

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 32323/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 10 FEBRUARY 2023

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

And

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

First Intervening Party

OPERATION DUDULA

Second Intervening Party

Summary: *civil procedure – applications for intervention – the main application is for the review of a set of decisions by a minister not to further extend exemption*

permits granted to Zimbabwean citizens in terms of the Immigration Act 13 of 2002 – leave to intervene as respondent granted to the All Truck Drivers Forum and Allied South Africa and a similar application for intervention by Operation Dudula was refused.

ORDER

1. The application by Operation Dudula to intervene in the main application is refused.
2. The application by All Truck Drivers Forum and Allied South Africa to intervene in the main application is granted and it is joined as the third respondent therein.
3. The aforementioned third respondent is directed to deliver any answering or supplementary affidavit that it may wish to deliver in the main application within 10 (ten) days from date of this order.
4. The costs of the third respondent's application for intervention, shall be costs in the cause of the main application.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] A review application of a number of alleged administrative acts taken by the Minister of Home Affairs (the Minister) together with two ancillary opposed applications have jointly been set down for hearing by a full court of this Division on 11 – 14 April 2023. Two voluntary associations, All Truck Drivers Forum and Allied South Africa (ATDFASA) and Operation Dudula (Dudula) seek leave to intervene in the review application (the main application).

The Nature of the Main Application

[2] The main application is one launched by the Helen Suzman Foundation (HSF) in case no 32323/2022. HSF has been joined by a second applicant, the Consortium for Refugees and Migrants in South Africa (CORMSA) as second applicant in terms of an order of this court of 16 September 2022.

[3] The Minister is the first respondent in the main application and the Director-General of the Department of Home Affairs (the DG) is the second respondent. The respondents oppose the main application, but only the DG has deposed to an answering affidavit.

[4] The relief claimed by the applicants is the following (in terms of HSF's amended notice of motion):

“1 The First Respondent's decision to terminate the Zimbabwean Exception Permit (ZEP), to grant a limited extension of ZEP's of only 12 months, and to refuse further extensions beyond 30 June 2023, as communicated in:

1.1 The public notice to Zimbabwean national on 5 January 2022;

1.2 Directive 1 of 2021, published as GN 1666 in Government Gazette 45727 of 7 January 2020 (Directive 1 of 2021);

1.3 The First Respondent's press statement on 7 January 2022; and

1.4 Directive 2 of 2022, published on 2 September 2022, and the accompanying press statement

is declared unlawful, unconstitutional, and invalid.

2. *The First Respondent's decision referred to in paragraph 1 is reviewed and set aside.*

3. *The mater is remitted back to the First Respondent for reconsideration, following a fair process that complies with the requirements of sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).*

4. *Pending the conclusion of a fair process and the First Respondent's further decision, it is directed that:*

4.1 *Existing ZEP's shall be deemed to remain valid;*

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 reasons 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 section 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 authorization 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.”*

5. *The First Respondent, and any other parties opposing this application, are directed to pay the costs, jointly and severally, the one paying the other to be absolved.”*

[5] The factual context of the main application is largely (but not entirely) undisputed. It can be summarized as follows:

- In 2009, the then Minister of Home Affairs took a decision that a particular class of foreign persons, being Zimbabwean nationals, would be granted exemption from the ordinary visa processes in terms of the Immigration Act 13 of 2002 (the Immigration Act) and to allow this class of persons to apply for special permits that would allow them to either work, study or start a business in South Africa. This exemption regime, known as the Dispensation of Zimbabwe Project (DZP) was intended to grant an estimated 1,5 million undocumented Zimbabweans an opportunity to regularize their stay in South Africa.
- Upon termination of the DZP regime it was extended by the then Minister by way of the Zimbabwean Special Permit (ZSP) regime, which expressly allowed those who had unsuccessfully applied for DZP permits to re-apply and for those who had such permits to apply for extensions thereof.
- A third extension of this regime, resulted in the Zimbabwe Exemption Permit (ZEP) regime, which extended the lifespan of ZSP permits. This regime, involving some 178 000 permit holders, expired through effluxion of time on 31 December 2021.
- The current Minister decided to extend the validity period of the ZEP regime for a year until 31 December 2022.

- On 2 September 2022, the Minister published a further directive, in terms of which the “grace period”, being the lifetime of the ZEP regime, was further extended to 30 June 2023. The “grace”, according to the Minister refers to an opportunity to permit holders to apply for individual extensions of their permits or to otherwise regularize their stay in South Africa. The press statement by the Minister, however announced that there would be “*no further extension granted by the Minister*”.

- Against this background, the HSF contends that the Minister, in taking the decision not to further extend the ZEP regime (or more precisely, to only extend it until 30 June 2023) and to refuse to consider even individual further extension as contemplated in section 31(2)(b) of the Immigration Act), did so unlawfully.

- The five grounds relied on by the HSF for its challenge against the Minister’s decision are the following: firstly that the decision was taken in a procedurally unfair and irrational fashion, particularly in that it was taken in the absence of any prior consultation process with affected ZEP holders; secondly, that it was in breach of the Constitutional rights of ZEP holders, their spouses and children; thirdly, that it was taken without any regard to the impact thereof on any persons who had, by way of the successive regimes, been documented and legally in the country, some for over 13 years and who had roots in the country by way of businesses, residences and children at school, some who had been borne here; fourthly, that it reflected a material error of fact as to the present conditions in Zimbabwe and lastly that the decision is otherwise unreasonable and irrational.

[6] As already indicated before, the main application is opposed by the Minister. In the answering affidavit, whilst not disputing that the conduct of the Minister amounts to a decision reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and by conceding that there was no prior consultative process as contended for by the applicants, the DG contends that the regimes were always only intended to be temporary in nature and that the Minister was justified in only extending the ZEP regime’s lifetime until 30 June 2023.

[7] The HSF does not contend that the Minister is obliged to extend the exemption in perpetuity, but contends that the present decision is unlawful and that it falls short of fundamental requirements. Until this is remedied, the applicants claim the interim orders provided for in prayer 4 of the HSP's amended Notice of Motion quoted in paragraph [4] above.

[8] It is in the above dispute/s which ATDFASA, hereafter referred to as the Truck Drivers Forum, and Dudula seek to intervene and be joined as respondents. Both these proposed respondents seek to have the main application dismissed.

The Truck Drivers Forum's intervention application

[9] The Truck Drivers Forum is a voluntary association with perpetual succession, registered as a non-profit organization with registration number K[...]. Its stated mission and vision is, according to the affidavit deposed to by its spokesperson, "... *to promote truck driving as a professional sector, to optimize and open job opportunities*". It does not claim in its papers that ZEP holders are "taking the jobs of South African truck drivers" (as debated in oral argument between the parties) but assert that the ZEP regime was unlawful since the inception of it (and its predecessors) and that any extension thereof would be unlawful. The Truck Drivers Forum further allege that the ZEP regime had "... *contributed to the proliferation of illegal, undocumented drivers in the trucking industry in the Republic*". Whilst one of the Truck Drivers Forum's aims is expressly "... *to make only citizens of South Africa get jobs, own businesses and properties ...*", if further aims to prevent "*illegal and undocumented truck drivers [to be] employed in the Republic*". The truck Drivers Forum's general objectives, not relating to documented or exempted permit holders, are to be part of the negotiations at the National Bargaining Council for Road Freight Logistics, Labour Sectors and in relation to labour laws regulating participants in the trucking industry.

Dudula's intervention application

[10] Dudula is similarly a voluntary association with perpetual succession. Its spokesperson deposed to a very brief founding affidavit. Dudula claims that it is concerned about and opposed to criminality in general and in particular when

perpetrated by illegal foreigners who have entered the country. It is of the view that the ZEP regime exacerbates this situation.

The legal requirements

[11] The Truck Drivers Forum and Dudula have correctly identified Rule 12 as the applicable procedure whereby they can apply to intervene as respondents. They correctly accepted that the Rule does not create a right of joinder, but makes such joinder subject to the court's discretion.¹

[12] It is trite that a party seeking to intervene must show that "*he is specially concerned in the issue, the matter is of common interest to him and the party he desires to join and the issues are the same*".² These factors may create a "*direct and substantial interest*" in the subject-matter. This direct and substantial interest is the "*decisive criterion*".³

[13] These requirements have been addressed as follows in authority to which the Truck Drivers Forum have referred to in their heads of argument, namely *Gordon v Department of Health, KwaZulu Natal*⁴:

"the issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, had a legal interest in the subject matter, which may be affected prejudicially by the judgment of the Court in the proceedings concerned" and

"if the order or judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests of a party or parties not joined in the matter, (such party) must be joined".

[14] The court was further referred to the following applicable pronouncements:

¹ *United watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C).

² Harms, *Civil Procedure in the Supreme Court*, Vol 2 B12.3.

³ *Wynn v divisional Commission of Police* 1973 (2) SA 770 (E), *Ex parte Beukes and Bekker* [1998] 1 All SA 34 (LCC) at 41 – 43 and *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

⁴ 2008 (6) SA 522 (SCA) at para 9.

*“A party is entitled to join and intervene in proceedings where they have a direct and substantial interest in the matter. A person is regarded as having a direct and substantial interest in an order if that order would directly affect that person’s rights or interests. The interest must generally be a legal interest in the subject matter of the litigation and not merely a financial interest.”*⁵ and

*“The word “interest” ... has been interpreted to mean a direct and substantial interest which a person is required to have in the subject matter before he/she can be said to have locus standi in such a matter or before such a person may be joined or be allowed to be joined in proceedings. Direct and substantial interest is a direct and substantial interest in the order that a Court is asked to make in a matter. It is not enough if a person has an interest in a finding or in certain reasons for an order.”*⁶

[15] Lastly, the right to be heard in respect of a matter in which a party has an interest, has been dealt with by the Constitutional Court as follows:

*“A person has a direct and substantial interest in an order that is sought in the proceedings if the order would directly affect such a person’s rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in the circumstances in which his or her rights or interest will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person’s rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that as a general rule, no Court may make an order against anyone without giving that person the opportunity to be heard”.*⁷

[16] In assessing whether the requirements set out above have been satisfied, a court must bear in mind that a mere allegation that a party has an alleged interest is insufficient, there must be *prima facie* proof of such interest. At the same time, an

⁵ *The Minister of Finance v Afri Business NCP* 2022 (4) SA 362 (CC).

⁶ *Justice Nhlanhla Lebea v MEC for Public Works and Infrastructure, Free State* (unreported) [2022] ZACC 40 (with reference to an analogous rule).

⁷ *Snyders & Others v De Jager* 2017 (5) BCLR 604 (CC) 21 December 2016, para 9.

intervening party need not show a prospect of success, but merely that, if its allegations are accepted, it will be successful.⁸

Evaluation: Dudula's intervention

[17] The sole claim to a right to intervene contained in Dudula's 19-paragraph founding affidavit, is the following: *"The applicant is a civil rights movement whose main objective is to fight crime and criminality using legal protests and court applications. The organization is of the view that the extension of the Zimbabwean Exemption Permits together with a high number of illegal immigrants in the country is compounding the already dire situation of criminality. Accordingly, the applicant submits that it has a direct and substantial interest in the main application ..."*.

[18] Not only are these statements devoid of particularity or underlying evidence, they lack cohesion and substance. Is it alleged that all ZEP holders are criminals? That is an untenable proposition and cannot not be accepted as evidence. It can also not be accepted as a general statement applicable to either the present validity period of the ZEP regime or any extension thereof. The affidavit seems to suggest that ZEP holders are illegal immigrants while the opposite is the position: during the period of validity of their permits, ZEP holders are both documented and lawful foreigners. Dudula's premise upon which it claims a right to intervene is therefore without foundation.

[19] It must follow that Dudula has not presented any prima facie evidence indicating a direct and substantial interest in the main application as required by the case law discussed earlier.

Evaluation: Truck Drivers Forum's Intervention

[20] In similar fashion as with Dudula, the Truck Drivers Forum could not indicate how many ZEP holders operate in the truck driving industry. This aspect of their application was heavily criticised by the HSF but, by the same token, the HSF could not present any contrary figures or statistics. It did, however, concede that there are

⁸ *Ex parte Moosa: in re Hassim v Harrop Allin (Pty) Ltd* 1974 (4) SA 412 (T).

an unknown number of ZEP holders in the relevant industry in which the Truck Drivers Forum has an interest.

[21] While it may be impermissible for the Truck Drivers Forum to raise the issue of alleged illegality of the ZEP regime as a whole, based on its interpretation of section 31(2)(b) of the Immigration Act, as a collateral defence to the main application but without having initiated any claim for relief in that regard, not even by way of a proposed counter-application, their alternate argument might have the requisite prospect of success. This argument is to the effect that, once the ZEP regime has expended its lifetime through the effluxion of time, it simply ceases to exist and the *Oudekraal*-principle⁹ which would have applied in respect of the decisions of the Minister and his predecessors to create an exemption regime, would fall away.

[22] Based on the above, which issue I need not decide, the Truck Drivers Forum claims that the moment that the relief claimed in paragraph 4 of the HSF's amended notice of motion features before a court in the main application, it has a direct and substantive interest in the extent by which extensions of the validity of permits by the court may or may not impact on their members. I find that the Forum's concerns in this regard and regarding the regulation of truck drivers and how the Forum is going to deal with this aspect in bargaining councils, *prima facie* constitute sufficient direct and substantial interest justifying its intervention.

[23] Insofar as the matter might raise constitutional issues, I find that it would, in addition to the above requirements, be in the interests of justice that the validity arguments raised by the Truck Drivers Forum, be ventilated in the main application. I need to stress that no finding is being made in allowing the intervention, as to any of the aspects contained in the Truck Drivers Forum's arguments. That will be for the court hearing the main argument to determine.

⁹ This is a reference to *Oudekraal Estate (Pty) Ltd v City of Cape Town* 2010 (1) SA 333 (SCA) at para 26, which confirmed that an administrative act, even an alleged unlawful act, remains in existence and is capable of having legally valid consequences until it is set aside by a court.

[24] I therefore find that the Truck Drivers Forum is entitled to intervene in the main application as the third respondent.

Practicalities

[25] At the time when the intervention applications were allocated to me for hearing, it was envisaged that a decision in respect thereof had to be made in a reasonably short span of time, hence this judgment within five days from hearing the matters. It was also envisaged, should any party be granted leave to intervene, the consequence should not derail the hearing of the main application. For this purpose, Adv Mtshweni, who presented the arguments on behalf of the Truck Drivers Forum, committed his client to the delivery of its answering affidavit in the main application within 10 days from date of this judgment. There should then be sufficient time for the applicants in the main application to deliver any replying affidavits in response to what will principally be legal arguments and all parties can timeously supplement their heads of argument for the hearing two months hence.

Costs

[26] Although the general principle is that costs should follow the event, Adv Budlender SC was (rightly) more concerned about the merits of the applications than seeking to recover costs from any of the intervening parties, particularly the ultimately unsuccessful party in this case, being Dudula. Having regard to the nature of the subject matter and of the parties involved I, in the exercise of this court's discretion, find it fair not to mulct Dudula with costs. I accept the *bona fides* of its attempted intervention, even if unsuccessful, which is a factor I took onto account in reaching the aforesaid conclusion. In respect of the successful application by the Truck Drivers Forum, the suggestion was that costs should be costs in the cause, and I agree that this would be an appropriate order at this stage.

Order

[27] The following order is made:

1. The application by Operation Dudula to intervene in the main application is refused.

2. The application by All Truck Drivers Forum and Allied South Africa to intervene in the main application is granted and it is joined as the third respondent therein.
3. The aforementioned third respondent is directed to deliver any answering or supplementary affidavit that it may wish to deliver in the main application within 10 (ten) days from date of this order.
4. The costs of the third respondent's application for intervention, shall be costs in the cause of the main application.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 6 February 2023

Judgment delivered: 10 February 2023

APPEARANCES:

For the First Applicant:	Adv S Budlender SC together with Adv C McConnachie & Adv Z Raqowa
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Attorney for the First Applicant:	DLA Piper South Africa (RF) Inc., Johannesburg c/o, Macintosh Cross & Farquharson, Pretoria
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For the Second Applicant:	Adv D Simonsz together with Adv N Nyembe
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Attorney for the Second Applicant: Norton Rose Fulbright South Africa
Inc, Cape Town,
c/o, MacRobert Attorneys Pretoria

For the 1st & 2nd Respondent: No appearances

For the First Intervening Party: Adv M M Mojabelo together with
Adv D Mtsweni

Attorney for the First Intervening Party: MJ Mashao Attorneys, Pretoria

For the Second Intervening Party: Adv M C Ntshangase

Attorney for the Second Intervening Party: D Mabuna Inc. Attorneys,
Johannesburg
c/o, MJ Mashao Attorneys, Pretoria