



'Unlawful, Unconstitutional and Invalid.'¹

1. Introduction

On 28th June this year, a full bench of the Gauteng High Court handed down a much anticipated judgment with regard to the termination of the Zimbabwean Exemption Permits.² In its judgment the court acknowledged that the case had garnered much interest in the public domain, even beyond the Zimbabwean community and those engaged in the immigration sector. Indeed, in its media statement after the release of the judgement, the Helen Suzman Foundation (HSF), which was a co-applicant in the matter, underlined this point:

"The judgment is of huge significance for the approximately 178 000 ZEP holders who have lived in South Africa perfectly legally for almost fifteen years, finding that they are entitled to fair process, due consultation and clear reason, demonstrating good cause, when decisions of calamitous moment are made regarding their lives and livelihoods. Today's decision holds that the Minister of Home Affairs' decision to terminate the ZEP is unlawful, unconstitutional and invalid. That decision is remitted back to the Minister for fresh decision, following a fair process compliant with the requirements of administrative justice. But the decision is also one of ordinariness, for on these issues our laws and Constitution have long been clear. Where the exercise of public power will have drastic effect on the rights, lives and livelihoods of any persons, it cannot rationally be made without affording the affected persons an opportunity to make representations. In its restatement of this fundamental principle of our law, the Court upholds and safeguards the rights not only of ZEP holders but of every South African. The HSF welcomes today's judgment."³

This is indeed an important and timely restatement of the law and of the fundamental sense of respect for the dignity of each person that underpins it. It is a matter of great concern that twice in not even as many months, the Department of Home Affairs (DHA), and indeed the Minister, have been castigated by the courts. Referring to the DHA's failure to comply with a Constitutional Court-imposed obligation to amend parts of the Immigration Act, three years on, the Chief Justice spoke of the attitude of the DHA and the Minister and DG as a "pathetic dereliction of duty."⁴ In the case under discussion here, the High Court spoke of the Minister's decision as "unlawful, unconstitutional and invalid."⁵ These two examples show a worrying disregard by the DHA for court rulings and a disdain for procedural aspects in governance structures, all of which undermine our democratic ethos and respect for the rule of law.

2. Aspects of the Case and the Judgement

The case was brought, as is now well known, by the HSF, the Zimbabwean Exemption Permit Holders Association (ZEPHA), and the All Truck Drivers Forum & Allied South Africa. They had initially been brought as three separate challenges but, given the shared content, the court joined them. It should be noted that judgement is still awaited with regard to the specific ZEPHA request for permanent residence for ZEP holders on the basis of their length of stay.⁶

In 2009 the South African government offered Zimbabweans living and working in South Africa, irrespective of status, the possibility of applying for a permit which would enable them to regularise their stay for a limited period and thus continue living and working here legally. Some 250 000 Zimbabweans applied and 245 000 permits were issued.⁷ The offer was made mainly because of the political and economic crises in Zimbabwe

at that time, and the first tranche was valid for four years. In 2014 they were renewed and again in 2017. In November 2021 it was announced that cabinet had agreed to a termination of these permits pending a ‘twelve month grace period’ which would allow holders to apply to remain here on the basis of other visas, failing which they should return to Zimbabwe or face deportation. Since the November 2021 announcement there have been two further six-month extensions,⁸ the latest of which sets a termination date at the end of December 2023. This has now been superseded by the judgement, which requires that the *status quo* remains while the DHA is required to engage in a fair and proper public participation process as required by law, so that the Minister may arrive at a more informed decision with regard to the future of the ZEP holders. During this time no ZEP holder can be arrested, detained or deported on the basis of expired documentation.

The Court struck down the Minister’s decision on the following grounds:

- The Minister did not afford ZEP holders a reasonable opportunity to make representations as per the Promotion of Administrative Justice Act (PAJA);
- He did not consider the impact the decision would have on ZEP holders and their families; and
- The decision was an unjustified limitation of rights.⁹

The Court reminded the Minister that he had a duty to engage in a public participation process before coming to a decision, so that he might have an understanding of various angles. “The Court said the department had not adhered to the requirements of the Promotion of Administrative Justice Act. Section 4(1) of the Act says that where an administrative decision ‘materially and adversely affects the rights of the public’ an administrator owes a duty of fairness to the public at large. This would include the administrator holding public hearings or obtaining written comments.”¹⁰ It added, from a recent Constitutional Court case, “where a decision is ‘not a mechanical determination’ and ‘important interests are at stake, it is not procedurally rational to take a decision without notice to the affected parties to obtain their views on the matter’”.¹¹

It is a matter of public record that there was no engagement with the permit holders or with

civil society or with anyone who might have a view on the issue, before the decision was made. This led to the Court finding that the department had a “notable disdain for the value of public participation”. “Indeed, it is presumed that the ZEP holders are capable only of making representations on why the Minister’s decision should not apply to them personally and not on the merits of the decision itself. While the views of civil society and the public are deemed unnecessary all together.”¹² The Court concluded that the Minister’s decision was therefore procedurally unfair and irrational.¹³

This in effect means that “permit holders will now have another 12 months to remain in South Africa without fear of reprisal or arrest as the Court orders the Department to conduct a proper public participation process as required by law.”¹⁴ The Court also ruled that ZEP holders must be allowed to leave or enter South Africa, and may not be dealt with in terms of sections 29, 30 and 32 of the Immigration Act on the basis that they are ZEP holders.¹⁵

This does not definitively solve the long term need for security for the holders, but it lengthens the period for applying for other visas and – importantly – it reiterates the principle that no government minister or department can ride roughshod over the painstakingly established processes for ensuring justice for all who await important decisions that affect their lives.

3. The Minister’s Intention to Appeal

The Minister has instructed lawyers to appeal this decision, which he says amounts to a dangerous precedent.¹⁶ To quote the Minister’s spokesperson, Siya Qoza, at some length,

“The finding of the court on the applicability or otherwise of sections 3 and 4 of the Promotion of Administrative Justice Act (PAJA) is highly questionable, particularly the requirement for public participation when a decision of this nature is taken, affecting a specified category of persons only. In this instance, the affected Zimbabwean nationals.

“The decision the Minister took not to extend the Zimbabwean exemptions involves weighing of policy considerations which fall within the domain of the executive. The HSF judgment also deals with matters relating to a sacrosanct principle of separation of powers. The Minister believes this is another

strong ground for appeal. [Dr] Motsoaledi is of the opinion his decision was correct and took into consideration all interests and rights, including those of children. The Minister will also challenge the outcome of the ZEF interim interdict on appeal. The purpose of the interdict was unclear as the Minister issued directives to ensure affected Zimbabweans continued to enjoy protections afforded by the directives. The last Minister's Immigration Directive was issued on June 7. Since the Minister took the decision, no Zimbabwean national has been threatened in any manner whatsoever and/or deported. They continue to enjoy freedom of movement between South Africa and Zimbabwe, and anywhere, as pleaded in the affidavits filed in court on behalf of the Minister showing significant movements to and from Zimbabwe by the affected Zimbabwean nationals and their families. Many of those affected continued to apply for other visas and waivers, as provided for in the Immigration Act 13 of 2002.¹⁷

It is difficult to understand just how this constitutes a dangerous precedent. The Minister's authority to make such decisions is not at stake or being questioned and thus this principle is not threatened at all; what is at stake is that there should be compliance with the process that must precede such decisions.

4. Reactions

In a statement after the Court's ruling, the Zimbabwean Exiles Forum spokesperson, Advocate Gabriel Shumba, said that they "welcomed the decision as evidence of the rule of law in SA and an indicator of the country's constitutionalism. We hope that this small group of people, who have given so much to the economy and have tried to comply with the laws, will not be sacrificed on the altar of political correctness."¹⁸

In an article deeply supportive of the Minister's decision to terminate the ZEPs, and critical of the Court's ruling, Morgan Phaahla raises the issue as to whether the government needs to have a consultation each time they elect to control an influx of undesirable people. He maintains (even though this was not a key issue in the HSF arguments) that any attempt to enhance the expectations that such people could expect citizenship is mischievous, and stresses the point that "illegal migrant workers and hawkers are suffocating

the economy and public health care".¹⁹

The African Transformation Movement, a political party represented in Parliament, followed in the same vein and said that the country was

"being held to ransom by unpatriotic civil society movements. This is a clear indication that the ANC has failed to govern. The ANC has continuously failed to ensure law and order in our country and to govern in the best interests of South Africans. It cannot be that you are going to have a ZEP issue with continuous extensions. We can have NGOs, such as the Helen Suzman Foundation, advancing cases and issues that are not in the interests of SA citizens. This means we are going to have NGOs that are insensitive to the plights and sufferings of SA citizens. South Africa has a 43% unemployment rate, and close to 70% of the people are out of work. Therefore, that on its own requires that whatever decisions are taken, they are taken in the best interests of those citizens who are unemployed, living in poverty, and not enjoying the fruits of the economy of their own country."²⁰

It is interesting that at the heart of both the ATM leader's comments and the comments of Mr Phaahla, is the vexed business of false binaries, the unquestioned assumption that just because one is in favour of the protection of the rights and dignity of vulnerable people, one is, for example, against the progress of local people or against supporting their just struggles for a better life. Experience teaches us that these false binaries quickly harden into perceptions, and then into inflexible 'truths'.

5. Conclusion

Amidst all the 'sound and fury', the ideological contestation, and the key human issues that are at risk, it might be forgotten that the ZEP is also one of the key attempts in SA's recent history to manage the flow of people into the country. As such, it stands out as an example of good management of migration flows. Management is a core principle in responding responsibly to the movement of people. This example should provide us with one modality which, rather than trying to discard it, should be explored as a way for responding positively to the crises that will continue to see people moving across borders.

The South African National Development Plan

stated it succinctly: “If properly managed, migration can fill gaps in the labour market and contribute positively to South Africa’s development. Energetic and resourceful migrant communities can contribute to local and national development, and diverse, cosmopolitan populations are often the focus of cultural and intellectual innovation. If poorly managed, however, the skills and potentials of migrants will be neglected; migration will remain a source of conflict and tension, and migrants will be increasingly vul-

nerable to abuse, exploitation and discrimination.”²¹

A more serious examination of the ZEP model and the development of practices flowing from it, rather than the attempts to discredit it, must surely be the way forward towards responsible and respectful management of one of the key signs of our times, and one of the main tests for the respect we afford to others, especially those most marginalised.

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¹ <https://mg.co.za/news/2023-06-28-termination-of-zimbabwean-exemption-permit-declared-unlawful-unconstitutional-and-invalid/>

² <https://www.dailymaverick.co.za/article/2023-06-28-scolding-high-court-judgment-declares-zep-termination-unlawful-permits-stay-valid-for-another-year/>

³ <https://hsf.org.za/news/press-releases/minister-of-home-affairs-decision-to-terminate-zep-set-aside>

⁴ <https://allafrica.com/stories/202305260068.html>

⁵ <https://mg.co.za/news/2023-06-28-termination-of-zimbabwean-exemption-permit-declared-unlawful-unconstitutional-and-invalid/>

⁶ <https://www.moneyweb.co.za/news/south-africa/court-grants-zep-holders-another-12-months/>

⁷ <https://mg.co.za/africa/2022-06-02-zimbabweans-and-the-zep/>

⁸ <https://www.groundup.org.za/article/home-affairs-extends-validity-zimbabwean-permits/>

⁹ <https://www.news24.com/news24/southafrica/news/explainer-what-the-two-judgments-mean-for-zep-holders-home-affairs-dept-and-motsoaledi-20230630>

¹⁰ <https://www.dailymaverick.co.za/article/2023-06-28-scolding-high-court-judgment-declares-zep-termination-unlawful-permits-stay-valid-for-another-year/>

¹¹ <https://www.dailymaverick.co.za/article/2023-06-28-scolding-high-court-judgment-declares-zep-termination-unlawful-permits-stay-valid-for-another-year/>

¹² <https://www.dailymaverick.co.za/article/2023-06-28-scolding-high-court-judgment-declares-zep-termination-unlawful-permits-stay-valid-for-another-year/>

¹³ <https://www.moneyweb.co.za/news/south-africa/court-grants-zep-holders-another-12-months/>

¹⁴ <https://www.dailymaverick.co.za/article/2023-06-28-scolding-high-court-judgment-declares-zep-termination-unlawful-permits-stay-valid-for-another-year/>

¹⁵ <https://www.news24.com/news24/southafrica/news/explainer-what-the-two-judgments-mean-for-zep-holders-home-affairs-dept-and-motsoaledi-20230630>

¹⁶ <https://ewn.co.za/2023/06/29/minister-motsoaledi-to-appeal-high-court-ruling-on-zep>

¹⁷ <https://www.sowetanlive.co.za/news/south-africa/2023-06-30-minister-to-challenge-zep-judgments-as-they-set-dangerous-precedent/>

¹⁸ <https://www.iol.co.za/news/crime-and-courts/zep-extension-brings-temporary-relief-but-also-raises-some-concerns-6a5d5362-5d86-4226-ac93-2fc7175d0e94>

¹⁹ <https://www.iol.co.za/the-star/opinion-analysis/zep-permits-an-aloof-judiciary-arrogated-to-itself-some-power-to-govern-the-country-through-unintelligible-judgments-befe7a84-cc88-4a7f-af8f-b019ec4c7fb3>

²⁰ <https://www.iol.co.za/the-star/news/atm-leader-slams-high-court-decision-over-zimbabwean-exemption-permits-1d8d6240-07a8-48e6-ab40-d2395f2d506e>

²¹ https://www.gov.za/sites/default/files/gcis_document/201409/devplan2.pdf

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