order is not having an effect of a final judgment in its reading. Nor did the court in its judgment state that the order is final. The Court deemed a period of 12 months sufficient for the Minister to complete a fair process.

[28] The applicants' notice of motion seeks an order that the execution of the interim order is not suspended by any application for leave to appeal or any appeal, and the order continues 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.

[29] As appears below the applicants are asking for what they already have by operation of the law in terms of section 18(2) of the Act. To the extent that both counsel for the applicants, Ms Steinberg and Mr Simonsz submitted that a declaratory order would provide further protection in the event that the Minister does not comply with the Court order after 30 June 2024 their apprehension is not borne out by the

facts. The Minister's stance is to obey the court orders while he proceeds with the appeals.

[30] If this Court made the declaration sought it would be the third time that the Court declares that its order is of an interim nature. As stated above, it has done so in the judgment and in dismissing the Minister's application for leave to appeal already. As stated in paragraph [19] of the judgment the Court was at pains to state this fact.

[31] Section 18(2) addresses the issue of its operation and execution before and after any application for leave to appeal or of an appeal. The HSF and CORMSA application seeks what is granted by operation of the law. Moving this application in these circumstances was unnecessary.

[32] It also appears the applicants are asking for more than the applicants asked for and were granted in the main application and judgment. In addition, the declarator now sought was not asked for in the main application. Such a declaration is not required in view of the provisions of section 18(2) of the Act. Consequently, we hold that it is not necessary to grant a declarator.

[33] Regarding the submissions about the impact that it would have not to grant the declaratory relief, we do not agree that such consequences would follow. The guarantee of protection beyond the 12-month period if the order is not implemented pending the appeal of

this judgment and potentially further appeals to the Supreme Court of Appeal or the Constitutional Court, flows from the provisions of section 18(2) and the injunction that the ZEP holders are protected until the Minister has taken a decision following a fair process. The mere production of the Court order affords the ZEP holders protection.

COSTS

[34] The applicants pray that the first respondent, in his personal capacity, be ordered to pay 50% of the costs of this application, including the costs of three counsel. They pray that the first and second respondents be ordered to pay the balance of the costs, jointly and severally, including the costs of three counsel.

[35] The HSF submits that the Minister displayed an obstinate refusal to provide any undertakings to comply with this Court's temporary order despite the dismissal of his application for leave to appeal. As stated above in their submissions they complain that his refusal has been based on constantly shifting and contradictory grounds which have changed with each filing, leaving a state of utter confusion. His conduct is characterised as grossly negligent and insensitive to the plight of ZEP holders.

[36] The nub of this submission is that the Minister's attitude has necessitated this application and that waiting to bring contempt

proceedings later if or when the Minister failed to comply would not remedy the damage that would have been caused.

[37] On behalf of the Minister it was argued that, the Minister at all times acted in accordance with legal advice internal to his department and external. As such it cannot be suggested therefore that he acted recklessly in his personal capacity. To burden him with a personal costs order would lead to deterring him from litigating in his official capacity and therefore in the discharge of his mandate for fear of punitive costs orders to be paid by him personally.

[38] Given the conspectus of evidence we hold the view that a personal cost order is not warranted under the circumstances. It is for this reason that we consider no order as to costs should be awarded.

CONCLUSION

[39] there is therefore no need for a duplication of this protection by issuing a declaratory order for protection pending any for the reasons alluded to above, the ZEP holders remain protected by application of section 18(2) of the Act. There is therefore no need for a duplication of this protection by issuing a declaratory order for protection pending any contemplated appeals by the Minister. For this reason, the enforcement application that the enforcement application in terms of section 18, read with section 21(1) of the Superior Courts Act, stands to be dismissed.

ORDER

[37.1] In respect of the Condonation application and supplementary answering affidavit, the respondents are to pay the costs including costs of three counsel in respect of the first applicant and that of one counsel in respect of the second applicant;

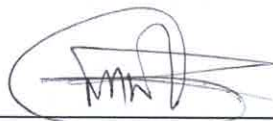
37.2 The enforcement application is dismissed;

37.3 No order as to costs.

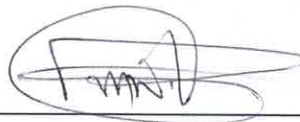


C COLLIS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

P.P.



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



M MOTHA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

COUNSEL FOR FIRST APPLICANT:

C Steinberg SC
C McConnachie
Z Raqowa
M Kritzinger

INSTRUCTED BY:

COUNSEL FOR FIRST AND SECOND RESPONDENTS:

W Mokhare SC
C Georgiades SC
T Mokhatla

INSTRUCTED BY:

DATE OF THE HEARING:

26 October 2023

DATE OF JUDGMENT:

6 November 2023