

Employment Law

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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The verdict is in: The decision to terminate Zimbabwean Exemption Permits was found to be invalid, unlawful, and unconstitutional

On 28 June 2023, the High Court handed down a landmark judgment where the decision by the Minister of the Department of Home Affairs (DHA) not to extend the longstanding Zimbabwean Exemption Permit (ZEP) after 31 December 2021 was found to be invalid, unlawful, and unconstitutional.

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The verdict is in: The decision to terminate Zimbabwean Exemption Permits was found to be invalid, unlawful, and unconstitutional

On 28 June 2023, the High Court handed down a landmark judgment where the decision by the Minister of the Department of Home Affairs (DHA) not to extend the longstanding Zimbabwean Exemption Permit (ZEP) after 31 December 2021 was found to be invalid, unlawful, and unconstitutional.

It is now well known that on 29 November 2021, a directive was issued by the Director-General of the DHA confirming the Minister's decision that no further extensions would be granted to approximately 178,000 Zimbabwean nationals who are holders of a ZEP. This decision was accompanied by an initial grace period of 12 months (i.e. until 31 December 2022) in which ZEP holders were provided an opportunity to legalise their status in South Africa through the mechanisms provided for in terms of the Immigration Act 13 of 2002 (Act). After this grace period, additional grace periods were provided to ZEP holders, with the latest one being granted until 31 December 2023.

The surprising announcement by the Minister not to extend the ZEPs gave rise to numerous applications being instituted against him, including by the Helen Suzman Foundation

(Foundation) to challenge his decision not to extend the ZEPs. It is common cause that the Minister made this decision without providing ZEP holders – or the South African public at large – with any prior notice or an opportunity for consultation. The Minister was also clear in his assertion that his decision was final. In the circumstances, the Foundation reviewed the Minister's decision on *inter alia* the grounds set out below.

1. The Minister's decision was procedurally unfair and irrational as it was made without first consulting with ZEP holders, civil society and the South African public

In relation to this ground, the Foundation argued that the Minister's decision amounted to administrative action which was reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and



Cliffe Dekker Hofmeyr

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the inherent principle of legality as enshrined in the Constitution of the Republic of South Africa. The High Court agreed with the Foundation and held that the Minister's decision amounted to administrative action after considering the elements laid out in the Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* (CCT 133/13) [2014] (5) SA 69 (CC).

Having found that the Minister's decision amounts to administrative action, the court considered the application of PAJA. Section 3 of PAJA states that any administrative action which materially or adversely affects an individual's rights or legitimate expectations must be procedurally fair in that: a clear statement of the administrative action must be made; adequate notice of a right of review or internal appeal must be given; and affected individuals must be provided with a reasonable opportunity to make representations. Section 4 of PAJA requires a duty of procedural fairness to be provided to the public

at large through the holding of *inter alia* a public inquiry, a notice and comment procedure or another appropriate procedure to give effect to section 3 of PAJA.

In addition to observing the demands of procedural fairness, the Minister was obliged to make a decision that was rational.

With due regard to the above, the High Court considered the evidence placed before it, namely that ZEP holders, civil society and the South African public were not notified of the Minister's intended decision or provided with an opportunity to make representations before he made his decision. The Minister's decision was made after only having internal discussions with certain units within the DHA. This much was conceded by the Minister. In the circumstances, the High Court held that for this reason, amongst others, the Minister's decision went against the very purpose of procedural fairness and rationality.

2. The Minister's decision was made without any consideration to the impact on the lives of ZEP holders

Evidence was placed before the High Court by the Foundation to demonstrate that no attempts were made by the Minister to assess the impact of his intended decision on ZEP holders – and their children – prior to his decision being made. This argument was opposed based on the allegation that due regard was had to the impact of the Minister's decision on ZEP holders and their children as the Minister called for representations. It was further argued that had these representations been placed before the Minister, same would have been considered.

The court considered that no admissible evidence was placed before it by the Minister in relation to whether he took any such considerations into account, and if so, how these considerations were taken into account. Having regard to this,

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the only conclusion that the court could reach was that the Minister failed to consider the inevitable impact of his decision on the lives and livelihoods of ZEP holders and their children. The court accordingly held that the Minister's decision must be reviewed and set aside as he failed to take relevant information into account when making his decision, which decision was unreasonable under section 6(2)(h) of PAJA.

3. The Minister's decision breached the constitutional rights of ZEP holders and their children

The Foundation argued that the Minister's decision amounted to an unjustified limitation of the rights of ZEP holders and their children. The unjustified limitation included a limitation of their right to dignity, which encompasses their right to access to health, employment opportunities, protection from deportation and education. In

addition, the Foundation argued that in making his decision, the Minister failed to take into consideration the best interests of any children that were affected by his decision.

This argument was opposed on the basis that the rights afforded to ZEP holders and their children under the ZEP regime were never intended to be permanent. In addition, it was argued that the Minister's decision never amounted to a deprivation of rights to ZEP holders and their children, but rather to a granting of rights to them, and that ZEP holders are afforded no more rights than any other foreigner in South Africa.

In considering section 36 of the Constitution, and in applying the two-stage limitation analysis, the High Court was required to consider what justifications the Minister offered in the making of his decision. In his press statement of 7 January 2022, the Minister contended that his decision was based on improved

conditions in Zimbabwe, and his decision would alleviate pressure on South Africa's asylum system and budget and resource constraints. The High Court also considered the reasons for the Minister's decision that were put forward by the Director-General, namely that unemployment in Zimbabwe had decreased to 5,2%. No clear evidence was, however, placed before the court in support of any of these allegations.

The High Court accordingly held that in the absence of any evidence, the only conclusion that could be reached was that the Minister failed to prove a justification, based on any facts, which was rational, between the limitation of ZEP holders' rights on one hand, and a legitimate governmental purpose on the other. In the absence of any factual evidence, the Minister's decision amounted to an unjustified limitation of rights, which was both unconstitutional and invalid in terms of section 172(1) of the Constitution.

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The High Court accordingly made *inter alia* the following order:

- The Minister's decision to terminate ZEPs, and to refuse to grant any further extensions after 30 June 2023 was declared invalid, unconstitutional and unlawful.
- The Minister's decision was reviewed and set aside.
- The decision was remitted back to the Minister for reconsideration, pursuant to following a fair process which complies with sections 3 and 4 of PAJA.
- Pending the conclusion of a fair process, and the Minister's further decision within 12 months:
 - existing ZEPs shall remain valid for the next 12 months; and
 - ZEP holders will continue to enjoy the protection afforded to them, namely that:
 - they may not be arrested, ordered to deport or detained in terms of section 34 of the Act;

- they are allowed to enter into and depart the Republic of South Africa in terms of section 9 of the Act; and
- they will not be required to produce an exemption certificate or authorisation letter in order to remain in the Republic of South Africa.

Whilst the above judgment provides further relief to ZEP holders and their families, it remains to be seen whether the Minister will appeal the judgment and/or when he will commence a fair process to terminate ZEPs. Until then, ZEP holders and their families can breathe a little easier for the next 12 months, while continuing to work and reside in South Africa. Similarly, employers do not need to address the continued employment of their employees in possession of ZEPs for at least the next 12 months.

Hedda Schensema and Taryn York



Employment 2023 Rankings

Employment Law practice is ranked in Tier 1.

CDH Kenya's Employment Law practice is ranked in Tier 3.

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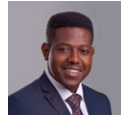
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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