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.

16th OCTOBER 2023
DATE

SIGNATURE

In the matter between:

THE MINISTER OF HOME AFFAIRS	First Applicant
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Second Applicant
and	
THE HELEN SUZMAN FOUNDATION	First Respondent
THE CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	Second Respondent
ALL TRUCK DRIVERS FORUM AND ALLIED SOUTH AFRICA	Third Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is 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 16 October 2023.

JUDGMENT

THE COURT:

Introduction

[1] On 28 June 2023 the court delivered judgment and orders in respect of the first applicant's review application ("the review application") declaring the Minister of Home Affair's failure to consult with the Zimbabwean Exemption Permit Holders ("the ZEP Holders") and interested non-governmental organisations ("NGOs") and the public, unlawful, unconstitutional and invalid. The order remits the matter back to the Minister for reconsideration following a fair process that complies with the requirements of sections 3 and 4 of the Promotion of Administrative Justice Act.[1] As a result the ZEP Holders' status quo is preserved for 12 months in terms of the expired ZEP dispensation.

[2] Furthermore, in the same judgment, the third respondent's counter application against the Minister was dismissed with costs.

[3] On 13 July 2023 the Minister and the Director-General of Home Affairs ("the D-G") launched an application for leave to appeal against the whole judgment and orders as aforementioned. They are referred to as "the Minister" or ("the applicants"), collectively. The third respondent (referred to as TDF henceforth) launched its application for leave to appeal on 14 July 2023. It seeks leave to appeal against the order that its counter application was inordinately late and therefore that it fell to be dismissed with costs.

[1] Act No. 3 of 2000

[4] The first respondent, referred to as the Helen Suzman Foundation ("HSF") and the second respondent, referred to as the Consortium for Refugees and Migrants in South Africa ("CORMSA"), oppose the applications. CORMSA associates itself with the HSF's submissions.

Test for leave to appeal

[5] Section 17(1) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act") provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard. The section reads as follows:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
>
> (a) (i) the appeal would have a reasonable prospect of success;
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
>
> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[6] The section has been interpreted in *MEC Health, Eastern Cape v Mkhitha*[2] wherein it was interpreted as requiring a truly reasonable prospect of success. The case further elaborates that there must exist a realistic chance of success on appeal based on proper grounds.

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2 (Case No.1221/15) [2016] ZASCA 176 (25 November 2016).

The Minister's and TDF's application for leave to appeal

[7] The applications are brought in terms of section 17(1)(a). It bears emphasis that subsection (1)(a)(ii) requires compelling reasons why the appeal should be heard. In *Ramakatsa & Others v African National Congress & Another*[3] the court confirmed that a reasonable prospect of success requirement applies too to the alternative ground of "some other compelling reason why the appeal should be heard." A list of what may constitute such compelling reasons, though not a closed list,[4] includes:

7.1 the interests of justice;

7.2 an important question of law;

7.3 a discrete issue of public importance that will have an effect on future disputes;

7.4 where the matter is of great importance to the parties.

[8] The grounds advanced by the Minister are that:

8.1 the decision of the Minister is not reviewable under PAJA, as it does not constitute administrative action;

8.2 the Minister gave reasons for the 12 months' extension of the ZEP when he approved the D-G's memorandum of 20 September 2021;

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3 (Case No.724/2019) [2021] ZASCA 31 (31 March 2021)

4 *Ramakatsa* at [10]; *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA); *Kock v Morrison & Another* 2019 (5) SA 51 SCA at [8].

8.3 the affected ZEP holders were all given an opportunity to be heard, albeit after the decision was taken, including a number of NGO's;

8.4 the decision does not require public participation as required by Section 4 of PAJA;

8.5 procedural fairness does not depend on being given a meaningful opportunity to make representations before or after the decision as long as such an opportunity is given in order to have that decision changed or modified;

8.6 consideration was taken of the impact that decision would have upon ZEP holders and the rights of children in the directive giving the 12 months' extension protected their rights pending the expiry of the period;

8.7 the D-G's evidence on the consideration of their rights of the children has been accepted by the Minister;

8.8 the court erred by elevating the inquiry 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 *Minister of Welfare and Population Development v Fitzpatrick*[5];

8.9 the Minister discharged the onus on justification of the limitation of the ZEP holders' rights;

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5 2000 (3) SA 422 (CC) at [17].

8.10 the court had in substituting that decision of the Minister for that of the court in respect of the temporary order;

8.11 the order violates the doctrine of separation of powers and so does the section 172 order.

[9] The TDF's grounds for leave to appeal are that the court erred in applying the 180 days test in determining whether its application was brought within time as its challenge of the Minister's decision was based on legality and not PAJA[6]. It further contends that the judgment does not tender reasons justifying and explaining the order in the context of review on the grounds of legality. It is contended further that even if PAJA was found to apply, its counter application was not out of time for the reason that the 180 days had not expired when its application was launched, alternatively, that even if it were so, the court ought to have exercised its inherent discretion to overlook the delay in respect of the timeframes under both PAJA and legality.

Evaluation of the grounds for leave to appeal

[10] It is common cause that the Minister's decision was taken before consultation with the ZEP Holders or NGOs acting in the interest of the ZEP Holders or the public. It is common cause that that decision would have an adverse bearing on the rights acquired by the ZEP holders and their children.

[11] Crucial to establishing the grounds for leave to appeal is the quality of evidence or the incontrovertible importance of the issues contemplated in section 17(1)(a)(ii), respectively.

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6 Promotion of Administrative Justice Act, 3 of 2002 ("PAJA").

[12] What renders the Minister's application destined for failure is the Minister's failure to depose to the answering affidavit in the review proceedings. Only the Minister, as the decision maker, could give evidence as to what passed through his mind and how his mind was exercised. The affidavit deposed to by the Director-General ("the D-G") constitutes inadmissible evidence. As was held by the Supreme Court of Appeal *in Freedom Under Law v Judicial Services Commission*[7] if the decision maker has failed to depose to an affidavit it is impermissible for a functionary in the office to do so on behalf of the decision maker. In those circumstances the affidavit of the functionary falls to be declared inadmissible. The court in *FUL* proceeded on the basis that on the merits the application was to fail in any event. However, the principle is that inadmissible affidavits should not be considered in adjudicating a matter. That deals a death blow to the prospects of success on appeal on any of the two legs contemplated in section 17(1)(a).

[13] Both the Minister and TDF submit that the court was wrong to apply the provisions of PAJA to their respective cases. The Minister contends that his decision was of an executive nature and therefore immunised from sections 3 and 4 of PAJA, and the TDF contends that its counter application was a challenge on the Minister's lack of legislative authority to take the decision on the termination of the ZEP dispensation. It was a legality challenge, it is submitted. Such illegality further tainted the Minister's authority to grant the extensions to the ZEP dispensation.

[14] The characterisation of the Minister's decision is correct. On the authority of *Motau*[8], there is no prospect that a court of appeal would find differently. The definition of

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7 [2023] ZASCA 103 (22 June 2023) at [27].
8 *Minister of Defence and Military Veterans v Motau & Others* 2014 (5) SA 69 (CC) at [33].

administrative action in PAJA, read with the *Motau* judgment is unassailable as found by this court.

[15] The Minister criticises the judgment on procedural fairness and irrationality on the basis that the court spent four pages setting out steps taken by the Department of Home Affairs in affording the ZEP holders a hearing albeit after the decision was taken. It is submitted that the court ignored authorities to the effect that fairness depends on the circumstances of each case and in particular the nature of the decision. Reference is made to the cases of *AB v Pridwin Preparatory*[9] and *Mamabolo v Rustenburg Regional Council*[10]. The two cases do not avail the Minister's contentions. The Minister does not attempt to deal with and answer to the judgment's reasoning set out from paragraphs [52] – [58] where the judgment sets out that the Minister was not only obliged to consult beforehand under Section 3 of PAJA and that it is so required even under the principle of legality that the procedure followed by the Minister had to be rational.[11] The two cases set out the principle of rational decision-making outside the ambit of PAJA, especially where acquired rights would be affected.

[16] In argument TDF submitted that its challenge to the ZEP extension granted in December 2022 was not out of time either on the PAJA or legality test for condonation. This ground is set out in the notice of motion.[12] TDF pleaded that this extension is tainted with the illegality of the Minister's exercise of his powers under section 31(2)(b) of the

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9 2020 (5) SA 327 (CC) at [205].
10 2010 (1) SA135 SCA at [20] – [24].
11 *Albutt v Centre for the Study of Violence and Reconciliation & Others* [2010] ZACC 4; 2010 (3) SA 293 (CC) and *e.TV (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa & Another v e.TV (Pty) Limited* [2022] ZACC 22 (28 June 2022) at [52].
12 Counter-application: 047-2, para 1.6; 047-14, para 3.2.

Immigration Act.[13] TDF's challenge is anchored on the review of the grant of ZEPs under section 31(2)(b).

[17] First, the criticism that the court did not consider the delay in terms of the legality test is not borne out by what is said in paragraph [18] of the judgment. The delay was considered in terms of PAJA and then it was stated:

"Furthermore, this court is of the view that a period of over two years is an unreasonable delay, especially when there are no reasons justifying and explaining the delay. Accordingly, the ATDFASA does not comply with the test as set out in Khumalo and Another v MEC for Education, KwaZulu-Natal."

Reference to *Khumalo & Another v MEC for Education, KwaZulu-Natal*[14] is to the test on legality review and condonation thereunder. The court's discretion was properly and judicially exercised in refusing condonation even under the *Khumalo* test.

[18] TDF has referred to the *Buffalo City Metropolitan Municipality v ASLA Construction*[15] case which considered *Khumalo, State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*[16] and other cases regarding condonation applications under PAJA and the legality test. One of the most crucial guidance that *Buffalo City Metropolitan Municipality* gives to the courts is that:

"[51] The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two-step *Khumalo* test to ascertain whether the delay is undue and, if so, whether it should be overlooked."

Conclusion

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13 Ibid: 047-17, paras 3.8 and 3.9.
14 2014 (5) SA 579 (CC) at [49].
15 2019 (4) SA 331 (CC).
16 2015 (2) SA 23 (CC).

[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 it's 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 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.

[21] The TDF contends that the court misdirected itself by considering its application in terms of section 7(1) of PAJA. The court did not err in this regard. The conduct or impugned decision was taken in terms of empowering legislation and was therefore characterised as administrative action. Although the decision was taken by a member of the executive, he did so in terms of legislation. He took that decision when exercising a public power or performing a public function in terms of legislation.[17]

[22] As to the costs, there is no reason to depart from the principle that led the court to award a costs order against the Minister. The *Biowatch* principle is clear that a successful litigant in the vindication of constitutional rights must usually have a costs order awarded against the state. There is no prospect of success in appealing such a discretionary order. The principle did not work in favour of TDF because its counter application was dismissed and therefore there was no ventilation of the merits of its application. In this application

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[17] Section 1(a)(ii) of PAJA.

too, the same principle shall apply and the Minister must pay the costs of the application, including costs of two counsel where employed.

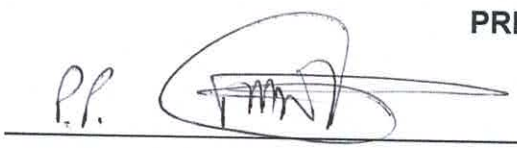
[23] The *Bio Watch* rule was properly applied.

[24] Consequently, the following order is made:

1. The first and second applicants' application for leave to appeal is dismissed with costs, including costs of two counsel where employed.

2. The third respondent's (All Truck Drivers Forum and Allied South Africa) application for leave to appeal is dismissed with costs.

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



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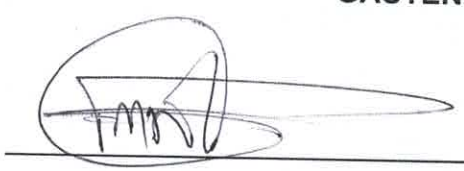

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