THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 245/2024

In the matter between:

MINISTER OF HOME AFFAIRS **FIRST APPELLANT**

DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS **SECOND APPELLANT**

and

VINDIREN MAGADZIRE **FIRST RESPONDENT**

ZIMBABWE IMMIGRATION FEDERATION NPC **SECOND RESPONDENT**

Neutral citation: *Minister of Home Affairs and Another v Vindiren Magadzire and Another* (245/2024) [2025] ZASCA 81 (6 June 2025)

Coram: MOCUMIE, MBATHA and UNTERHALTER JJA and DAWOOD and MODIBA AJJA

Heard: 13 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 6 June 2025.

Summary: Judicial review – final relief in one review – interim relief pending another review – overlapping grounds of review and orders – redundancy – interim relief as discretionary relief – mootness – *res judicata* – issue estoppel.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Collis and Malindi JJ and Motha AJ, sitting as a court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Unterhalter JA (Mocumie, Mbatha JJA and Dawood, Modiba AJJA concurring):

Introduction

[1] Since 2000, a substantial number of Zimbabwe nationals have come to South Africa. Some claim the protection of South Africa as refugees and asylum seekers; some have left Zimbabwe complaining of systemic discrimination; and others are likely to be economic migrants. The South African authorities lacked the administrative capacity to determine the status of so many migrants, and to make decisions concerning their rights. From 2009, the first appellant, the Minister of Home Affairs (the Minister) has exercised powers under s 31(2) of the Immigration Act 13 of 2002 (the Immigration Act) to permit some 180 000 undocumented Zimbabweans to remain lawfully in South Africa. This was done under successive permitting regimes, the most recent of which is the Zimbabwe Exemption Permit (ZEP, and in the plural ZEPs).

[2] In November 2021, the Minister announced that he would not be extending the ZEP regime, and ZEPs were due to expire on 31 December 2021. On 29 December 2021, however, the Minister issued Immigration Directive No 1 of 2021 extending the ZEPs for a further 12 months to permit holders to apply for visas under the Immigration Act. This extension was preceded by an announcement issued by the Cabinet, on 24 November 2021, that the ZEP dispensation would not be renewed. A grace period of 12 months would be given to allow Zimbabwe nationals who had enjoyed exemptions under the ZEP regime to regularise their status in terms of the Immigration Act, hence the Immigration Directive No 1.

[3] The respondents, Mr Magadzire and the Zimbabwe Immigration Federation NPC brought proceedings in the high court (Gauteng Division, Pretoria) to review the decision of the Minister not to renew the ZEP regime. Mr Magadzire is a Zimbabwean who lives and works in South Africa. The Zimbabwe Immigration Federation NPC (the Federation) is a voluntary association of ZEP holders and their immediate family members. The proceedings in the high court were brought in the interests of Mr Magadzire and the Federation, its members, and in the public interest. I shall refer to the respondents collectively as the Federation.

[4] The Federation's application was brought in two parts. Part B sought to review and set aside the decision of the Minister taken in terms of s 31(2)*(d)* of the Immigration Act not to extend the exemptions granted to Zimbabwean nationals under s 31(2)*(b)*. In addition, the Federation prayed that the matter be remitted back to the Minister to reconsider whether to grant an extension of the exemptions, to do so observing procedural fairness in terms of ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and while doing so, interdicts were sought, in essence, to ensure that ZEP holders continue to secure the benefits of the exemptions that they once enjoyed. I shall refer to this relief as the original Part B relief. In Part A, the Federation sought interim relief, pending the outcome of the original Part B relief. In essence, an interim interdict was sought to prevent the arrest or deportation of ZEP holders, to prevent them from being dealt with as undesirable persons or illegal foreigners under the Immigration Act, and to permit ZEP holders to enter and exit South Africa without detriment. I shall refer to this relief as the Part A relief.

[5] The Minister filed an answering affidavit opposing the application. The Director General, Mr Makhode, who deposed to this affidavit, made the following plain: 'This affidavit deals only with the interim relief sought in Part A . . .'. When the matter came before a full bench of the high court, it was set down for hearing before the same court as another application which has now resulted in a judgment

in *Helen Suzman Foundation v Minister of Home Affairs* (*Helen Suzman*).[1] It is common ground before us that in *Helen Suzman* the applicants in that case sought to review the same decision of the Minister that is challenged in the application brought by the Federation. The applicants in *Helen Suzman* prevailed. The high court made an order, in sum : to declare unlawful, review and set aside the decision of the Minister to terminate the ZEP regime; to remit the matter to the Minister for reconsideration, following a fair process; and pending the conclusion of that process and the Minister's further decision within 12 months, ZEP holders would enjoy protections akin to the interim relief sought in the Part A relief in the Federation's application. I shall refer to this order as the HSF order.

[6] What precisely occurred before the high court when the *Helen Suzman* and the Federation applications were called is not a matter of record before us. However, the following is clear from the judgment given by the high court (*per* Collis, Malindi JJ and Motha AJA) in the appeal now before us. The Federation, at the commencement of the proceedings, sought to move for final relief on the basis that the Federation waived its right to the record under Rule 53, and was willing to proceed on the papers as they stood. The Minister opposed this. His counsel contended that, as I have observed, the answering affidavit was framed to be responsive to the Part A relief; that the Minister wished to file further affidavits to deal with the original Part B relief, and the Minister would be prejudiced if he could not do so. The high court ruled, after a short adjournment, that it would only hear the Part A relief.

[7] That was understandable, given the stance of the Minister. But it is also common ground before us that the high court proceeded to hear the Federation application in the motion court week that the same court heard the *Helen Suzman*

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[1] *Helen Suzman Foundation & Another v Minister of Home Affairs and Others* (32323/2022) [2023] ZAGPPHC 490 (28 June 2023).

application. That was an application for final relief to review and set aside the Minister's decision not to extend the ZEP regime. The relief sought by the applicants in *Helen Suzman* was ultimately granted by way of the HSF order.

[8] What the high court did not explain in its judgment in *Helen Suzman,* nor in the judgment now on appeal before us, was what would transpire if it were to grant final relief in *Helen Suzman,* and the Part A relief to the Federation. That is precisely what occurred. In *Helen Suzman*, we were informed by counsel for the Minister, the Minister sought leave to appeal. This was refused, as was the Minister's petition to this Court. The HSF order made in *Helen Suzman* is thus being implemented, and, as a result, the Minister is following a fair process, we were told, to reconsider his refusal to extend the ZEP regime. Pending this, ZEP holders enjoy the protections extended by the HSF order*,* akin to the Part A relief sought in the Federation's application. The same court also granted the interim relief sought by the Federation: being the Part A order. The judgments in both cases were handed down on the same day, 28 June 2023, by the same court. The Minister sought leave to appeal the Part A order. The high court refused leave to appeal. The Minister petitioned this Court for special leave, which leave was granted.

[9] The principal contention advanced before us by the Minister was this. The HSF order is final relief. Efforts to appeal the HSF order have been exhausted, and the order is in effect. This means that the Minister's decision not to extend the ZEP regime has been set aside. There is no point in the Federation's Part B relief. This relief seeks to review and set aside the very same decision that was reviewed and set aside in the HSF order. Once that is so, the Part A order cannot be sustained because it is interim relief granted pending the set down for hearing of the Part B relief. The Part B relief cannot be litigated because it has been secured under the HSF order. In sum, once the high court had decided to grant the HSF order it could not make the Part A order, and hence the Part A order cannot stand. This Court should, on appeal, set it aside, and replace it with an order dismissing the Part A application, with costs.

Furthermore, the HSF order also protects those persons on behalf of whom the Federation's application was brought, whilst the Minister reconsiders his decision and pursues a fair process. The Minister argued that the Part A order should not have been granted by the high court, and invoked mootness, *res judicata*, and issue estoppel as the basis for this argument. I will reference the Minister's argument as the redundancy argument.

[10] The Federation contends that the Minister's appeal should be dismissed. First, it submits that the Part A order is not appealable. Second, if it is appealable, the redundancy argument is flawed because the cause of action that the Federation will pursue in Part B is distinctive, and does not replicate what was decided in the *Helen Suzman* case. Further, the apparent identity of the relief secured by the HSF order and the original Part B relief no longer holds. Since the HSF order was handed down, the Federation has amended its Part B relief. We were furnished with a copy of the amended notice of motion. The amended Part B relief, although it retains a prayer to review and set aside the decision of the Minister not to extend the ZEP regime, now also seeks declaratory relief that this decision of the Minister is unconstitutional. Counsel for the Federation explained that the basis of this declarator is that the Minister does not enjoy the power to undo or revise the protections that ZEP holders have enjoyed over a long period – only Parliament may do so. This is so in virtue of the constitutional rights of ZEP holders, and the exclusive competence of Parliament to abridge these rights. In addition, Part B of the Federation's application raises an issue of law that formed no part of the *Helen Suzman* case. The issue is this. Section 31(2)*(b)*(ii) of the Immigration Act permits the Minister to withdraw a right 'for good cause'. The Minister, so it will be contended in Part B, did not establish the jurisdictional fact of good cause to enjoy the power to bring to an end the dispensation of exemption enjoyed by ZEP holders. The Minister thus acted *ultra vires* in doing so. And would continue to do so, if, following the implementation of the HSF order, he was again to seek to decide to revoke the exemption dispensation. In sum, the Federation submits that both as to

the cause of action it relies upon in Part B and the amended relief it now seeks, Part B concerns live issues for the high court to determine that were not decided in the *Helen Suzman* case. Hence, the Part A order continues to enjoy efficacy and has no redundancy, notwithstanding the HSF order.

Appealability

[11] I turn first to the question as to whether the Part A order is appealable. In *Lebashe*,[2] the Constitutional Court decided that an interim interdict may be appealable, even if it lacks the attributes identified in *Zweni*,[3] if the interests of justice so dictate. Quite what this capacious criterion entails is a work in progress. In this matter, the Part A order does not meet the test in *Zweni:* it may be altered by the high court; it is not predicated on any definitive determination of the rights and obligations of the parties; and it does not dispose of the main issues that now fall for decision under the amended relief sought in Part B. However, I am nevertheless of the view that it would be in the interests of justice for this Court to entertain this appeal. That is so because the principal ground of appeal raised by the Minister poses a somewhat novel question as to whether the high court could have made the Part A order, in the face of what it ordered in the *Helen Suzman* case. If we do not resolve this question, the parties will be left in some doubt as to whether the Part A order can be enforced. This uncertainty would be prejudicial both to the Minister and the Zimbabwean nationals on whose behalf the Federation brought its application. For these reasons, the Part A order is appealable, and I do so find.

The Part A order

[12] I recall that the redundancy argument proceeds from the premise that the Part A order should not have been granted by the high court because it is predicated upon the Part B relief which cannot be litigated because it was determined in the *Helen*

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[2] *United Democratic Movement and Another v Lebahse Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) paras 43-45.
[3] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J-533A.

Suzman case by the very same court that granted the Part A order. The Minister sought to advance this argument under different propositions of law. The Part A order was said to be moot, alternatively the relief should not have been granted by reason of the doctrines of *res judicata* or issue estoppel.

[13] None of these legal characterisations has purchase. If the Part A order had become moot because it was overtaken by the HSF order, that would be a basis for us to decline to entertain the Minister's appeal. *Res judicata* also cannot be relied upon. The parties in the *Helen Suzman* case are not the same as those who brought the proceedings in the Federation's application. There may be some question as to whether the HSF order is *in rem*. But as I shall explore in what follows, the Federation is not seeking the same thing on the same grounds as that which was sought in the *Helen Suzman* case.[4] *Res judicata* is thus not a defence that was available to the Minister to preclude the high court from giving the Part A order. Nor is it available on appeal. So too, issue estoppel does not arise: the parties are not the same, and there remain issues for determination in Part B that are distinctive.

[14] The difficulty that has arisen in this case is attributable to the disposition of the Federation's application and the *Helen Suzman* case by the high court. The Minister made it clear at the commencement of the hearing of the Federation's application that his answering affidavit served only to deal with the order sought by the Federation in Part A, and that it would be prejudicial to the Minister were the high court to entertain the final relief sought by the Federation in Part B. This much is clear from the judgment of the high court. Once the high court decided that it would proceed only with Part A of the Federation's application, it should have given some consideration to the question as to what consequences would result should it transpire that the Federation secured an order under Part A, and the applicants in the *Helen Suzman* case obtained final relief. Since both applications were set down

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[4] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) 555 (A) at 562A.

before the same court, in the same week, there was reason to expect such consideration. What transpired is simply that the high court handed down judgment in both cases on the same day. It would have been prudent, even if consolidation was not ordered, to have considered the question of interim relief in both cases, and when Part B of the Federation's case was ripe, then to have heard both cases together. Regrettably, that did not happen, and we must determine the legal consequences of the grant of the Part A order and the HSF order.

[15] The essential complaint of the Minister is that the high court could not, and most certainly should not, have made the Part A order, if it was to make a final order in the *Helen Suzman* case to review and set aside the Minister's decision to terminate the ZEP regime. In *OUTA*,[5] the Constitutional Court offered cautionary words as to the grant of injunctive relief that restrains the exercise of executive or legislative competence. The case before us is very different, but the cautionary warning remains salient. An interim interdict is a discretionary remedy. Where an interim order sought at the instance of litigants in case A would be entirely redundant because a final order granted (or to be granted) in case B would entirely dispose of the final relief that was ultimately to be sought in case A, there would be strong reasons for a court to decline to grant an interim order. That would be so, even if the requirements of *res judicata* or issue estoppel are not met. First, there would be no apprehension of irreparable and imminent harm if the interim interdict were not to be granted in case A because the remedy in case B would likely cure any such apprehension. Second, there would, in addition, be reason in case A to exercise the court's discretion against the grant of interim relief because it would serve no purpose.

[16] The question is whether the grant of the Part A order by the high court is a case of such redundancy. I have set out above the essential features of the

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[5] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*) para 65.

Federation's cause of action. I recall that the Federation invokes the constitutional rights of ZEP holders and contends that the Minister's decision to terminate the ZEP regime is *ultra vires*. We do not have the benefit of the papers that served before the high court in *Helen Suzman*. However, the judgment in *Helen Suzman* does traverse the grounds upon which the decision of the Minister was claimed to be reviewable, and which led the court to review and set aside the Minister's decision.

[17] In essence, the case made out by the applicants to the satisfaction of the high court in *Helen Suzman* was predicated upon three grounds of review. First, the Minister's decision was procedurally irrational because, as the court held, 'the Minister not only failed to invite representation but also failed to consider any representations before taking the decision'. Second, the Minister failed to assess the impact of a decision to terminate the ZEP regime upon the constitutional rights of ZEP holders, their families, and children. The court found no evidence that the Minister had done so, and hence concluded that the Minister had failed to take account of relevant information and had acted unreasonably. Third, the court held that the termination of the ZEP regime affected the constitutional rights of ZEP holders to dignity (encompassing the right to health, education, and protection from deportation) and the rights of their dependent children. No adequate case had been made out by the Minister for the limitation of these rights, and hence the court concluded that 'the Minister's decision is an unjustified limitation of rights which is unconstitutional and invalid in terms of s 172(1) of the Constitution and must be reviewed and set aside'. I shall refer to these findings of the high court in *Helen Suzman* as the HSF review findings.

[18] There is some overlap between the case for review that is advanced by the Federation in its founding affidavit and the review that found favour with the high court in *Helen Suzman*, and led that court to make the HSF review findings. The Federation's founding affidavit has a section headed 'Part B: Grounds of Review'. There the Federation relies upon the Minister having acted in a procedurally

irrational and unfair manner; the Minister's failure to take into account relevant considerations and his consideration of irrelevant considerations. These grounds of review cover similar territory to those that are to be found in the HSF review findings. The Federation's review also invokes the constitutional rights of ZEP holders and their dependent children.

[19] However, the Federation's review also raised distinctive grounds of review that do not figure in the HSF review findings. First, it contends that the Minister acted *ultra vires* his powers under s 31(2)*(b)*(ii) of the Immigration Act in terminating the ZEP regime because good cause is a jurisdictional fact necessary for the exercise of this power and it was lacking. Since the circumstances prevailing in Zimbabwe have not materially changed, there was no good cause established for the Minister to terminate the protections afforded by the ZEP regime, and there is no reason to suppose that this will change in the foreseeable future. Second, the Minister made an error of law in that his decision was based upon the belief that after 31 December ZEP holders would be required to leave South Africa. However, those ZEP holders who fled Zimbabwe and would qualify as refugees enjoy the protection of the principle of *non-refoulement* and may not be deported to Zimbabwe. The Minister's decision was thus, it is contended, vitiated by a material error of law. These grounds of review have no analogue in the HSF review findings.

[20] It might be thought that these distinctive grounds of review should make no difference because the original Part B relief set out in the Federation's notice of motion is very similar to the relief ultimately granted by the high court in *Helen Suzman.* However, the distinctive grounds of review, and, more generally the invocation of the constitutional rights of the ZEP holders, have provided a springboard for the Federation's amended notice of motion. As I have explained, the relief now sought by the Federation includes a prayer for a declarator that the decision not to extend the exemptions granted to Zimbabwean nationals under

s 31(2)*(b)* of the Immigration Act is unconstitutional, invalid, and of no force or effect. I will refer to this as the declaratory relief.

[21] The declaratory relief is predicated upon the proposition that the Minister does not enjoy the power to decide whether to extend the ZEP regime. ZEP holders and their dependents enjoy constitutional rights to remain in South Africa, and the limitation of those may only be effected by Parliament enacting a law of general application. Furthermore, the *ultra vires* challenge holds that the Minister not only lacked the power to terminate the ZEP regime when he did, but would continue to suffer this disability in the future. The declaratory relief has remedial entailments that are altogether different from the relief that was granted in *Helen Suzman*. The HSF order remitted the matter back to the Minister for reconsideration, and to do so following a fair process. The premise of the HSF order is that it is open to the Minister to exercise his powers under the Immigration Act to decide whether or not to extend the ZEP regime. The declaratory relief, by contrast, is predicated upon the proposition that the Minister cannot exercise this power; and no point would be served in sending the matter back to the Minister. Rather, the ZEP holders enjoy constitutional rights to remain in South Africa that only Parliament can abridge. Further, the *ultra vires* challenge, if accepted, would not permit the Minister to terminate the ZEP regime. That is a remedial outcome of a considerably more far-reaching kind, because it reaches into the future and is not based upon a reconsideration by the Minister of his decision to terminate the ZEP regime.

[22] Thus both the cause of action relied upon by the Federation, as also the declaratory relief now sought by it, render Part B of its application distinctive. The redundancy argument accordingly cannot hold. It may be said (counsel for the Minister did not advance this proposition in oral argument) that the amendment of the Federation's notice of motion occurred after the interim order was made by the high court, and hence its enlarged remedial remit cannot provide a basis to defend the interim order that was made when the Part B relief in the Federation's notice of

motion largely mimicked the relief granted in *Helen Suzman*. Such a contention is unavailing because the declaratory relief is, in part, based upon the distinctive features of the Federation's cause of action, and more generally, the invocation of constitutional rights, which though common to those relied upon in *Helen Suzman,* can be put to support a different remedial outcome.

[23] Had the high court raised the issue with the parties as to whether an interim interdict should be issued, given the outcome that might result in *Helen Suzman*, it would have been entirely permissible for the Federation to raise the declaratory relief that it has ultimately sought. The high court simply did not raise the matter with the parties. That omission does not prevent this Court from considering whether the interim relief was properly granted on the basis that the Federation's application raised issues and was capable of supporting relief that is distinctive of the *Helen Suzman* decision. The Part A order was not redundant when granted, nor has it become so, because it pends final relief in Part B, based on grounds, not determined in the *Helen Suzman* judgment. I caution that, in rejecting the redundancy argument, I should not be understood to make any finding as to the prospects that the grounds advanced by the Federation in support of its declaratory relief will succeed. The Minister did not seek to make any case before us as to whether the high court was incorrect to conclude that the Federation had established a *prima facie* right, though open to some doubt. The Federation's Part B case awaits the adjudication of the high court in due course.

[24] For these reasons, the Minister's appeal must fail. The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For the appellant:	W R Mokhare (with him T Mokhatla)
Instructed by:	Denga Attorneys, Johannesburg
	Webbers Attorneys Inc., Bloemfontein
For the respondents:	T Ngcukaitobi SC (with him N Chezi-Buthelezi and N Ka-Siboto)
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