IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: **32323/2022**

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	Intervening Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Second Respondent
ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA	Third Respondent

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FIRST AND SECOND RESPONDENTS' NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that on the day and at the time to be determined by the Registrar of this Court, the first and second respondents ("respondents") will make an application for the following order:

1. Granting the respondents leave to appeal to the Supreme Court of Appeal against the whole Judgment and Order of Collis J (with Malindi J and Motha AJ concurring) granted on 28 June 2023 in which the Full Court ruled in favour of the applicants;

2. Directing that costs of the application for leave to appeal be costs in the appeal; and

3. Granting further and/or alternative relief.

TAKE NOTICE FURTHER that the application for leave to appeal is brought in terms of section 16(1)(a)(ii), read with section 17(1)(a) of the Superior Courts Act 10 of 2013 and rule 49(1)(b) of the Uniform Rules of Court.

TAKE NOTICE FURTHER that the respondents reserve the right to supplement the grounds for leave to appeal.

TAKE NOTICE FURTHER that the application for leave to appeal will be made on the following grounds (as contemplated in sections 17 (1)(a) (i) and 17 (1) (a) (ii) of the Superior Courts Act 10 of 2023):

A. <u>INTRODUCTION</u>

1. The genesis of the exemptions in terms of the current provisions[1] is fully set out in the answering affidavit filed in the **African Amity** matter by the second respondent (Director- General)[2].

2. Since 2009, successive Ministers of Home Affairs granted exemptions in terms of section 31 (2) (b) of the Immigration Act to the Zimbabwean nationals[3].

3. The current exemptions were introduced to "*due an influx of asylum seekers from Southern African Development Community ("SADC"). The majority of them were Zimbabwean nationals" …The Department of Home Affairs ("DHA") Asylum Seeker Management Unit ("ASMU") was unable to cope with the numbers… It had neither the staff compliment and financial resources to deal with the influx[4]".*

4. This led to the DHA approaching National Treasury requesting financial assistance to start the process of granting exemptions to the SADC nationals, including Zimbabwean nationals[5].

5. Significantly "*the DHA requested National Treasury to make available an amount of R145 803 928 available to start a special project of granting exemptions by the Minister of Home Affairs. National Treasury decided only to approve an amount of R15 million to deal with the exemptions process for SADC nationals"[6].*

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1 Section 31 (2) (b) of the Immigration Act 13 of 2002.
2 Annexure "**RA4**", Caselines: 018-100-107.
3 Judgement: paras 21-30.
4 Annexure "**RA4**", para 40: Caselines: 018-109.
5 *Ibid*, para 41.
6 Annexure "**RA4**", paras 42 and 43: Caselines: 018-109-110.

6. The special project was "*financially unsustainable*"[7].

7. It is common cause that when the exemptions were granted, including renewals thereof to the affected Zimbabwean nationals, no consultations were undertaken as contemplated in sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

8. The Director- General initiated a discussion within all the affected units and made a recommendation/submission to the first respondent ("Minister"). The reasons for his recommendation appear in paragraphs 3-4 of the submission[8].

9. The Minister approved the recommendation not to extend the exemption regime on 20 September 2021 and at the same time, accepted the recommendation to extend the validity of the exemption permits for a period of 12 months. The directive to that effect was issued on 29 December 2021 and published in the Government *Gazette* on 7 January 2022.

10. The Court failed to take into consideration the above context and evidence, and thereby arriving at conclusions and/or findings which are unsustainable.

B. <u>COMPELLING REASONS FOR GRANTING LEAVE TO APPEAL: Section 17 (1) (a) (ii) of the Superior Courts Act 10 of 2023):</u>

7 Annexure "**RA4**", para 42: Caselines: 018-110.
8 Annexure "**FA8**": Caselines: 001-103.

11. The respondents respectfully submit that there are compelling reasons that warrant leave to appeal being granted by this Court to the Supreme Court of Appeal.

Applicability of sections 3 and 4 of PAJA

12. The Court correctly agreed with the applicants' case that the Minister is empowered to terminate the temporary exemption regime granted to the Zimbabwean nationals[9]. It erred however, in finding that the decision of the Minister is reviewable under any of the grounds advanced by the applicants.

13. The White Paper on International Migration was developed in 2017 long after the introduction of the special project of granting exemptions to SADC nationals. Furthermore, it does not address the factors to be taken into consideration when the Minister decides not to extend the exemption[10].

14. The Court misconstrued the 12 months period extending the validity of the permits and found that such a decision was" *without providing reasons for doing so*"[11]. This finding fails to take into consideration the fact that the Minister accepted the recommendation (and reasons) of the Director-General that "*the Minister should consider imposing a condition extending the validity of the exemptions for a period of three years, alternatively, a period of 12 months and any other period which the Minister deems appropriate. The condition to include*

[9] Judgment: para 10.
[10] Judgment, paras 31 and 32.
[11] Judgment: para 37.4.

allowing the holders of exemptions to apply for one or other visas provided for in the Immigration Act while in South Africa"[12]. (Underlining provided)

15. The extension relates to the validity of the exemption permits and this decision by the Minister does not constitute an administrative action. Despite the decision of the Minister not to extend, the exemption permits had expired on 31 December 2021:

15.1 The exercise of the powers by the Minister involves a decision that is policy laden and polycentric[13].

15.2 The Court failed to heed the warning in **Du Plessis**[14] and could not resist the temptation of descending into the Executive terrain.

Procedural fairness and irrationality

16. Assuming that the affected Zimbabwean nationals were entitled to be heard as provided for section 3 of PAJA, the requirements were met:

16.1 The affected exemption holders were heard albeit after the decision was taken[15].The Court ignored binding authorities to the effect that fairness depends

12 Annexure "**FA8**", para 5: Caselines: 001-100.

13 **International Trade Administration Commission v SCAW South Africa Pty Ltd** 2012 (4) SA 618 (CC), para 195.

14 **Du Plessis v De Klerk** 1996 (3) SA 850 (CC), para 180.

15 Judgement: paras 40-44 and annexures "**FA13**" and "**FA14**".

on the circumstances of each case and in particular the nature of the decision as set out in **Doody**[16], **Pridwin**[17] and **Mamabolo**[18].

16.2 The Court misdirected itself by relying only on the email correspondence from Ms Maliwa in reaching the conclusion that "*the response illustrates that the invitation for representations was vague and not designed to elicit meaningful representations from either the ZEP holders or the public*"[19].

16.3 The Court failed to consider the evidence tendered by the respondents to the effect that approximately 6 000 representations were received and majority of them were responded to[20].

<u>Public participation: section 4 of PAJA</u>

17. The Court erred in concluding that the decision of the Minister required compliance with the provisions of section 4 of PAJA thus requiring public participation[21]. The Court in the main relied on the authority in **Albutt**[22]. This is misplaced. The decision not call for public participation was justified. First, the decision affected a specific category of persons and not the public. Second, such

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16 **R v Secretary of State of Home Department, ex parte Doody** 1993 (3) ALL ER 92 HL quoted in **Du Preez v Truth and Reconciliation Commission** 1997 3 SA 204 (A), para 32.
17 **AB v Pridwin Preparatory** 2020 (5) SA 327 (CC), para 205.
18 **Mamabolo v Rustenberg Regional Council** 2001 (1) SA 135 SCA, paras 20-24.
19 Judgment: para 72.
20 AA, para, 144: Caselines: 010-307.
21 Judgment: para 81.
22 **Albutt v Centre for Study of Violence and Reconciliation** 2019 (3) SA 293 (CC).

a decision is not administrative action and is voluntary[23]. Third, indeed this does not show "*disdain for the value of public participation*" as the Court found[24].

18. The Court also failed to take into consideration the fact that Scalabrini, African Amity, Freedoms Advocate and Zimbabwe Diaspora Association were consulted, albeit after the decision was taken..

19. The Court failed to appreciate that the issue is whether or not a meaningful opportunity to make representations was given in order to have the decision changed or modified. This question has nothing to do with whether representations were made before or after the decision was taken.

20. There is no factual and legal basis for the conclusion that... "*the Minister's failure to conduct any prior consultations, before announcing the decision to terminate the ZEP programme, rendered the decision procedurally irrational given the far-reaching implications of the decision*" and that "*furthermore, the fact that it was notionally possible for affected organizations and individuals to make representations before the decision could be taken, renders the decision so taken as procedurally unfair and irrational. The Minister not only failed to invite representations but also failed to consider any representations, before taking the decision*"[25].

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23 Hoexter, Administrative Law, 3rd Edition: page 559. See also **Residents of Joe Slovo Community**, **Western Cape v Thubelisha Homes** 2010 (3) SA 45 ,(CC), para 300.

24 Judgment: para 75.

25 Judgment: paras 80 and 81.

21. The Court was wrongly fixated on the notion that representations after the decision was taken was unconstitutional and unlawful. This is a wrong premise and as such all the authorities[26] relied on by the Court were completely misplaced.

Impact on ZEP holders and rights of children

22. The conclusion that "*on the totality of the evidence presented before the court, the inescapable conclusion that must be drawn is that the Minister failed to consider the impact of his decision on ZEP holders, their families and children*"[27] is unsustainable for the following reasons:

22.1 First, the impact on the ZEP holders and their families was considered by both the Director- General and Minister. Hence the first directive was issued as recommended by the Director- General. The directive afforded certain protections to the ZEP holders, such as freedom of movement, right to work and other constitutional rights were guaranteed. They would continue with their normal day to day lives as though there was no decision not to extend the exemption regime. Above all, they did not have to pay for new permits (stickers) and they are free to apply for one or other visas while in South Africa. They in fact, enjoy better rights and privileges than they had under the exemption regime.

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26 Judgment, paras 82, 83 and 84.
27 Judgment: para 96.

22.2 Second, the Departmental Advisory Committee ("DAC") was set up in order to fast-track their visa applications[28] .

22.3 Third, outside lawyers were appointed to advise the Minister on waiver applications.

22.4 Fourth, the impact on the ZEP holders and automatically families and children was contained in the press statement, which referred to the directive containing protections afforded to them.

22.5 Fifth, the right to dignity was considered and in any event, this right cannot be implicated in the nature of the decision taken by the Minister. If this were so, that would amount to egregious breach of separation of powers.

Rights of children

23. There mere fact that the rights of children were not specifically mentioned in the submission does not mean such that was not foremost in the mind of both the Director- General and Minister. The Director- General states under oath that such rights were considered[29]. The applicants merely tender a bare denial. The Court ought to have accepted the evidence tendered by the Director-General, instead of an expectation that such evidence ought to have appeared in the record. This is so, because the applicants waived their right to a rule 53 record[30].

28 AA, para 267: Caselines: 010.90 and Further Affidavit: para 36: 010-281.
29 AA, para 267 Caselines:010-90 and Further Affidavit, para 36: Caselines: 010-281.
30 Further affidavit: para 133: Caselines: 010-305. .

24. The evidence relied upon by the applicants to demonstrate the breach of children rights is contained in the affidavit deposed to by LM[31] . First, she did not apply for any visa or make representations. Second, the number of children affected by the decision is not provided except that a generalised statement about breach of children rights is made. The Court is left to speculate as to the number of children involved.

25. Rights of children cannot (due to the nature of the decision) trump up, all other fundamental rights[32].

26. The Court erred by elevating the enquiry on regulation of the immigration status of parents to that of the rights of children, without balancing the competing interests and rights as set out in **Fitzpatrick**[33].

27. In any event, the Court could have exercised its inherent powers as a guardian of minor children and appointed a Family Advocate to furnish the report to it[34].

28. In the circumstances, the finding of the Court to the effect that the Minister's decision is "*unreasonable*" is simply not correct[35].

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31 AA, paras 213 to 215: Caselines: 010-71.

32 **Minister for Welfare and Population Development v. Fitzpatrick** 2000 (3) SA 422 (CC), para 17; **S v M** 2008 (3) SA 232 (CC), para 42.

33 **Fitzpatrick**, para 17.

34 **C v Department of Health, Gauteng** 2012 (2) SA 208 (CC), para 27; **Van der Burg and Another v National Director of Public Prosecutions** 2012 2 SACR 311 (CC), para 72; **M v S** 2008 3 SA 232 CC, para 36.

35 Judgment: para 98.

Limitation of rights

29. The Court failed to correctly appreciate that any finding of breach of constitutional rights should be followed by an enquiry on the limitation of rights as pleaded by the respondents[36].

30. The Court ought to have found that the respondents discharged the onus on justification and met the evidentiary requirements set out in **Rail Commuters**[37]:

30.1 The budgetary constraints were fully set out, starting from the refusal by National Treasury to grant the request amount referred to in paragraphs 4-6 above.

30.2 The submission of the Director- General set out in great detail the budgetary reductions[38] in the financial years 2020/21 and 2021/22.

31. Had the Court carefully considered the submission, it would not have reached a conclusion that "*in the absence of transparency on the part of the respondents…we must conclude that the Minister failed to prove a justification based on the facts which is rational between the limitation of rights on the one hand and a legitimate governmental purpose*"[39].

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36 **Minister of Home Affairs v NICRO** 2005 (3) SA 250 (CC), para 34.
37 **Rail Commuters Action Group v Transnet t/a Metrorail** 2005 (2) SA 359 (CC), para 88
38 Annexure "**FA8**", para 4.2: Caselines 001-98.
39 Judgment: para 126.

32. The other grounds of review relied upon by the applicants (which the Court did not deal with) on the basis that it would be "*superfluous*" to do so[40], are all without merit on the case as pleaded by the respondents. The challenge based on the principle of legality falls to be dismissed.

Substitution

33. The Court erred in substituting the decision of the Minister for that of the Court in respect of the temporary order in that:

33.1. The Minister has issued directives (all in all three), the most recent extending the validity of the permits to 31 December 2023. The Government *Gazette* to this effect was made available to the Court before judgment was delivered on 28 June 2023.

33.2 The test for substitution has not been met[41].

33.3 The order violates the doctrine of separation of powers and the just and equitable order issued by the Court was not appropriate.

33.4. The factors taken into consideration by the Court in granting the substitution order are not exceptional at all[42].

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40 Judgment: para 128.

41 **International Trade Administration Commission v SCAW South Africa Pty Ltd Limited** 2012 (4) SA 618 (CC), para 195.

42 **Trencon Pty Limited v Industrial Development Corporation of South Africa** 2015 (3) SA 245 (CC), paras 46-55.

34. There are compelling reasons to grant leave to appeal to the Supreme Court of Appeal[43].

C. **Prospects of success**

35. There are prospects of success based on the grounds for leave to appeal set out in paragraphs 11-33. The Supreme Court of Appeal is highly likely to reach a different conclusion than that of this Court.

Costs

36. The Court erred in ordering costs against the respondents[44], when in fact the Court mainly decided the matter on the constitutional rights of ZEP holders, including the minor children. The Court ought to have found that the **Biowatch**[45] principle applies and therefore not make an order as to costs.

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43 **Minister of Justice and Constitutional Development v Southern Africa Litigation Centre** 2016 (3) SA 317 SCA, 330C.

44 Judgment, para 147.5.

45 **Biowatch Trust v Registrar Genetic Resources and Others** [2009] ZACC 14; 2009 (6) SA 232 (CC) 2009 (10) BCLR 1014 (CC), paras 56-58.

DATED AT PRETORIA ON THIS THE 13th DAY OF JULY 2023.

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AND TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**

GAUTENG DIVISION, PRETORIA

AND TO: **DLA PIPER SOUTH AFRICA(RF) INC**

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Without prejudice of clients rights
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