IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(HELD AT CONSTITUTIONAL HILL)

CASE NO.

In the matter between:

SAMUEL KAUNDA and 69 other applicants	First to Seventieth Applicants

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE MINISTER OF SAFETY AND SECURITY	Third Respondent
THE MINISTER OF INTELLIGENCE	Fourth Respondent
THE MINISTER OF HOME AFFAIRS	Fifth Respondent
THE MINISTER OF FOREIGN AFFAIRS	Sixth Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Seventh Respondent

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AFFIDAVIT : ALWYN GRIEBENOW

I, the undersigned,

ALWYN GRIEBENOW,

do hereby make oath and say that:

INTRODUCTION

1. I am an attorney of the High Court of South Africa and I practise as A. Griebenow Incorporated trading as Griebenow Attorneys at 157 Cape Road, Mill Park, Port Elizabeth.

2. I act for all the applicants in this matter. A list of the applicants is annexed to the notice of motion to the main application, which list is marked "A". The main application is annexed hereto marked "CC2".

3. What is stated herein is to the best of my knowledge and belief true and correct and within my personal knowledge and belief unless otherwise stated or the context otherwise indicates.

4. I am duly authorised to bring this application on behalf of the applicants and to depose to this affidavit on their behalf.

THE PARTIES

5. The applicants are all South African citizens and nationals holding South African passports who were detained in Zimbabwe on 7 March 2004, and are presently incarcerated at the Chikurubi Maximum Security Prison some 25 kilometres outside Harare. I have at all material times represented the applicants in Zimbabwe and therefore have an intimate

knowledge of this matter. I have also represented the applicants in the main application.

6. The first respondent is the President of the Republic of South Africa who is cited herein in his official capacity as head of and main representative of the State, care of the State Attorney, Fedsure Building, corner Van der Walt and Pretorius Streets, Pretoria.

7. The second respondent is the Minister of Justice and Constitutional Development, care of The State Attorney, Fedsure Building, Cnr van der Walt and Pretorius Streets, Pretoria.

8. The third respondent is the Minister of Safety and Security, care of The State Attorney, Fedsure Building, Cnr van der Walt and Pretorius Streets, Pretoria.

9. The fourth respondent is the Minister of Intelligence, care of The State Attorney, Fedsure Building, Cnr van der Walt and Pretorius Streets, Pretoria.

10. The fifth respondent is the Minister of Home Affairs, care of The State Attorney, Fedsure Building, Cnr van der Walt and Pretorius Streets, Pretoria.

11. The sixth respondent is the Minister of Foreign Affairs, care of The State Attorney, Fedsure Building, Cnr van der Walt and Pretorius Streets, Pretoria.

12. The seventh respondent is the National Director of Public Prosecutions, care of The State Attorney, Fedsure Building, Cnr van der Walt and Pretorius Streets, Pretoria.

13. The respondents are all cited in their official capacities as such and as representatives of their various Departments and the State. The applicants believe that the respondents and their various Departments are well placed to accord and execute the relief requested in the main application.

14. Insofar as they have an interest in the matter, I will also see to it that the application for leave to appeal is served on the Zimbabwean and Equatorial Guinean Embassies in South Africa.

15. I point out that the Society for the Abolition of the Death Sentence intervened in the proceedings *a quo* and argument was presented on its behalf by the *amicus curiae*, advocates Unterhalter SC and du Plessis. I will also see to it that the application is served on the said Society. The *amicus curiae* supported the application.

APPLICATION FOR LEAVE TO APPEAL

16. This is an application for leave to appeal directly to the Honourable Court against the judgment and order of His Lordship Mr Justice Ngoepe, the Judge President of the Transvaal Provincial Division, which judgment was delivered on 9 June 2004 in the High Court of South Africa, Transvaal Provincial Division, under Case No 12967/2004 ("the judgment"). The judgment was the result of an application brought by the applicants for certain mandatory relief ("the main application"), as is set out in pages 1 to 5 of the main application, encompassing the notice of motion. In summary, the effect of the relief requested was to direct the Government of South Africa ("the Government") to assist the applicants in enforcing their constitutional rights, the applicants having been incarcerated in Zimbabwe.

17. As is apparent from the judgment (annexure "CC1" hereto), the main application was dismissed with costs by His Lordship Mr Justice Ngoepe.

18. As is apparent from the main application, it is the contention of the applicants that the Government has failed to take effective steps to protect the constitutional rights of the applicants, its citizens, and therefore the main application was necessary, on an urgent basis, not to protect only the applicants' most basic constitutional rights, but in particular the most important of those rights, that is to say, the right to life.

SUMMARY OF MAIN APPLICATION

19. It is deemed appropriate, to assist this Honourable Court in deciding whether to grant leave to appeal, to set out some of the material facts of the applicants' case, as contained in the main application. It is respectfully submitted that these material facts are not disputed by the respondents, or in any event not disputed to the extent that they should not be accepted by the Honourable Court.

20. As is apparent from the main application, it is the contention of the applicants that they were in transit and on their way to the Democratic Republic of the Congo, to guard certain mines, when they were apprehended at the Harare Airport in Zimbabwe, by the Zimbabwean authorities.

21. As is further apparent from the main application, it is the contention of the Zimbabwean authorities, having received information from the South African Government, that the applicants intended to stage a *coup d' etat* in Equatorial Guinea.

22. Equatorial Guinea has lodged a formal application with the Zimbabwean Government for the extradition of the applicants to Equatorial Guinea to stand trial in Equatorial Guinea. The Zimbabwean Ministry of Foreign Affairs has written to the Attorney-General of Zimbabwe requesting that

the application for the extradition of the applicants be favourably considered.

23. All the indications are that Zimbabwe will accede to the requests from Equatorial Guinea in this regard. Should the applicants be extradited to Equatorial Guinea there is no prospect of them receiving a fair hearing and they face almost certain death.

24. Equatorial Guinea's President Obijang Nguema has made it clear what fate awaits the applicants should they be extradited to his country. According to a report by Agence France Presse (AFP) on 29 April 2004 the West African country's President has said that 15 men arrested in his country, who are alleged to have been in cahoots with the applicants, face capital punishment. "*If we have to kill them, we will kill them*" he is reported as having said.

25. The South African authorities were aware of the applicants' impending departure from South Africa and co-operated with the Zimbabwe authorities in setting a trap for the applicants, and tipped the Zimbabwe authorities off about the arrival of the applicants' aircraft in Harare. As part of a carefully orchestrated plan, the applicants were then led into the trap and detained at Harare International Airport.

26. Despite there being various newspaper reports to the effect that the South African Government had tipped off and passed information to the

Zimbabwean authorities, this was initially disputed by the respondents, in their answering papers in the main application. However, after a further newspaper report was handed up to His Lordship Mr Justice Ngoepe during the initial stages of argument in the main application relating to a statement made by Minister Lekota, it was conceded by counsel for the respondents, for purposes of the application, that the South African Government had passed on the information to the Zimbabwean authorities which enabled the Zimbabwean authorities to arrest the applicants.

27. As is further apparent from the main application, the applicants' constitutional rights guaranteed by the Constitution have been grossly violated, infringed, abused and threatened in Zimbabwe. This situation persists.

28. These rights include the applicants' right to dignity (section 10 of the Constitution), right to life (section 11 of the Constitution), right to freedom and security of person (section 12 of the Constitution) and right to fair detention and fair trial (section 35 of the Constitution).

29. It is the contention of the applicants that, despite various requests, the Government has been extremely slow, unhelpful and ineffective in protecting the constitutional rights of their citizens, the applicants.

30. It is further the applicants' contention that the Constitution imposes a positive and pro-active obligation on the State to respect, protect, promote

and fulfill the applicants' rights contained in the Bill of Rights. The Honourable Court is in particular referred to sections 1, 2, 7(2), 8(1) and 237 of the Constitution. It is therefore the contention of the applicants that they were clearly entitled to the relief sought in the main application.

31. Primarily it was submitted by the applicants that they were entitled to the relief sought by virtue of the Constitution, which is supreme. Secondly, it was submitted by the applicants that by virtue of the foreign policy of the Government, they were entitled to the relief sought.

32. It is respectfully submitted that His Lordship Mr Justice Ngoepe, in his judgment, in particular did not pay sufficient regard to the supremacy of the Constitution, and further adopted an overly restrictive approach in regard to the applicants' constitutional rights, in particular their right to life.

33. The infringement of some of the applicants' constitutional rights are now highlighted.

34. It is for example the applicants' case that they were assaulted and thrown off the aeroplane by the Zimbabwean authorities on their arrest, and made to lie on the tarmac whilst they were being kicked and accused of being mercenaries on their way to Equatorial Guinea. This transpired on 7 March 2004.

35. The applicants were thereafter detained and moved to various destinations where a number of them were interrogated and tortured. After a few days they eventually all ended up at Chikurubi Maximum Security Prison, Harare, and they have been detained there since then.

36. Despite repeated requests, the applicants were denied access to lawyers for a week despite continued requests by them in this regard, and a number of them were forced to make statements against their will and the contents of which were untrue.

37. I was instructed in Port Elizabeth by the twin brother of applicant Louis du Preez on Thursday, 11 March 2004. I briefed a senior counsel from Johannesburg, who had practised in and was admitted to practice in Zimbabwe, and Mr Jonathan Samkange of Byron Venturas and Partners in Harare to assist me.

38. Counsel and I flew to Harare on 12 March 2004 for the first time. Arrangements were made to consult clients on Saturday, 13 March 2004.

39. As is apparent from the main application, we had to wait some 5 hours on the Saturday before we could see our clients. This was to set a pattern for our subsequent attempts to see our clients, and even on occasions, Court appearances. It would take up to 3 to 4 hours to gain access in order to see our clients, and once we had been permitted to speak to some of

them we were afforded only a short time with which to consult with them, before being told that we would have to leave the prison.

40. Relatives and friends of the applicants, who similarly attempted to see the applicants, were refused access. This was ongoing for over two months.

41. Despite the fact that relatives have gone through a lengthy process and all the procedures laid down, the Prison Authorities refused them access. This has been the basis of one of the many Court applications which have been launched on behalf of the applicants in Zimbabwe and, despite an order from the presiding Magistrate in this regard, the Court order, as is in the case of many others, has simply been disregarded.

42. We were not allowed to consult with the applicants in private and without members of the investigating team being present. We were also not allowed to converse with the applicants in Afrikaans because members of the investigating team and the prison authorities cannot understand that language.

43. The applicants' first Court appearance was only on 23 March 2004, more than two weeks after they had been arrested. This Court hearing took place at the Chikurubi Maximum Security Prison, as all subsequent Court hearings (other than urgent applications to the High Court).

44. On the date of the first hearing, there was a large number of journalists representing the international media with television cameras outside the prison gates wishing to gain access. The only journalists who were allowed inside the prison with their cameras were those attached to the State-controlled Zimbabwe television service. The others were turned away on the basis that they are not "properly accredited". A news team from Sky Television in the United Kingdom was deported as soon as it landed at Harare Airport.

45. As if further apparent from the main application, on 23 April 2004 the applicants opposed a further remand, on the basis that no reasonable suspicion existed of them having committed any of the offences with which they have been charged in Zimbabwe. During the subsequent hearing which took place over a number of days, evidence of three of the applicants were led. Not one of the three applicants was shaken in any way in cross-examination and much of their evidence was uncontested and stood uncontradicted. The notes I made of their evidence during the hearing are attached to the main application.

46. The State led no evidence whatsoever and despite the fact that the investigating officer was at all relevant times present in Court, he was not called to rebut the evidence given by the applicants or to indicate what evidence there was against them.

47. On 12 May 2004, the presiding Magistrate dismissed the applicants' application for the refusal of a further remand and without giving any reasons.

48. It is also necessary to refer the Honourable Court, as I did in the main application, to the role played by members of the Central Intelligence Organisation ("CIO") of Zimbabwe. The CIO in Zimbabwe are known as "The President's Men".

49. Three or four CIO members attend every Court hearing and often come to the Prison. They issue instructions to all the State authorities concerned, the Chief Superintendent in charge of the Prison, the Investigating Officer, the State Prosecutor and the Magistrate. I have personally witnessed them shouting at the Prosecutors and berating them for having made concessions which they were bound to make during the course of hearings in terms of a judgment of the Zimbabwean Constitutional Court (*Blanchard v Minister of Justice, Legal and Parliamentary Affairs* 1999 (4) SA 1008 (ZS)), insofar as the human rights of the applicants are concerned.

50. The applicants, as prisoners on remand, who have not yet been convicted, are entitled to the rights of remand prisoners. They are, however, not treated as remand prisoners and are not allowed, for example, to wear

their civilian clothing, which is in direct contradiction to the *Blanchard* judgment.

51. Even although Zimbabwe is just as cold as South Africa in winter, and even colder, the applicants are only allowed to wear the attire that they have been issued with from the outset at the Chikurubi Prison, that is to say, short pants, short-sleeved shirts and slip-ons. This attire is common knowledge to all who have watched television reports concerning the applicants in Zimbabwe in recent months.

52. After we, as the defence team, had obtained an order from the Court to the effect that the applicants should be allowed food from outside the Prison to supplement the totally inadequate Prison diet, that they should be allowed to attend Court without being shackled in leg-irons and with hand-cuffs, that their relatives should be afforded access to them and the like (there were 13 similar orders obtained in all), the CIO representatives berated the Prosecutors outside Court for concessions which they had made in this regard, notwithstanding the fact that they were obliged to make the concessions in terms of the *Blanchard* judgment.

53. One of the orders obtained from the presiding Magistrate was to the effect that the applicants' hand-cuffs and leg-irons should be removed. Notwithstanding this Court order the applicants were all hand-cuffed and had leg-irons placed on them between 01:00 and 02:00 in the morning and

remained so shackled for ten days, twenty-four hours a day until a further urgent application to the High Court in Harare and a further Court order led to their hand-cuffs and leg-irons being removed.

54. The applicants were in the meantime brought before the Magistrate with hand-cuffs and leg-irons and when we, as the defence team, protested to the Magistrate he asked the State to explain the position. Messrs Phiri and Musona, the State advocates, stated that they were aware of the Court Order but that they and the prison authorities were acting on "instructions from above" and nothing could be done about the matter.

55. The Magistrate then called the Superintendent in charge of the Prison to explain his actions and to explain why he was acting in blatant breach of a Court order. He, too, stated that he was simply acting "on instructions from above". The presiding Magistrate, Mr Mishrod Guvamombe, a senior provincial Magistrate, adjourned Court saying that he was not prepared to proceed with the hearing under these circumstances. He then adjourned to a tent next to the Court, which is in fact a converted hospital ward in the Prison grounds.

56. Three members of the CIO who were present and the Investigating Officer entered the Magistrate's tent. We as the defence team were not allowed to enter. The Prosecutors also entered and we could hear the parties shouting at each other. The matter stood down for the whole day with the

Magistrate refusing to continue with the proceedings and it was necessary to launch a further urgent High Court application.

REQUESTS FOR EXTRADITION TO EQUATORIAL GUINEA

57. In the main application we refer to documentary evidence shown to us at Court which confirmed that Equatorial Guinea had applied for the extradition of the applicants to Equatorial Guinea to stand trial there.

58. This was also confirmed by the CIO officers who were present at Court.

59. On Wednesday, 28 April 2004, the Government of Zimbabwe passed a statutory instrument in terms of which Equatorial Guinea was added to the list of countries to which Zimbabwe may extradite persons.

60. On Thursday, 29 April, President Nguema of Equatorial Guinea flew into Bulawayo from South Africa where he had attended the Independence celebrations, and had a 5-hour meeting with President Mugabe of Zimbabwe during the course of which the extradition of the applicants to Equatorial Guinea was discussed. Since then there have been numerous reports in the media to the effect that the applicants will in fact be extradited to Equatorial Guinea.

61. On Friday, 14 May 2004, the Zimbabwe Independent Newspaper in Harare carried a most disturbing report, and that was that Zimbabwe had

entered into a US$ 1.2 billion deal to extradite the applicants to Equatorial Guinea in exchange for fuel.

62. There is thus every chance that the applicants can be extradited to Equatorial Guinea. It is clear from the main application, it is respectfully submitted, that in the event of the applicants being extradited to Equatorial Guinea, the consequences for them will be dire. They will almost certainly be put to death without being afforded a fair trial.

NO FAIR TRIAL IN ZIMBABWE OR EQUATORIAL GUINEA

63. In the main application, much evidentiary reliance was placed on reports and statements by eminent and specialised human rights bodies and authorities, who made it clear that the applicants will not receive justice or a fair trial in either Zimbabwe or Equatorial Guinea. These bodies and authorities comprise amongst others of the Human Rights Committee of the General Council of the Bar; Advocate J S M Henning SC – Deputy National Director of Public Prosecutions and the Head: National Prosecution Services in South Africa; the International Bar Association Human Rights Institute; Mr Alejandro Artucio, Special Rapporteur of the Commission on Human Rights of the United Nations on Equatorial Guinea; Amnesty International; Dato Param Cumaraswamy, the Former UN Special Rapporteur on the Independence of Judges and Lawyers; and

the Executive Director of Zimbabwe Lawyers for Human Rights, Mr Arnold Tsunga.

64. It is pointed out that in the main application there was no rebuttal of the statements and reports by the Human Rights Bodies and Organisations referred to. There was, for example, no allegation in the respondents' papers, to the effect that the applicants would receive a fair trial and justice in Zimbabwe or Equatorial Guinea. This notwithstanding the fact that the applicants had been detained in Zimbabwe (as also a number of other alleged mercenaries in Equatorial Guinea) since about 7 March 2004, for a period of more than 3 months. Nor was it disputed that the applicants face the death penalty if they were to be deported to Equatorial Guinea.

65. I refer to some of the evidence alluded to in the reports in question (none of which was seriously disputed by the respondents) in relation to Equatorial Guinea:

65.1. There is no ethical norm or a value system in place in Equatorial Guinea and there is no regard for human rights. The "mercenaries" there will probably be executed.

65.2. Basic values such as that one should have persons arrested brought before Court within 48 hours and the right to legal access, are non-existent in Equatorial Guinea. (It is common

cause that the South Africans arrested in Equatorial Guinea on or about 7 March 2004 still have not been brought before Court, neither have they had access to lawyers.)

65.3. The Government in Equatorial Guinea appears to be a family business.

65.4. Members of a South African delegation to Equatorial Guinea were shocked when they saw the South African “mercenaries” there.

65.5. A trial which culminated in the conviction of treason of some 144 defendants on 23 May 2003, was widely criticised by observers.

65.6. Observers were shocked and sickened at the physical condition of many of the accused.

65.7. The accused displayed broken bones, cuts and bruises consistent with torture and ill-treatment.

65.8. The trial fell well below the regional and international standards regarding fair trial proceedings.

65.9. The Supreme Court composes of two military Generals and none of the Judges are qualified jurists.

65.10. *Habeas corpus* is non-existent.

65.11. There is a clear lack of judicial independence and the rule of law. Court orders are not complied with.

65.12. There is widespread judicial corruption.

65.13. Some of the defendants arrived at Court totally beaten, unable to walk, some of them with their bones broken.

65.14. Civilians died after being detained, and no autopsies performed.

65.15. Previous “rebels” who were arrested in 1998, suffered a similar fate.

65.16. These “rebels” were concentrated in the general police station and public prison of Malabo (known as “Black Beach”) in conditions of complete lack of hygiene, overcrowding and inadequate food.

65.17. Many of the prisoners were subjected to severe torture and beatings, showing physical signs of injury and ill-treatment.

65.18. They were also held incommunicado for a long time.

65.19. Most of the male detainees showed clear signs of injuries on their arms and legs caused as a result of the bonds by which they were lifted from the ground as a form of torture to make them talk.

65.20. Torture of detainees was commonplace.

65.21. Amnesty International concluded that the trial was characterised by serious human rights violations and countless procedural irregularities, such as the use of confessions obtained under torture which were retracted by the accused when in Court; the indifference of the Bench to the complaints of torture made by the accused and evidenced by the marks that could be seen on their bodies; the lack of adequate defence due to the fact that, amongst other things, the defence lawyers only had one day to study the specific charges made against their client; and the lack of independence of the Bench of Judges.

65.22. The conditions of detention in which the detainees were held before and during the trial amounted to torture. The detainees were stripped and crammed together in small cells. None was given medical attention and some were denied food which had been brought to them by their families.

65.23. The wives of two of the prisoners who went to bring food to their husbands were also beaten and tortured and one of them was raped by several soldiers.

65.24. Detainees were regularly transferred to unofficial places of detention, where they were severely tortured.

65.25. Many of them were trussed and hung from a bar by a rope which was passed around their wrists, in front of their chests, bound their elbows behind their back and tied their legs together. After being held in this position for some time, the bones in their forearms as well as, in some cases, their legs, eventually broke. They were also given heavy blows while in this position. Some were severely beaten with sticks and whips.

65.26. During this trial observers were able to see that many of the defendants had their arms broken, approximately half-way along the forearm, and that their hands were hanging down from there. Some also had broken legs, as well as deep leg wounds. During the trial, some of them still had sores on their chests and backs from the lashings that they had been given.

65.27. They were crammed into tiny cells and were given insufficient amounts of food. After their torture, none of the prisoners received medical attention.

65.28. Several bodies within the European Union had publicly protested against the trial.

65.29. The European Parliament unanimously adopted a resolution in which it called for the political trial to be annulled and demanded the immediate release of all the political prisoners and the members of their families, and condemned in the strongest possible terms the torture and ill-treatment to which the political prisoners and their families had been subjected.

65.30. It is pointed out that in spite of the widespread and consistent international condemnation of the judicial system in Equatorial Guinea, the learned Judge *a quo* did not see his way open to make a finding on the efficacy and fairness of the legal and judicial system of Equatorial Guinea. It is respectfully submitted that the learned Judge *a quo* clearly erred in this regard. It is also pointed out that **no evidence** was placed before the learned Judge *a quo* by the respondents, indicating that Equatorial Guinea had a fair legal system.

66. It is respectfully submitted that the same applies to the legal system in Zimbabwe.

67. There has been widespread condemnation of the interference by the authorities in Zimbabwe with the legal system, and in particular in relation

to the widely publicised arrests of judges Blackie and Paradza. It is submitted that it is clear that the applicants will not receive a fair trial in that country. They have also not up to the present time received a fair trial there.

68. Some of the evidence alluded to in the main application by human rights bodies and authorities in relation to Zimbabwe is to the following effect:

68.1. There is a continued deterioration of the rule of law and human rights protection in Zimbabwe.

68.2. There is no hope for the rule of law in Zimbabwe. There is no hope for judicial and lawyers' independence. The Government is no longer a Government of law but of men. Governmental lawlessness becomes the order of the day.

68.3. Just three weeks ago the Government of Zimbabwe once again refused to obey two orders of Court.

68.4. What is happening in Zimbabwe could be summed up as amounting to a gross violation of human rights.

68.5. Judges who have given judgments adverse to the Government of Zimbabwe have been harassed and arrested.

68.6. Chilling reports are given of the extent to which teachers, lawyers, Judges, opposition party members, farmers and scores of others have fallen victim to the brutal tactics by the ZANU-PF regime to silence any opposition to its policies.

68.7. Numerous examples are provided of Court orders which are simply disregarded and ignored.

68.8. Magistrates are assaulted.

68.9. Once again, and in spite of the various reports by human rights bodies and organisations about Zimbabwe's legal system, it is pointed out that the learned Judge *a quo* did not find his way open to have regard to the position in Zimbabwe. It is pointed out, once again, that there was no evidence to the contrary placed by the respondents before the Court *a quo*. It is respectfully submitted that the learned Judge *a quo* clearly erred in this regard.

69. In addition to the aforegoing, the following bodies also expressed their criticism of Zimbabwe's human rights record, it continuing gross violation of human rights, and failure to accord justice and fair trials :

69.1. The Human Rights Watch.

69.2. The International Bar Association's Human Rights Institute.

69.3. The International Bar Association.

CONDITIONS IN CHIKURUBI MAXIMUM SECURITY PRISON

70. It must be noted that the applicants did not only rely on reports of bodies and authorities in the main application, but also alluded to *inter alia* the following in relation to their own treatment and experiences in Zimbabwe and at Chikurubi Maximum Security Prison:

70.1. Initially, 8 of the applicants were held in solitary confinement in small cells with cement floors and a hole in the floor. The only window is a window too high for the applicants to see out of it. No beds or bedding were provided. The applicants were issued with lice-ridden blankets on and under which they have to sleep.

70.2. Initially and for the first few weeks of their incarceration, those applicants who were held in solitary confinement were not allowed any reading or writing material and were only allowed out of the cells once a day for a period of 15 minutes, to shower.

70.3. The remaining applicants were detained in cells containing between 40 and 50 prisoners which were designed to hold far

fewer prisoners, under similar conditions as the ones in solitary confinement.

70.4. The applicants are plagued by lice and requests by ourselves that we be allowed to provide insecticides to kill and/or control the lice were turned down by the prison authorities.

70.5. The applicants' daily diet consisted of a portion of dry mealie meal porridge in the morning without any milk or sugar, a cup of dry rice and boiled cabbage in the afternoon, and in the evening a choice between the porridge or the cup of dry rice and cabbage.

70.6. Once a week the applicants received a meagre ration of meat. The meat is invariably rotten and inedible. It consists of items such as pigs tongues and tails.

70.7. The applicants have all lost a considerable amount of weight since their initial detention.

70.8. Although the applicants are entitled to wear their civilian clothing in terms of the *Blanchard* judgment, they are not being allowed to do so.

70.9. We have not been allowed to hand over jerseys knitted for the applicants, over to the applicants.

70.10. Eighteen of the applicants were assaulted by prison warders using batons. Prison warders wearing masks came into the applicants' cell, made them undress and stand up against the wall, facing the wall. They then advised them that they were going to "show you South Africans" and started beating them with batons.

70.11. After they had severely beaten the applicants in question the wardens threw salt water over the applicants' wounds. I personally observed the extensive linear bruises across applicant Kaunda's back, being the result of the assault.

70.12. Twelve prison officers have been arrested and charged with the assault. However, the officer in question who instructed that an investigation be carried out has now himself been suspended from his duties.

70.13. The prison is rife with serious diseases. These include tuberculosis, HIV Aids, dysentery and a skin condition which causes the skin to crack and peel off.

70.14. Deaths are a daily occurrence. We have on a number of occasions witnessed bodies being carted out of prison.

70.15. The applicants were placed in handcuffs and leg irons despite a Court ruling to the contrary.

71. The above material facts are only a few of the facts alluded to by the applicants in the main application.

URGENCY

72. It is respectfully submitted that the appeal is a matter of urgency. The applicants' plight and violation of their human and constitutional rights is on-going.

73. It is pointed out that the learned Judge *a quo* also regarded the matter as urgent.

THE JUDGMENT

74. It is respectfully submitted that the learned Judge *a quo* erred in law and in fact in amongst others the following respects.

GENERAL

75. It is respectfully submitted that the learned Judge President in particular did not pay sufficient regard to the supremacy of the Constitution, and further adopted an overly restrictive approach in regard to the applicants' constitutional rights, in particular their right to life. It is trite, it is respectfully submitted, that the Constitution calls for a generous interpretation, suitable to give the applicants the full measure of their fundamental rights and freedoms contained in the Constitution.

76. The learned Judge *a quo* also appears to have held that the Constitution does not enjoy extra-territorial effect. This is clearly incorrect, it is respectfully submitted.

Ad para 12 of the judgment

77. It is disputed, with respect, that the video film referred to was hardly relevant to the case.

78. In the video reference is made to the fact that the President himself had become Head of State by means of a *coup d' etat*. In the process he had the previous President, his own uncle, killed. This gives one a clear idea of whom one is dealing with, and the fate that awaits the applicants if delivered to Equatorial Guinea.

79. What is further of relevance, is that detainees attending trial exhibited various injuries including broken legs. This clearly impacts on the fairness of the trial system in Equatorial Guinea, it is respectfully submitted.

Ad para 16 thereof

80. It is respectfully submitted that the learned Judge *a quo* clearly erred in

holding that he could not make any findings on the efficacy and fairness of the legal and judicial systems of Equatorial Guinea and Zimbabwe. The learned Judge held that he had no expert evidence to rely on.

81. It is respectfully submitted that the learned Judge President had overwhelming evidence at his disposal, to the effect that the applicants will not receive a fair trial in Zimbabwe or Equatorial Guinea. In fact, the evidence is that thus far, the applicants have not received a fair trial in Zimbabwe.

82. Much of the evidence alluded to by the bodies and authorities referred to in any event amount to fact, and no expertise is required therefor. In any event, it is respectfully submitted, the bodies and authorities referred to are experts in their field.

83. It is for example pointed out that Advocate Jan Henning SC headed an official delegation to Equatorial Guinea. Advocate Henning is extremely

well placed to comment on Equatorial Guinea's justice system, he himself being a very senior Prosecutor and specialist in his field. The learned Judge *a quo* should also have had regard to the reports and statements of the bodies and authorities referred to by virtue of the *Brandeis Brief* principle.

84. It is pointed out that the learned Judge *a quo* accepted allegations regarding assaults, ill-treatment and conditions in prison. It is respectfully submitted that by accepting such allegations, it should necessarily follow that the applicants will not have a fair trial. In fact, during the course of argument, the learned Judge President stated emphatically that if one is being assaulted, one cannot by any means have a fair trial.

Ad para 20 thereof

85. The learned Judge President appears to have held that the Constitution does not have extra-territorial effect. It is respectfully submitted that the learned Judge President erred in such respect. No such restriction is contained in the Constitution and it is trite, it is submitted, that the Constitution allows for a generous interpretation.

86. What the learned Judge President appears to have held, with respect, is that once the applicants left South Africa, they waived their rights to dignity, to life, to freedom and security of person, and to fair detention and to fair trial etc. It is respectfully submitted this is clearly incorrect.

87. There is authority to the effect that the rights to life and dignity for example cannot be waived. In any event, waiver is not readily inferred and reference is made, with respect, to the Honourable Court's judgment in *Mohamed*, at paras [61] to [67].

Ad para 21 thereof

88. It is respectfully submitted that the learned Judge President erred in

holding that there was no evidence as to the actual content of the various media statements attributed to Government officials etc. It was clear from the newspaper reports that the information passed on by the South African Government enabled the Zimbabwean authorities to arrest the applicants. Without such information, the Zimbabwean authorities would not have been in a position to arrest the applicants. The newspaper reports are also consistent and were never seriously disputed by the respondents.

89. The evidence was thus overwhelming that the South African Government had acquiesced and assisted in the arrest of the applicants in Zimbabwe.

90. The learned Judge President also appears to have held that as the exchange of intelligence information between South Africa and Zimbabwe was legitimate, the applicants are not entitled to the protection of the Constitution and not entitled to the relief sought. It is respectfully

submitted that here too the learned Judge President clearly erred. The relief requested by the applicants is, it is respectfully submitted, not dependent on the exchange of information, but is dependent on the terms and provisions of the Constitution itself. It is therefore respectfully submitted that the applicants are entitled to the relief sought by virtue of the provisions of the Constitution, and the obligations that the Constitution impose on Government, and not dependent on information passed on by the Government. If any, the passing on of information and the acquiescence of the South African Government in the arrest of the applicants, merely strengthens the applicants' case. The applicants' case is not dependent thereon.

Ad para 22 thereof

91. It is respectfully submitted that the learned Judge President erred in holding that the issuing of Government policy does not give rise to a legal duty.

Ad para 23 thereof

92. It is further respectfully submitted that the learned Judge President erred in holding that a Court cannot interfere in diplomatic communications between sovereign States.

93. It is further submitted that the learned Judge President attached too much weight to the case of *Abbasi*, referred to in this paragraph. (*Abbasi* is a judgment of the Court of Appeal of England and Wales consisting of 3 Judges.)

94. It is respectfully submitted that *apropos* the *Abbasi* case, circumspection is required and appropriate because English law has its own concepts and principles and does not necessarily provide the same foundation for an identical development of our law. It is for example pointed out that in *Abbasi*, no reference was made to the judgments of this Honourable Court in *Mohamed* and *Makwanyane*, which judgments were handed down before the judgment in *Abbasi*.

95. It is respectfully submitted that a judgment of the Inter-American Court of Human Rights (consisting of 5 Judges) in the matter of *Hilaire v Trinidad and Tobago*, reported at p34 of the *Butterworths Human Rights Cases* (BHRC) of 25 May 2004, is more persuasive authority. In the *Hilaire* matter 32 persons were convicted of murder in Trinidad and Tobago and sentenced to death. The inter-American Commission on Human Rights ("the Commission") submitted a case on behalf of the said persons to the Court against the States of Trinidad and Tobago for certain mandatory relief.

96. In a lengthy judgment, and despite the fact that Trinidad and Tobago did not recognise the jurisdiction of the Inter-American Court of Human Rights ("the Court"), there was a unanimous finding that the State (States of Trinidad and Tobago) had infringed the rights of the complainants in various respects and *inter alia* ordered unanimously :

96.1. that the State should abstain from applying the Offences Against the Person Act of 1925 and should within a reasonable period of time modify the Act to comply with international norms of human rights protection;

96.2. that the State should order a re-trial;

96.3. that the State should submit before the competent authority the review of certain cases;

96.4. on ground of equity, that the State should abstain from executing the victims;

96.5. on grounds of equity, that the State should pay damages to some of the victims' families;

96.6. that the State should modify the conditions of its prison system to conform to the relevant international norms of human rights protection;

96.7. that the State, from the date of notification of the judgment, should provide the Court with a report every 6 months regarding the measures taken to implement the judgment; and

96.8. that the Court should oversee implementation of the judgment.

97. It is clear from the judgment that the Court imposed provisions of the American Convention, on Trinidad and Tobago.

98. It is further of note that, at para 103 of the judgment, reference was made to the judgment in the *Makwanyane* case.

99. On p16 of the judgment of the learned Judge President, it appears that the learned Judge President found that the applicants had not exhausted their local remedies. It is respectfully submitted that the learned Judge President also erred in such respect.

100. It was common cause that various applications had been made on behalf of the applicants to the High Court in Zimbabwe, as also to the Presiding Magistrate, and that various orders were so obtained. Most of these orders were simply ignored by the prison authorities and the CIO.

Ad para 24 thereof

101. It is respectfully submitted that the learned Judge President's finding that the unlawful removal of the applicant from South Africa, was the

cornerstone of the *Mohamed* judgment, and entitled the applicant in that matter to the relief sought, is incorrect. It is respectfully submitted that the Constitution and the right to life, dignity etc. formed the cornerstone of the *Mohamed* judgment and entitled the applicant to the relief sought.

102. It is also respectfully submitted that the learned Judge President erred in finding, by implication, that the Constitution does not enjoy extra-territorial application. The effect of the *Mohamed* judgment is, with the greatest of respect, clearly extra-territorial. Reference is also made to the *Hilaire* judgment referred to above.

Ad para 25 thereof

103. It is respectfully submitted that the learned Judge President clearly erred in finding that there was "no evidence that the government has refused or is refusing to make the requested interventions".

104. There was absolutely no evidence in the main application that Government was prepared to make the requested interventions. In fact, it was Government's case that it was not legally obliged to make the requested interventions.

105. The learned Judge President also held that it is "more difficult" to enforce a mandatory interdict than a prohibatory interdict. It is pointed out, however, that our Courts have often issued mandatory interdicts. Reference is also

made to the *Hilaire* judgment referred to above, as well as the judgment of this Honourable Court in the *TAC* matter (*Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC)).

Ad para 27 thereof

106. It is respectfully submitted that the learned Judge President erred in finding that the Government has complied with its own foreign policy in relation to its nationals in other countries. It is apparent from the main application that South Africa's foreign policy places a strong emphasis on justice, human rights and a commitment to international law in relation to its nationals in foreign jurisdictions. This was not adhered to in the present matter.

107. It is also respectfully submitted that as is apparent from the main application, Government's assistance in the present matter has left much to be desired, and was prompted by bad publicity in the press.

Ad para 28 thereof

108. The learned Judge President appears to have held that it would be appropriate for Government to intervene only after the death sentence had been imposed, and not before.

109. It is respectfully submitted that this is clearly incorrect, and amounts to an infringement of various of the applicants' constitutional rights.

110. To act only after the death sentence has been imposed, may very well also be too late. In the well-known case of *Mariette Bosch*, who was executed in Botswana on 31 March 2001, reports of the execution only came through after the execution had taken place without any prior notification to other interested parties. Her execution was conducted in secrecy. The family of Ms Bosch were only officially informed of her execution a day after she had been executed, and not even her lawyer was notified of the date of the execution.

Ad para 30 thereof

111. It is respectfully submitted that the learned Judge President erred in not finding that the *Mohamed* judgment is not in principle, distinguishable from the present matter.

112. It is also respectfully submitted that the learned Judge President further erred in finding that there was no extradition treaty between Zimbabwe and South Africa, and that the lack thereof would make the enforcement of the proposed *mandamus* order particularly difficult. It was common cause at the hearing of the application that the South African Government could request the Zimbabwean Government to extradite the applicants to South

Africa. There was no legal obstacle in the South African Government's way in such regard.

113. The learned Judge also, with respect, erred in holding that the Government was the most appropriate organ to deal with the matter, unrestrained by Court orders. In this regard I respectfully refer to the order issued by this Honourable Court in the *TAC* matter. It is also clear, it is respectfully submitted, that by leaving the matter in Government's hands, no effective relief is available to the applicants.

114. The learned Judge President was also critical of the wording of prayer 5, to the extent that it requests that the Government should act with "extreme urgency". It is pointed out that in the *TAC* matter Government was ordered to do certain things "without delay". There is in principle no difference.

Ad para 31 / prayer 2

115. It is respectfully pointed out that there is nothing to prevent the South African Government from requesting the extradition or release of the applicants from Zimbabwe.

Ad para 32 / prayer 3

116. This is exactly the applicants' case, that is to say that Government is entitled to request the release or extradition of the applicants from Zimbabwe.

Ad para 33 / prayer 4

117. It is respectfully submitted that there is nothing strange about such a request. The applicants' lives are threatened and, it is respectfully submitted, that in terms of the *Mohamed* judgment they are entitled to request Government to seek the assurance sought. It is pointed out that Government is merely requested to **seek** an assurance, not to enforce it. The applicants are merely requesting that justice be afforded them.

118. It is once again respectfully submitted that the learned Judge President's criticism of the phrase "extreme urgency", is unfounded.

119. The learned Judge President further states that the order as proposed cannot be granted. This does not, with respect, appear to accord with the *Mohamed* judgment.

Ad para 34 / prayer 5

120. One is, with respect, not dealing with a South African citizen facing theft of a packet of cigarettes in Zimbabwe. One is dealing with applicants who

are facing the death penalty. Once again, reference is made to the *Mohamed* judgment.

Ad paras 35, 36 and 37 / prayers 6, 7 and 8

121. What the applicants have sought, in simple and non-prescriptive terms, is the enforcement of their constitutional rights as guaranteed in the Constitution. It is respectfully submitted that there can be no criticism of this.

CONCLUSION

122. It is respectfully submitted that there are reasonable prospects of success on appeal, and that it is in the interests of justice that this Honourable Court hear the appeal.

123. It is respectfully submitted that the matter is of paramount importance and deserving of the attention of the Honourable Court. The matter has received extensive coverage in the media.

124. In the Court *a quo*, the costs of three counsel was allowed.

125. The applicants' constitutional rights and especially their right to life, are being infringed and threatened. The matter is extremely serious and urgent.

126. Wherefore I respectfully pray that it may please the above Honourable Court to grant the relief sought in the notice of application for leave to appeal.

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Deponent

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at on this day of JUNE 2004 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

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COMMISSIONER OF OATHS