IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT CONSTITUTIONAL HILL)

CASE NO:

In the matter between:

SAMUEL KAUNDA and 69 Other Applicants	Applicants
and	
THE PRESIDENT OF 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

---

RESPONDENTS' OPPOSING AFFIDAVIT

I, the undersigned

THERESIA BEZUIDENHOUT

do hereby make oath and state that:

1.

1.1 I am an adult female employed as Director: Law Enforcement, in the Department of Justice and Constitutional Development.

1.2 The facts described in this affidavit fall within my personal knowledge, unless I state otherwise or the context makes it obvious that they do not fall within my personal knowledge. To the best of my belief, those facts are true and correct.

1.3 Insofar as I make legal submissions in this affidavit, I do so on the advice of the legal representatives of the respondents.

2. The respondents oppose the application for leave to appeal directly to this court. I have been authorised by the respondents to make this affidavit on their behalf and to set out the factual and legal bases on which the respondents oppose the application.

3. I have previously deposed to the main answering affidavit on behalf of the respondents, in the court below. Insofar as the applicants rely on the averments and legal contentions contained in their founding and replying affidavits, filed in the court below in support of the application for leave to appeal, the respondents refer to, and rely upon, the averments and contentions made in the answering affidavit I have previously made.

4. The respondents also rely on the legal submissions made in the written submissions made on their behalf in the court below. Those submissions are set out in annexure “CC4” of the affidavit made by the applicants’ attorney, Mr Griebenow.

5. I have read the application for leave to appeal. I have also read the judgment in respect of which leave to appeal is sought. The import of that judgment has also been explained to me by the respondents’ legal representatives. I shall respond, paragraph by paragraph to the application for leave to appeal. Before I do so, I set out, in brief, the respondents’ attitude to the application for leave to appeal.

The respondents’ attitude to the application for leave to appeal directly to this court

6. In a nutshell the respondents’ response to the application for leave to appeal is the following:

6.1 the respondents accept that the judgment of the court below raises constitutional issues of importance. They submit, however that the importance of those issues is not substantial as to require direct attention by this court without the interposing judgment of the Supreme Court of Appeal or the full bench of the court below;

6.2 whilst the court below treated the application as one of urgency, the applicants have not adduced acceptable evidence in the present application to demonstrate that that application is urgent and the degree of urgency requires and justifies immediate consideration of their application for leave to appeal;

6.3 even if there is demonstrable urgency for an immediate appeal, the applicants have not shown that the Supreme Court of Appeal will not be able to deal with and dispose of the appeal as a matter of urgency;

6.4 as I shall indicate below, the sole basis on which the applicants claimed, in the court below, that the application is urgent, is that there was a likelihood of their imminent extradition from the Republic of Zimbabwe to the Republic of Equatorial Guinea. In this application, the applicants have not demonstrated that such a likelihood remains, and that it is imminent, and that unless the appeal is heard directly by this court, then, the extradition is likely to take place;

6.5 the applicants have failed to show that there are reasonable prospects of success of the appeal;

6.6 there are no compelling considerations, including the need to interpret *the Constitution*, any rule of law which is of application in these proceedings to be consistent with *the Constitution*, or the question of costs, which justifies the hearing of the appeal directly by this court. The respondents submit that there are considerations which make it necessary and desirable that the Supreme Court of Appeal or the full bench of the court below should hear the appeal, with the necessary leave of the court below, or the President of the Supreme Court of Appeal, before this court could hear the appeal.

7. Against the above background, I now proceed to respond to the individual paragraphs of the application for leave to appeal. I will respond, firstly, to the application for leave to appeal, and thereafter to the affidavit of Mr Alwyn Griebenow.

Response to the application for leave to appeal

8. **Ad paragraphs 1 to 4**

The applicants have not demonstrated grounds of urgency or other compelling considerations which justify the urgent hearing of the application for leave to appeal directly to this court.

9.

Ad paragraph 5

I admit that the court below delivered the judgment contained in annexure "CC1" on 9 June 2004. There are no reasonable prospects that the judgment and order of the court below might be reversed on appeal.

10. **Ad paragraph 6**

10.1 The respondents do not agree that the issues described in paragraphs 6.1, 6.2 and 6.4 are constitutional matters within the meaning of section 167(3) and (6) of *the Constitution*.

10.2 Even if those issues are constitutional matters, the respondents submit that all of the issues raised in paragraphs 6.1 to 6.5 are not of substantial importance as to require immediate and direct attention by this court, without the interposing decision of the Supreme Court of Appeal or the full bench of the court below.

10.3 The essence of the issues raised in the present application is whether there is a legal obligation on the respondents, in the context of the facts of this case, to take positive steps described in paragraphs 3 to 8 of the notice of motion. That essential feature of the issues raised cannot be as

fundamental as to justify immediate attention of this court, without a prior judgment or order of the Supreme Court of Appeal or the full bench of the court below.

11. **Ad paragraph 7**

11.1 The respondents respectfully submit that the issue described in paragraph 7.2 was not raised at all in the court below.

11.2 All of the issues described in paragraphs 7.1 to 7.4 require attention by at least, the Supreme Court of Appeal and that its judgment will be important and beneficial to this court, in the event there is a further appeal, in the ordinary course, to this court.

12. **Ad paragraphs 8.1 and 8.2**

12.1 The grounds of appeal described in these paragraphs relate to interpretation of the provisions of *the Constitution*. They also relate to the interpretive approach adopted by the court below. The respondents submit that:

12.1.1 the interpretation of *the Constitution* is a matter in respect of which the Supreme Court of Appeal has jurisdiction;

12.1.2 the court below did not adopt a narrow interpretation of *the Constitution* as alleged by the applicants;

12.1.3 the interpretative approach adopted by the court below was correct and that there is not reasonable prospect that the appeal may succeed on the grounds described in paragraphs 8.1 and 8.2.

13. **Ad paragraph 8.3**

13.1 The respondents submit that the court below was correct in holding that the reports referred to in paragraphs 8.3.1 to 8.3.8 did not constitute sufficient evidence to prove the nature, efficacy and quality of the legal systems in Equatorial Guinea and Zimbabwe, particularly criminal trials to which the applicants may be put.

13.2 In the absence of expert evidence which describes the nature of ordinary criminal trials to which accused persons are subjected to in Equatorial Guinea and Zimbabwe, the claims that the applicants would not receive a fair trial would be speculative. The respondents submit therefore that the court below was correct by not relying on the opinions

expressed in the reports described in paragraphs 8.3.1 to 8.3.8.

14. **Ad paragraph 8.4**

The respondents submit that the grounds of appeal described in this paragraph have no reasonable prospect of success. The facts described in this paragraph, even if they are true, do not support the applicants' contention that the applicants themselves will not receive a fair trial either in Equatorial Guinea or Zimbabwe.

15. **Ad paragraph 8.5**

15.1 The respondents submit that the court below was not mistaken when it concluded that the alleged assaults, ill-treatment and conditions of the detention of the applicants in Chikurubi prison will not deprive the applicants of a fair trial in Zimbabwe.

15.2 Even if the court below was mistaken, the respondents submit that the applicants have appropriate remedies to deal with their complaint of the alleged lack of fair trial in Zimbabwe. They have not demonstrated that such remedies would be inadequate or ineffective to ensure that they receive a fair trial in Zimbabwe.

16. **Ad paragraph 8.6**

16.1 The ground of appeal described in this paragraph mistakenly presupposes that:

16.1.1 the right to life, dignity, freedom and security of person, “fair detention” and fair trial described in *the Constitution* are of application in Zimbabwe or Equatorial Guinea; and

16.1.2 the effect of *the Constitution* is that those rights must apply for the benefit of South African nationals abroad, wherever they are, including the applicants.

16.2 The respondents submit that the court below correctly found that the particular fundamental rights asserted by the applicants, namely, the right to life, dignity, freedom and security of person, “fair detention” and fair trial, have no extra-territorial application.

17. **Ad paragraph 8.7**

17.1 The respondents dispute that it became common cause during the hearing that the South African authorities had

passed intelligence information to the Zimbabwean authorities before the arrest of the applicants in Harare.

17.2 During the proceedings the respondents' representatives agreed that the applicants should place before that court a press report attributed to the Minister of Defence without further proof. A copy of that report is annexure "AG43" of the applicants' supplementary affidavit (volume 9). The respondents did not at all admit that the contents of annexure "AG43" were true and correct.

17.3 The applicants are mistaken in suggesting that the probabilities support the conclusion that South African authorities passed intelligence information to the authorities in Zimbabwe before their arrest.

17.4 Even if the probabilities support the applicants' version, that in itself is not enough to justify the applicants' conclusion that the South African authorities acted unlawfully and that their unlawful actions resulted in their arrest in Zimbabwe. It should be recalled that the applicants' cause of action was that –

> "*They [South African authorities] co-operated with Zimbabwe authorities to* ***set up a trap*** *for the*

applicants, and permitted them to leave the country via Polokwane … and tipped the Zimbabwe authorities about the arrival of the aircraft in Harare. As part of a ***carefully orchestrated plan****, the applicants were then let into the trap and detained at Harare International Airport."*[1]

17.5 The respondents submit that the probabilities urged in paragraph 8.7 of the application for leave to appeal do not indicate any unlawful or improper conduct on the part of the South African authorities. They also submit that the press report (annexure "AG43") does not indicate any unlawful or improper conduct. There was therefore no basis on which the applicants could rely upon, for their contention that the fundamental rights asserted by them were violated as a result of that unlawful or improper conduct.

18. **Ad paragraph 8.8**

18.1 The ground of appeal described in this paragraph was not part of the applicants' cause of action and the court below was not called upon to deal with the issue raised in that paragraph.

---

1 Volume 2: Griebenow: p.19, para 22.

18.2 Even if the applicants are entitled to raise that ground of appeal, there is no reasonable prospect that the appeal might succeed on that ground, simply because there is no evidence to show that the South African government "acquiesced in or assisted in the arrest" of the applicants in Zimbabwe.

19. **Ad paragraph 8.9**

19.1 The ground of appeal described in this paragraph does not correctly characterize the finding of the court below. Properly construed, the finding was that the exchange of intelligence reports between South African and Zimbabwean authorities was a legitimate conduct and that conduct did not violate, at all, the fundamental rights asserted by the applicants, and did not impose a constitutional duty on South African authorities to take positive steps described by the applicants in the notice of motion.

19.2 The respondents submit that the finding of the court below, properly construed, was correct and that there is no reasonable prospect that that finding might be upset on appeal.

20.

Ad paragraph 8.10

20.1 The nature and extent of responsibilities which South African foreign missions abroad have towards South African citizens who are in distress abroad are described in paragraphs 7 and 8 of annexure "EB5" of the respondents' opposing affidavit in the court below,[2] and also annexure "AN1" to that affidavit.

20.2 The respondents submit that the foreign policy pursued by the South African government did not give rise to a legal duty to take positive steps described in the notice of motion.

21. **Ad paragraph 8.11**

21.1 Although the extradition legislation of both South Africa and Zimbabwe provide for designation of countries who may be entitled to make request for extradition, and that both countries have designated each other in terms of their respective legislation, there is no extradition treaty between the governments of South Africa and Zimbabwe. It follows therefore that extradition requests must be made and determined in accordance with the relevant legislation.

---

[2] Volume 6: Ntsaluba: p.5, para 7 to p.7, para 8.11.

21.2 The respondents submit that extradition, in terms of Zimbabwean Extradition Act, is a composite process comprising:

21.2.1 first, a request for extradition, which is a diplomatic act made by a political authority of a requesting country;

21.2.2 secondly, a judicial process which requires authorization of such a request by courts, including the court of appeal, if necessary.

21.3 The respondents submit that the court below correctly found that the request for extradition is a diplomatic act which falls within the range of diplomatic powers between sovereign states, and that there was no obligation at all, on the facts before it, to impose a legal duty upon the respondents to exercise such diplomatic powers.

22. **Ad paragraph 8.12**

22.1 The respondents submit that the court below was correct in its interpretation of the judgment of this court in Mahomed's

case,[3] particularly when it held that the facts in the Mahomed's case were materially distinguishable to the facts in the present application.

22.2 The respondents also submit that the existence or otherwise of the obligation upon the government to take positive steps, such as those described in the notice of motion, is a matter which must be determined on the facts of each case. The court below was correct when it concluded that on the facts of the application before it, such obligation was not shown to exist.

22.3 The respondents submit therefore that the judgment in Mahomed's case:

22.3.1 does not have the wider application contended by the applicants;

22.3.2 is not authority for the proposition that *the Constitution* has an extra-territorial application;

22.3.3 does not have extra-territorial effect, both in its true meaning and its intended scope.

---

[3] Mahomed and Others v President of the Republic of South Africa and Others 2001 (3) SA 893 (CC),

23. **Ad paragraph 8.13**

23.1 This ground of appeal mischaracterizes the finding made by the court below. In its proper context, the finding of the court below was that it was not persuaded to exercise its discretionary power in favour of the applicants to direct that the government of South Africa should "intervene" in the manner requested by the applicants. One of the factors it took into account in refusing to exercise its discretion in favour of the applicants was that they failed to show that the government has refused to make the interventions sought by the applicants.

23.2 The respondents submit that as a matter of fact, the applicants have failed to show a refusal by the respondents to act in the manner requested by them. Apart from the fact that the application was unfounded, the application was launched:

23.2.1 precipitously, without any clear indication by any of the respondents that they will not intervene at all or assist the applicants in the manner that was legally permissible;

23.2.2 in the face of an express request by or on behalf of the seventh respondent to the applicants to assist him in obtaining sufficient information to conclude investigations, and if necessary, consider whether to request the extradition of the applicants from Zimbabwe.[4]

23.3 The respondents submit therefore that there is no reasonable prospect that the factual finding made by the court below might be upset on appeal.

24. **Ad paragraph 8.14**

24.1 The respondents have already submitted that the contents of foreign policy, as described in annexure "AN1" of Dr Ntsaluba's affidavit[5] do not impose the legal duty described in paragraph 8.14 of the application for leave to appeal.

24.2 The respondents submit therefore that there is no reasonable prospect that the finding of the court below might be reversed in this regard.

25.

---

4 Volume 4: p.294, annexure "AG32"

5 Volume 7: pp.457 to 482.

Ad paragraph 8.15

25.1 The implication attributed to the judgment of the court below in this paragraph is mistaken, and inaccurate. There is no basis to interpret the judgment of the court below in a way which could sensibly and properly give rise to the implication urged by the applicants.

25.2 Even if the applicants' interpretation of the judgment of the court below is correct, it does not necessarily follow that the government of South Africa would be in breach of its obligations, if any, were it to intervene after a possible conviction of the applicants and a possible imposition of the a sentence of death.

26. **Ad paragraph 8.16**

I have dealt with the ground of appeal similar to the one raised in this paragraph. The respondents respectfully submit that as matter of principle and on the facts, the Mahomed's judgment is distinguishable.

27. **Ad paragraph 8.17**

27.1 I have shown that there is no substance in the applicants' submission that the court below mistakenly concluded that

there was no extradition treaty between South Africa and Zimbabwe. I respectfully submit that no extradition treaty between the two countries exist.

27.2 What was common cause between the parties (in the court below) was that a request for extradition and the resulting extradition could lawfully be made in Zimbabwe in terms of the relevant provisions of the Zimbabwean Extradition Act.

27.3 The applicants are mistaken in suggesting that there was no legal obstacle which prevented a request for extradition which was urged by the applicants. The respondents submit that the making of a request at this stage would be premature, for the necessary investigations into extraditable offence upon which a request for extradition could lawfully be made have not yet been completed. The finding by the court below that the investigations have not yet been completed is incontrovertible.

28. **Ad paragraph 8.18**

28.1 The grounds of appeal described in this paragraph demonstrate the fallacy of the applicants' contention that the mere request supposedly made by Equatorial Guinea for the extradition of the applicants, makes the applicants'

extradition to that country imminent, or requires urgent "intervention" by the South African government.

28.2 It is presumptuous for the applicants to claim that a request for extradition which may be made by South Africa to Zimbabwe "would be acquiesced by Zimbabwe". The making of the request cannot, without more, lead to the acceptance of that request.

28.3 On the applicants' version, the government of Zimbabwe has already approved the request by the government of Equatorial Guinea to extradite the applicants to Equatorial Guinea. It would not follow, as a matter of course that the government of Zimbabwe will acquiesce to a competing request for extradition by the government of South Africa.

28.4 The applicants are also mistaken in contending that their consent to be extradited to South Africa ought necessarily to lead to their extradition or the making of a request for such extradition by the government of South Africa. The respondents submit that that consent has less probative value, having regarding to the fact that the necessary investigations have not been completed.

28.5 The applicants do not point to facts which indicates that they have committed an extraditable offence in South Africa.

29. **Ad paragraph 8.19**

29.1 The respondents submit that the court below correctly exercised its discretion when it refused to make the declarator described in prayer 3 of the notice of motion. There is no misdirection at all which would require interference with the exercise of the discretion.

29.2 The declaration sought by the applicants would amount to a mere re-statement of a legal principle, on a matter of law which has no practical effect.

29.3 Moreover, that declaration would not be predicated upon a dispute between the parties as to the legal position on the rights of the government of the Republic of South Africa to make a request for extradition.

30. **Ad paragraph 8.20**

30.1 The ground of appeal described in this paragraph does not correctly reflect the nature of the order sought in paragraph 4 of the notice of motion.

30.2 In truth, and in substance, the order sought was in the nature of a mandatory interdict which was predicated upon the assumption that there was, firstly, a legal duty which rested upon the respondents to seek the assurance, and secondly, that the respondents have acted in breach of that legal duty, when they allegedly refused to seek the assurance.

30.3 On both scores, the relief was correctly refused by the court below. There is no reasonable prospect that the findings of the court below might be reversed on appeal.

31. **Ad paragraph 8.21**

31.1 The grounds of appeal described in this paragraph is unfounded. It is regrettable that the applicants have mischaracterized the import of paragraph 34 of the judgment of the court below. It is hoped that this is not deliberate.

31.2 The respondents submit that the court below correctly concluded that the offences which the applicants face in Zimbabwe are not likely to attract a punishment by death. It is not the applicants' case that death sentence is likely to follow from a possible conviction on the charges they presently face in Zimbabwe.

31.3 The court below also correctly concluded that the applicants' averments that the right to life asserted by them requires imminent protection by the government, because their extradition to Equatorial Guinea was imminent, was unfounded. The applicants' claim of imminent extradition is not borne out by subsequent events that followed. As at the making of the present application, the applicants have not yet been extradited to Equatorial Guinea.

32. **Ad paragraph 8.22**

32.1 The respondents submit that the true nature of the relief sought in prayers 6, 7 and 8 of the notice of motion was prescriptive, as found by the court below.

32.2 The respondents also submit that however considered, the fundamental predicate for that relief was that there was a legal obligation upon the respondents to take positive steps described in paragraph 6 to 8 of the notice of motion. There is no reasonable prospect that a court of appeal might come to the conclusion that such an obligation exists, as a matter of law and fact.

33.

Ad paragraphs 9 and 10

The respondents do not dispute the averments in these paragraphs.

34. **Ad paragraph 11**

Should leave to appeal be granted, the respondents agree with the estimated duration of the hearing.

35. **Ad paragraph 12**

The respondents submit that the attitude adopted by the applicants is, as a matter of practice and procedure, inadvisable and not desirable. In the event this court refuses to grant the application for leave to appeal, then the applicants will have to explain their failure or election not to have made an application for leave to appeal to the Supreme Court of Appeal, should they afterwards decide to do so. The respondents reserve all of their rights to deal with such application, should it subsequently be made.

36. **Ad paragraph 13**

The respondents submit that it is not in the interest of justice to grant the application for leave to appeal, and request that the present application should be dismissed with costs.

Affidavit of Griebonow

37. I now respond to the averments and submissions made in the affidavit of Griebenow. I will not deal with matters which are common cause. Insofar as the contents of that affidavit repeat the averments and submissions already made in the grounds of appeal which I have already dealt with, I refer to what I have said above, and I shall not repeat the respondents' response to those averments and submissions.

38. **Ad paragraphs 1 to 12**

The averments in these paragraphs are not disputed.

39. **Ad paragraph 13**

Save to deny that the applicants are entitled to the relief requested in the notice of motion, the averments in this paragraph are not denied.

40. **Ad paragraph 18**

The respondents submit that there is no basis in law, fact and in terms of *the Constitution* for the relief sought by the applicants.

41.

Ad paragraphs 20 to 26

The averments made in these paragraphs have been dealt with in the respondents' opposing affidavits, in the court below. The respondents deny those averments to the extent that they are in conflict with their opposing affidavits.

42. **Ad paragraphs 27 to 31**

The respondents submit that the submissions made in these paragraphs are unfounded, for the reasons already set out above.

43. **Ad paragraphs 33 to 61**

Once again, the averments in these paragraphs repeat the contents of the founding affidavit in the court below. The respondents have dealt with these averments in their opposing affidavits and do not repeat herein what they have said in their opposing affidavit. They request, however, that the contents of their opposing affidavits be considered, when this court considers the application for leave to appeal.

44. **Ad paragraph 62**

The respondents submit that the claim made in this paragraph is not well-founded, and is not borne out by the probabilities.

45. **Ad paragraphs 63 to 71**

Once more, the averments in these paragraphs repeat the contents of the founding affidavit to which the respondents have responded in their opposing affidavits.

46. **Ad paragraphs 72 and 73**

The respondents do not agree that the appeal is urgent.

47. **Ad paragraphs 77 to 79**

The video material referred to in these paragraphs is an irrelevant polemical material which has no probative value and was correctly disregarded by the court below.

48. **Ad paragraphs 80 to 121**

48.1 The submissions made in these paragraphs repeat the contentions and averments made in the grounds of appeal already dealt with by the respondents. I do not repeat the responses made by the respondents to those averments and contentions.

48.2 The applicants' reliance on the Brandeis brief principle is mistaken. The opinions expressed in the reports relied upon by the applicants are not sufficiently accurate, common cause or indisputable as to be cognisable under the Brandeis brief principle.

48.3 I have been advised that the judgment of the Inter-American Court of Human Rights in Hilaire case[6] does not support the applicants' contentions.

49. Whilst it is true that the application in the court below obtain widespread media coverage, and that the plight of the applicants also received widespread media reports, the respondents do not accept that the present application assumes substantial significance as to warrant immediate and urgent attention of this court, by virtue of widespread media coverage.

50. The respondents submit that there is no reasonable prospect that the judgment of the court below might be reversed on appeal. The interest of justice do not require that any appeal arising from that judgment be heard directly by this court.

---

6 Hilaire and Others v Trinidad and Tobago BHRC (16) 34.

WHEREFORE the respondents request that the application be dismissed with costs.

_____
DEPONENT

I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN TO, BEFORE ME, AT **JOHANNESBURG** ON THIS THE DAY OF **JUNE 2004**, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO. R.1258 DATED 21 JULY 1972 (AS AMENDED) AND GOVERNMENT NOTICE NO. R.1648 DATED 19 AUGUST 1977 (AS AMENDED) HAVING BEEN COMPLIED WITH.

_____
COMMISSIONER OF OATHS