

Immigration Insights

by CDH Employment Law



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In this issue

SOUTH AFRICA

The Constitutional Court dismisses the Minister's application for leave to appeal ZEP judgment



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The Constitutional Court dismisses the Minister's application for leave to appeal ZEP judgment

On 28 June 2023, the High Court declared the decision by Dr Aaron Motsoaledi, the former Minister of Home Affairs (Minister), to terminate the Zimbabwean Exemption Permit (ZEP) unlawful, unconstitutional and invalid. This decision concerned the rights of over 178,000 ZEP holders. As a consequence, the court remitted the matter back to the Minister for reconsideration following a fair process in accordance with the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The Minister subsequently applied for leave to appeal the judgment of the High Court. The Minister argued that the applicability of PAJA as understood by the court and the opposing parties was erroneous and furthermore, that the decision to terminate ZEPs falls within the ambit of the executive's powers. The Minister also submitted that the interests of all relevant parties were considered prior to taking the decision. This application was opposed by the Helen Suzman Foundation. The application for leave to appeal was dismissed by the Supreme Court of Appeal, pursuant to which the Minister filed an application for leave to appeal in the Constitutional Court.

On 18 June 2024, the Constitutional Court dismissed the Minister's application for leave to appeal and confirmed that the termination of the ZEP was unlawful. The Minister is now required to comply with the judgment of the High Court and to reconsider his decision not to grant any further

extensions to ZEP holders pursuant to a fair process which complies with PAJA, and to meaningfully consult with those whose rights would be affected by terminating the ZEP. The Constitutional Court affirmed that this legal duty binds the Minister (notwithstanding changes that may occur in office with the new government that has been formed), when deciding the ZEP's future.

Current extension

In the interim, ZEP holders are legally authorised to continue residing and working in South Africa in accordance with the Government Gazette that was published by the Minister on 4 December 2023 under the following terms and conditions:

- ZEPs are extended until 29 November 2024 to provide them with an opportunity to apply for a new exemption permit, or alternative work visa; and
- ZEP holders are entitled to apply for a new exemption permit that will be issued with an expiry date of 29 November 2025.

All ZEP holders are accordingly allowed to continue working and residing in South Africa until at least 29 November 2024, unless they obtain new exemption permits which will allow them to reside and work in South Africa akin to permanent residents until 29 November 2025.

In addition to the above, ZEP holders who applied for waivers or alternative visas, will be afforded certain other protections while they await the outcome of their waiver and visa applications. These ZEP holders are not required



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to apply for new exemption permits (although they are not prohibited from doing so) as the validity of their current ZEPs have been extended pending the outcome of their application for legal status in South Africa.

While their ZEPs remain valid:

- no ZEP holder may be arrested, ordered to depart or be detained for purposes of deportation for any reason relating to them not having a valid exemption permit in their passport;
- no ZEP holder can be dealt with in terms of sections 29, 30 and 32 of the Immigration Act 13 of 2002, which sections deal with prohibited persons, undesirable persons and illegal foreigners;
- ZEP holders are allowed to enter or leave South Africa provided that they comply with all other requirements, except for not having an expired permit in their passport; and

- no ZEP holder should be required to produce a valid exemption permit; or an authorisation letter to remain in South Africa when applying for a new exemption permit.

Although the Constitutional Court's decision provides much needed relief for ZEP holders and their families, it remains to be seen whether ZEPs will ultimately be terminated after a fair process is followed, as directed by the court. Due to this degree of uncertainty, employers should continue to encourage all ZEP holders in their employ to identify and apply for alternative work visas which would permit them to continue working in South Africa after 29 November 2025.

Taryn York and Mapaseka Nketu

A close-up photograph of a South African birth certificate. The text on the certificate includes 'SOUTH AFRICA', 'CERTIFICATE', 'REGULARS OF BIRTH', 'in the Population Register', and 'S.A. CITIZEN'. A gavel is visible in the foreground, partially obscuring the bottom of the certificate. The background is dark and out of focus.

SOUTH AFRICA
CERTIFICATE
REGULARS OF BIRTH
in the Population Register
S.A. CITIZEN

OUR TEAM

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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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