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

CASE NO : CCT23/04

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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HEADS OF ARGUMENT ON BEHALF OF APPLICANTS

INTRODUCTION

1. 1.1 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 (*volume 2*), 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.

1.2 Gratitude is expressed to the Honourable Court for hearing the application in the Court vacation.

2. As is apparent from the judgment (*Volume 1 annexure "CC1"*), the main application was dismissed with costs by His Lordship Mr Justice Ngoepe.

3. The relief requested in the Court *a quo* amounted to the following :

3.1 Dispensing with the requirements of the Uniform Rules of Court relating to forms and service and allowing the application to be brought forthwith as a matter of urgency.

3.2 Directing and ordering the Government of the Republic of South Africa ("the Government") to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

3.3 Declaring that the Government is a matter of law, entitled to request the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

3.4 Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean Government that the applicants will not be released or extradited to Equatorial Guinea.

3.5 Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean and Equatorial Guinea Governments, as the case may be, to not impose the death penalty on the applicants.

3.6 Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa ("the Constitution") are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

3.7 Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants' right to freedom and security of person including the rights not to be subjected to torture, or cruel inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

3.8 Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

3.9 Directing and ordering the Government to, through the office of the second respondent, report in writing to the Registrar of the High Court on a weekly basis as to the issues set out above where applicable.

3.10 Directing and ordering the respondents to jointly and severally pay the applicants' costs of this application, including the costs of three counsel, in the event of their opposing the application.

4. His Lordship Mr Justice Ngoepe held that the matter was urgent (*judgment para 7*), but dismissed the remainder of the application and the relief sought (*judgment para 40*).

5. 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, viz. the right to life.

Volume 1 affidavit Griebenow in application for leave to appeal para 18 p6

URGENCY

6. In spite of the learned Judge President having held that the matter was urgent, the respondents still contend, in their opposing papers to the applicants' application for leave to appeal, that the matter is not urgent.

Volume 11 Bezuidenhout para 6.2 p4;

para 8 p5

(For sake of convenience the respondents' answering papers are referred to as forming volume 11)

7. The respondents contend in this regard that "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".

Volume 11 Bezuidenhout para 6.4 p4

8. There is no merit in this contention, it is respectfully submitted.

9. Extradition is still imminent and, in any event, the violation of the applicants' constitutional rights is on-going. In this regard, reference is made to what was stated by Heher J (as he then was) in *Silva v Minister of Safety and Security 1997 (4) SA 657 (WLD) at 661 I – H* :

"Were this a normal case, that is to say a matter of some commercial expediency or a matter involving something less than the freedom of the individual, I would have no hesitation at all in granting the postponement that has been sought.

However, a detained person has an absolute right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention."

Similarly, it is submitted, the applicants are entitled not to be deprived of their constitutional rights "for one second".

LEAVE TO APPEAL DIRECTLY

10. In their answering papers to the application for leave to appeal, the respondents contend that the applicants should not have applied for leave to appeal directly to the Honourable Court, but instead applied for leave to appeal to the Full Bench or the Supreme Court of Appeal.

Volume 11 Bezuidenhout para 6.3 p4;

para 6.6 p5

11. 11.1 Reference is made in this regard to the judgment of the Honourable Court in *Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (5) BCLR 433 (CC).*

11.2 At *para [15]* the Honourable Court stated that the broad consideration in determining whether or not to grant leave to appeal directly to the Honourable Court is in the interests of justice. The exercise involved the

weighing up of a number of factors, some of which were summed up as follows :

The importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matter in issue and the prospects of success on the one hand and, on the other hand, the disadvantages to the management of the Honourable Court's role and to the ultimate decision of the case if the Supreme Court of Appeal is bypassed.

11.3 The Honourable Court further pointed out that the benefit of a judgment by the Supreme Court of Appeal is of particular relevance where the development of the common law is at issue. When a case concerns the direct application of the Constitution and does not involve the common law, and the interests of justice require its early resolution, direct access to the Honourable Court may be granted with less reluctance (*at para [16*]).

11.4 In conclusion, the Honourable Court considered it in the interests of justice that leave to appeal directly to the Honourable Court be granted (*at para [20]*).

11.5 The Honourable Court held that a resolution of the issue at stake would have distinct implications for the interests of justice, going beyond the needs of the parties. It would further contribute to certainty (*at para [18]*).

12. It is respectfully submitted that leave to appeal directly to the Honourable Court should be granted :

12.1 Important constitutional issues are at stake. The matter has also been widely reported in the media.

12.2 Hearing the appeal would avoid further protracted procedures and costs. It would also be less costly for the taxpayer.

12.3 A resolution of the constitutional issues herein would have distinct implications for the interests of justice, going beyond the immediate needs of the parties. It would further contribute to certainty as to what amounts to legitimate conduct in the circumstances.

12.4 It is respectfully pointed out that the Honourable Court has heard many cases where the Supreme Court of Appeal was bypassed and leave to appeal directly granted. As to a recent example, reference is made to the judgment of the Honourable Court in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others 2003 (12) BCLR 1333 (CC) at paras [3] and [4]*.

12.5 It is respectfully submitted that there are reasonable prospects of success on appeal.

12.6 The principle at stake is of the utmost importance for the applicants.

13. It is therefore respectfully requested that leave to appeal directly to the Honourable Court be granted.

SUMMARY OF MAIN APPLICATION

14. It is deemed appropriate, to assist the Honourable Court in deciding whether to grant leave to appeal and to allow the appeal, to set out some of the material facts and concerning features of the applicants' case, as contained in the main application. It is respectfully submitted that these material facts and concerning features 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.

Volume 1 Griebenow para 19 p6

See also *Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (AD) at 634 I – 635 C;* and

Soffiantini v Mould 1956 (4) SA 150 (EDLD) (Full Bench) at 154 D – 155 H

15. 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.

Volume 1 Griebenow para 20 p6

16. 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.

Volume 1 Griebenow para 21 p7

(It is not understood why the respondents initially denied that the applicants were arrested on information received from the South African Government. As is evident from the main application, the evidence to such effect is overwhelming. Just recently too, on 28 June 2004, a report was published in the Eastern Province Herald whereby the Intelligence Minister confirmed that the South African Secret Service was behind the arrest of the applicants in Zimbabwe. A copy of the report is annexed hereto marked "SJ1")

17. 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.

Volume 1 Griebenow para 22 p7

18. 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.

Volume 1 Griebenow para 23 p7

19. 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.

Volume 1 Griebenow para 24 pp7 and 8

20. 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.

Volume 1 Griebenow para 25 p8

(The allegations regarding the involvement of the South African authorities also correspond with the probabilities, it is respectfully submitted).

21. 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.

Volume 1 Griebenow para 26 p8

22. 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.

Volume 1 Griebenow para 27 p9

23. 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).

Volume 1 Griebenow para 28 p9

24. It is trite, it is submitted, that the rights to life and dignity are the most important of all human rights in the Constitution, and deserve special protection.

S v Makwanyane and Another 1995 (3) SA 391 (CC) at para [144] :

"The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, …"

See also *Cheadle et al South African Constitutional Law : The Bill of Rights (2002) pp130 and 131*

25. The other rights relied upon by the applicants, i.e. the right to freedom and security of person (section 12 of the Constitution) and right to fair detention and fair trial (section 35) are also fundamental, it is respectfully submitted.

Cf *Cheadle et al supra p125*

26. There can be no doubt, it is respectfully submitted, that the dignity of the applicants in particular, have been infringed in Zimbabwe. Indeed, as unsentenced prisoners, particular regard should be taken to respect the applicants'

dignity in as much as these can be accorded to them in their particular circumstances.

27. It is further respectfully submitted, in general, that there is no need to restrict the protection of the applicants to within the territorial confines of South Africa.

28. It is submitted that the Constitution calls for "a generous interpretation … suitable to give to individuals full measure of the fundamental rights and freedoms referred to."

S v Zuma and Others 1995 (2) SA 642 (CC) at para [14]

Cf. also *Makwanyane supra at para [9]*

"Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law."

S v Zuma supra para [15]

29. It is trite, it is submitted, that the Honourable Court is the supreme custodian of the Constitution and the rights contained therein.

30. 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 the citizens, the applicants.

Volume 1 Griebenow para 29 p9

31. It is submitted by the applicants that the Constitution reigns supreme and that the Constitution imposes a positive and pro-active obligation on the State to respect, protect, promote and fulfil the applicants' rights contained in the Bill of Rights. The applicants in particular rely on sections 1, 2, 7(2), 8(1) and 237 of the Constitution.

Volume 1 Griebenow para 31 p22

32. The Constitution is the supreme law of our land. The supremacy clause in the Constitution is contained in section 2, which provides:

"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed."

33. Section 1 of the Constitution articulates the foundational values of the Constitution in the following way:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) …"

34. The centrality of the Bill of Rights and its foundational values to the newly created democracy is expressed in section 7 of the Constitution which provides:

"(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must **respect, protect, promote and fulfil** those rights in the Bill of Rights."

(Own emphasis provided)

35. Section 8(1) of the Constitution further states as follows:

"The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state."

36. The provisions of section 237 of the Constitution are also relevant. This section provides that :

“All constitutional obligations must be performed diligently and without delay.”

37. Primarily it was submitted by the applicants in the Court *a quo* 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.

Volume 1 Griebenow para 31 p10

38. 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.

Volume 1 Griebenow para 32 p10

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

Volume 1 Griebenow para 33 p10

40. 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.

Volume 1 Griebenow para 34 p10

41. 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.

Volume 1 Griebenow para 35 pp10 and 11

42. When the applicants' legal team eventually succeeded in setting up a consultation with the applicants, they had to wait some 5 hours on a Saturday before they

could see their clients. This was to set a pattern for subsequent attempts to see the applicants, and even on occasions, Court appearances. It would take up to 3 to 4 hours to gain access in order to see the applicants, and once the legal team had been permitted to speak to some of them they were afforded only a short time with which to consult with them, before being told that they would have to leave the prison.

Volume 1 Griebenow para 39 pp11 and 12

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

Volume 1 Griebenow para 40 p12

44. Despite the fact that relatives had 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.

Volume 1 Griebenow para 41 p12

45. The applicants' legal team were not allowed to consult with the applicants in private and without members of the investigating team being present. They were

also not allowed to converse with the applicants in Afrikaans because members of the investigating team and the prison authorities do not understand that language.

Volume 1 Griebenow para 42 p12

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

Volume 1 Griebenow para 43 p13

47. 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.

Volume 1 Griebenow para 44 p13

48. 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.

Volume 1 Griebenow para 45 pp13 and 14

49. 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.

Volume 1 Griebenow para 46 p14

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

Volume 1 Griebenow para 47 p14

51. In the main application, reference was also made 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".

Volume 1 Griebenow para 48 p14

52. Three or four CIO members attended every Court hearing and often came to the Prison. They issued instructions to all the State authorities concerned, the Chief Superintendent in charge of the Prison, the Investigating Officer, the State Prosecutor and the Magistrate. The applicants' legal team 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 were concerned.

Volume 1 Griebenow para 49 pp14 and 15

53. 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.

Volume 1 Griebenow para 50 p15

54. 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.

Volume 1 Griebenow para 51 p15

55. After the applicants' legal 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.

Volume 1 Griebenow para 52 pp15 and 16

56. 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.

Volume 1 Griebenow para 53 p16

57. The applicants were brought before the Magistrate with hand-cuffs and leg-irons and when 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.

Volume 1 Griebenow para 54 p16

58. 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.

Volume 1 Griebenow para 55 p17

59. Three members of the CIO who were present and the Investigating Officer entered the Magistrate's tent. The applicants' legal team were not allowed to enter. The Prosecutors also entered and the applicants' legal team 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.

Volume 1 Griebenow para 56 p17

60. It is therefore clear from the papers, it is submitted, that the applicants' constitutional rights have been grossly abused, infringed and threatened, and the process is on-going.

61. It must be trite, it is submitted, that the applicants' reliance on the Constitution, and the protection afforded to them by the Constitution, is not dependent on their guilt or innocence.

62. It also appears that there is a strong perception amongst the authorities in Zimbabwe, Equatorial Guinea and South Africa that the applicants are guilty of the offences which they are alleged to have committed, and that they in particular intended to stage a *coup d' etat* in Equatorial Guinea. The perception created is therefore that it is of no great moment that the applicants may not be afforded a fair trial, justice and the rights entrenched in the Constitution. This perception is reinforced by the lack of proactive engagement in the matter on the Government's part and its failure to render meaningful assistance to the applicants.

63. This perception is incorrect, unacceptable and contrary to the presumption of innocence enshrined in our law.

Cf. *S v Bhulwana 1996 (1) SA 388 (CC)* where the Honourable Court dealt in some depth with the presumption of innocence.

64. It is submitted that it is apposite to bear in mind what the presumption of innocence stands for :

"The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal

consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harm. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until the state proves an accused's guilt beyond reasonable doubt, he or she is innocent. **This is essential in a society committed to fairness and social justice**. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."

Schwikkard : Presumption of Innocence (1999) at pp13 – 14

(Own emphasis provided)

65. Regarding the evidence placed by the applicants before this Honourable Court in support of their application, it is submitted that the applicants have made out a very strong case:

65.1 Mr Griebenow, the applicants' attorney who deposed to the founding affidavit, has clearly over a period of time been intimately involved in their affairs and deposes to facts of which he has first-hand knowledge;

65.2 In support of the applicants' case, much reliance is also placed on reports and statements by human rights bodies and authorities. These bodies and authorities make it clear that the applicants will not receive justice in either Zimbabwe or Equatorial Guinea.

65.3 The applicants also rely on, as background material and supportive evidence, various newspaper reports. These reports are consistent, not rebutted, and the applicants should be allowed to rely on them.

Compare *Premier, Eastern Cape, and others v Cekeshe and others 1999 (3) SA 56 (TKD) at 84I-J*

65.4 It is submitted that if the newspaper reports were not true, one would have expected of Government to correct them. Despite the abundance of newspaper reports, for example all confirming that Government passed on information to Zimbabwe, no retractions or corrections were forthcoming.

65.5 It is respectfully submitted that in assessing the applicants' case, regard must also be had to the case put forward by the respondents. The case of the respondents as set out in their papers, consists mainly of queries and bare denials and does not detract from the merits of the applicants case in any way. There is no proper rebuttal. There is, for example, no allegation in the respondents' papers, to the effect that the applicants will receive a fair trial and justice in Zimbabwe and Equatorial Guinea. This notwithstanding the fact that the applicants have been detained in Zimbabwe (as also a number of other alleged mercenaries in Equatorial Guinea) since about 7 March 2004, for a period of nearly four months.

Nor is it disputed that the applicants face the death penalty if they are deported to Equatorial Guinea.

REQUESTS FOR EXTRADITION TO EQUATORIAL GUINEA

66. In the main application reference was made to documentary evidence shown to the applicants' legal team at Court which confirmed that Equatorial Guinea had applied for the extradition of the applicants to Equatorial Guinea to stand trial there.

Volume 1 Griebenow para 57 p17

67. This was also confirmed by the CIO officers present at Court.

Volume 1 Griebenow para 58 p18

68. 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.

Volume 1 Griebenow para 59 p18

69. 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.

Volume 1 Griebenow para 60 p18

70. 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.

Volume 1 Griebenow para 61 p18

71. 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.

Volume 1 Griebenow para 62 pp18 and 19

NO FAIR TRIAL IN ZIMBABWE OR EQUATORIAL GUINEA

72. 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.

Volume 1 Griebenow para 63 p19

73. 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.

Volume 1 Griebenow para 64 pp19 and 20

74. In fact, these reports are quite damning of the judicial systems in Zimbabwe and Equatorial Guinea. One would have expected of the respondents, if these reports were not true, to have placed some evidence before the Court *a quo* which would have placed doubt on the veracity and truth of these reports. No such evidence was forthcoming. Regrettably, one was also not able to find media reports (of which we are aware of) depicting the judicial systems of Zimbabwe and Equatorial Guinea in a positive light. This is, regrettably a realism.

75. Reference is made to some of the evidence alluded to in the reports (none of which was seriously disputed by the respondents) in relation to Equatorial Guinea :

75.1 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.

75.2 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.)

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

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

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

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

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

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

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

75.10 *Habeas corpus* is non-existent.

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

75.12 There is widespread judicial corruption.

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

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

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

75.16 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.

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

75.18 They were also held incommunicado for a long time.

75.19 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.

75.20 Torture of detainees was commonplace.

75.21 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.

75.22 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.

75.23 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.

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

75.25 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.

75.26 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.

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

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

75.29 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.

75.30 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.

Volume 1 Griebenow para 65 pp20 – 26

76. It is respectfully submitted that the same concerns apply to the legal system in Zimbabwe.

77. 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.

Volume 1 Griebenow para 67 p26

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

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

78.2 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.

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

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

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

78.6 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.

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

78.8 Magistrates are assaulted.

78.9 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.

Volume 1 Griebenow para 68 pp26 – 28

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

79.1 The Human Rights Watch.

79.2 The International Bar Association's Human Rights Institute.

79.3 The International Bar Association.

Volume 1 Griebenow para 69 p28

CONDITONS IN CHIKURUBI MAXIMUM SECURITY PRISON

80. 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:

80.1 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.

80.2 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.

80.3 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.

80.4 The applicants were plagued by lice and requests by the applicants' legal team that they be allowed to provide insecticides to kill and/or control the lice were turned down by the prison authorities.

80.5 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.

80.6 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.

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

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

80.9 The applicants' legal team have not been allowed to hand over jerseys knitted for the applicants, over to the applicants.

80.10 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.

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

80.12 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.

80.13 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.

80.14 Deaths are a daily occurrence. The applicants' legal team have on a number of occasions witnessed bodies being carted out of prison.

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

Volume 1 Griebenow para 70 pp28 – 31

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

Volume 1 Griebenow para 71 p31

HUMAN RIGHTS

82. It is trite, it is respectfully submitted, that the Constitution imports a radical movement away from the previous state of our law. The Constitution is not simply some kind of statutory clarification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and **universal human rights for South Africans of all ages, classes and colours**. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism

and repression. The aspiration of the future is based on what is justifiable in an open and democratic society based on freedom and equality. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment. The Constitution contains, in material respects, a new and fundamental commitment to human rights.

Cf. *Shabalala and Others v Attorney-General of Transvaal and Another 1996 (1) SA 725 (CC) at para [26]*

83. Important excerpts in relation to human rights from the Honourable Court's judgment in *Makwanyane supra*, apposite to the present matter, are the following :

83.1 "Those who are entitled to claim this protection [of the Constitution] include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected."

Para [88]

83.2 "(Prisoners retain) those absolute natural rights relating to personality, to which every man is entitled. … The fact that their liberty had been legally curtailed could afford no excuse for a further legal encroachment upon it. …They were entitled to all their personal rights and personal dignity, not

temporarily taken away by law or necessarily inconsistent with the circumstances in which they had been placed."

Para [142]

83.3 "A prisoner is not stripped naked, bound, gagged and chained to his or her cell. The right of association with other prisoners, the right to exercise, to write and receive letters and the rights of personality … are of vital importance to prisoners and highly valued by them precisely because they are confined, have only limited contact with the outside world, and are subject to prison discipline. Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under chap. 3. …"

Para [143]

This last quotation is of particular significance in the present matter.

83.4 "Even the most evil offender, it has been held, 'remains a human being possessed of a common human dignity'."

Para [309]

MOHAMED'S CASE

84. It is respectfully submitted that the judgment of the Honourable Court in *Mohamed and Another v President of the RSA and others 2001 (3) SA 893 (CC)* is both applicable and decisive of the present matter.

85. The first appellant, one Mohamed, was at the time of the proceedings standing trial in a Federal Court in the United States of America on a number of capital charges related to the bombing of the United States embassy in Dar-Es-Salaam, Tanzania in August 1998. The appellants sought leave to appeal against the judgment of a Provincial Division in which the appellants were denied an order declaring (i) that the arrest, detention, interrogation and handing over of Mohamed to US agents was unlawful and unconstitutional, and (ii) that the respondents had breached Mohamed's constitutional rights by handing him over to the custody of the US Government without obtaining an assurance that the death penalty would not be imposed or carried out in the event of Mohamed's conviction.

86. The appellants also sought mandatory relief in the form of an order "directing the Government of the Republic of South Africa to submit a written request … to the Government of the United States of America that the death penalty not be sought, imposed nor carried out" in the event of conviction.

87. The Honourable Court upheld the appeal and issued the following order [*para [73]*] :

"3.1 It is declared that the handing over of Mohamed at Cape Town on or about 6 October 1999 by agents of the South African government to agents of

the United States for removal by the latter to the United States for him to stand trial in the Federal Court for the Southern District of New York on criminal charges in respect of which he could, if convicted, be sentenced to death, was unlawful in that:

3.1.1 It infringed Mohamed's rights under ss10, 11 and 12(1)(d) of the Constitution to human dignity, to life and not to be treated or punished in a cruel, inhuman or degrading way, inasmuch as a prior undertaking was not obtained from the United States government that the death sentence would not be imposed on Mohamed or, if imposed, would not be executed.

3.1.2 In terms of the provisions of chap VI of the Aliens Control Act 96 of 1991 read with reg 34 of the Aliens Control Regulations published under s56 of the said Act, there existed at the time of Mohamed's removal from the Republic of South Africa no authority in law to deport or purportedly to deport or otherwise to remove or cause the removal of Mohamed from the Republic to the United States.

3.1.3 In terms of 52 of the Aliens Control Act 96 of 1991 the removal of Mohamed from the Republic could not validly be effected before the expiry of a period of three days after he had been declared a prohibited person.

…

5 The Director of this Court is authorised and directed to cause the full text of this judgment to be drawn to the attention of and to be delivered to the Director or equivalent administrative head of the Federal Court for the Southern District of New York as a matter of urgency."

88. Due to the importance of this judgment and the applicants' reliance on it, we make extensive reference to excerpts therefrom:

88.1 "The argument is derived from the obligation imposed on the South African State by the Constitution to protect the fundamental rights contained in the Bill of Rights. The rights in issue here are the right to human dignity, the right to life and the right not to be treated or punished in a cruel, inhuman or degrading way. According to the argument the Constitution not only enjoins the South African government **to promote and protect** these rights but precludes it from imposing cruel, inhuman or degrading punishment. The Constitution also forbids it knowingly to participate, directly or indirectly, in any way in imposing or facilitating the imposition of such punishment. In particular, so the argument runs, this strikes at the imposition of a sentence of death."

Para [37]

(Own emphasis provided)

88.2 *"*The cornerstone of this argument is the finding of this Court in Makwanyane and Another that capital punishment is inconsistent with the values and provisions of the interim Constitution. …."

"On the contrary, the values and provisions of the interim Constitution relied upon by this Court in holding that the death sentence was

unconstitutional are repeated in the 1996 Constitution. The importance of human dignity to which great weight was given in Makwanyane is emphasised in the 1996 Constitution by including it not only as a right, but also as one of the values on which the State is founded."

Para [38]

88.3 "Moreover, an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend on whether the removal is by extradition or deportation. That obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty under which the 'deportation' or 'extradition' is carried out."

Para [42]]

88.4 "Another suspect, Mr Mahmoud Mahmud Salim, alleged to be a party to the conspiracy to bomb the embassies, was extradited from Germany to the United States. Germany has abolished capital punishment and is also party to the European Convention on Human Rights. The German government sought and secured an assurance from the United States government as a condition of the extradition that if he is convicted,

Salim will not be sentenced to death. This is consistent with the practice followed by countries that have abolished the death penalty."

Para [44]

88.5 "Our Constitution provides that 'everyone has the right to life'. There are no exceptions to this right"

Para [47]

88.6 "In Makwanyane Chaskalson P said that by committing ourselves to a society founded on the recognition of human rights we are required to give particular value to the rights to life and dignity, and that 'this must be demonstrated by the State in everything that it does'. In handing Mohammed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment."

Para [48]

88.7 "It is not only ss 10 and 11 of the Constitution that are implicated in the present case. According to s 12(1) (d) and (e) of our Constitution, everyone has the right to freedom and security of the person, which

includes the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way."

Para [54]

88.8 "These cases are consistent with the weight that our Constitution gives to the spirit, purport and objects of the Bill of rights and the **positive obligation** that it imposes on the State to 'protect, promote and fulfil the rights in the Bill of Rights. …is contrary to the underlying values of our Constitution. It is inconsistent with the government's obligation to protect the right to life of everyone in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment. "

Para [58]

(Own emphasis provided)

88.9 "In doing so they infringed Mohamed's rights under the Constitution and acted contrary to their obligations to uphold and promote the rights entrenched in the Bill of Rights."

Para[60]

88.10 "That is a serious finding. South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example.

Para [68]

88.11 "Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights. "

Para [71]

POWER OF COURT

89. It is respectfully submitted that the learned Judge President had the necessary power and authority to grant the relief sought.

Cf. *Mohamed supra*;

See also the order granted in *Minister of Health v Treatment Action Campaign (No. 2) 2002 (5) SA 721 (CC) at para [135]*. See also in particular *paras [96 – 114]* where the powers of Courts are dealt with.

See in particular *para [99]* where the following is stated:

"The primary duty of Courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice". The Constitution requires the State to "respect, protect, promote and fulfil the rights in the Bill of Rights." Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the **Mpumalanga** case, this Court set aside a Provincial Government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months. Also, in the case of **August,** the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications."

90. At *para 104* of the *TAC* judgment it is also stated that the power of grant mandatory relief includes the power, where it is appropriate, to exercise some

form of supervisory jurisdiction to ensure that its order is implemented. It is submitted that this would include the authority to impose on the respondents the obligation to report back to the Registrar on a weekly basis as requested in the notice of motion.

Further, as to the supervisory jurisdiction of a Court, see also *paras 104* and *107* of the *TAC* judgment.

91. As to the innovativeness of our Courts in issuing orders in previously unexplored waters, see also the judgment of Bertelsmann J in *S v Lubisi and Others 2003 (9) BCLR 1041 (T) at 1051 F – 1053 C*

92. It is therefore respectfully submitted that, primarily by virtue of the Constitution and the rights guaranteed and obligations imposed by it, the applicants were entitled to the relief sought.

GOVERNMENT POLICY

93. It is submitted, secondarily, that by virtue of Government's foreign policy, the applicants were entitled to the relief sought.

94. It is clear from various Government papers that it is a core function and priority of Government (in particular the Department of Foreign Affairs) to protect the human rights and properties of its citizens in other countries.

Volume 2 Griebenow paras 169 – 180 pp99 - 102

Cf. *OVS Vereniging vir Staatsondersteunde Skole en 'n Ander v Premier, Prov Vrystaat en Ander 1996 (2) BCLR 248 (OPD)***,** where the practice of paying subsidies to State-aided schools together with public pronouncements by officials and the publication of a White paper on education and training were held to have given rise to a legitimate expectation that such subsidies would continue to be paid.

Cf. also *Bacela v MEC for Welfare (Eastern Cape Provincial Government) [1998] 1 All SA 525 (E)* where Mpati J (as he then was) held that a Minister was bound by the regulations that she had issued.

Cf. also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (7) BCLR 687 (CC) at para [100]*.

THE JUDGMENT (ANNEXURE "CC1" IN VOLUME 1)

95. It is respectfully submitted that the learned Judge President erred in law and in fact in amongst others the following respects.

General

96. It is respectfully submitted that the learned Judge President erred in not attaching sufficient weight to the supremacy of the Constitution and in adopting an overly restrictive approach in regard to the applicants' constitutional rights.

97. It is respectfully submitted that the learned Judge President ought to have held that the Constitution calls for a generous interpretation, in such a manner as to provide the applicants the full measure of their fundamental rights and freedoms as set out in the Constitution.

98. It is respectfully submitted that the learned Judge President erred in finding, by implication, that the Constitution does not have extra-territorial effect.

Ad para 12 of the judgment

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

100. 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.

101. 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

102. 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.

103. 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.

104. 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.

105. 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.

Cf. *Chaskalson et al* : *Constitutional Law of South Africa (loose-leaf) pp7-13***;** and

Hogg : Constitutional Law of Canada (loose-leaf) at pp57-10 to 57-16.

Cf. also *S v Makwanyane supra at para [35]:*

"… and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of chap 3."

106. The learned Judge President erred with respect in not attaching any or sufficient weight to:

106.1 The fact that the reports in question set out facts which support the contentions of the applicants and their entitlement to the relief sought.

106.2 The fact that the lawyers acting for the alleged mercenaries detained in Equatorial Guinea, and the families of the persons in question, have for a period in excess of three months not been afforded access to them;

106.3 The fact that the suspected mercenaries detained in Equatorial Guinea have not yet appeared in Court notwithstanding the fact that they have been detained for a period in excess of three months;

106.4 The fact that there was nothing before the Court to suggest that the reports in question were in any way inaccurate or untrue;

106.5 The fact that it was not suggested on behalf of the respondents that the applicants would receive a fair trial in either Equatorial Guinea or Zimbabwe;

106.6 The fact that it was not suggested on behalf of the respondents that the applicants would not face torture and death should they be taken to Equatorial Guinea.

107. The learned Judge President, having accepted the applicants' allegations regarding assault, ill-treatment and conditions in Chikurubi Maximum Security Prison, the place where their trial in Zimbabwe is to take place, and having regard to the uncontested evidence of the all-pervading influence of the Central Intelligence Organisation ("CIO") in Zimbabwe, and the influence that they bring to bear on the Presiding Magistrate, the Prison Authorities and the State counsel, ought to have found that there was no prospect of the applicants receiving a fair trial in Zimbabwe, it is respectfully submitted.

Ad para 20 thereof

108. 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.

109. Our Courts have also adopted a broad approach to the issue of standing in constitutional cases.

Cf. *Ferreira v Levin NO 1996(1) SA 984 (CC) para [165]*;

Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA) at paras [22] and *[23]*;

De Waal et al The Bill of Rights Handbook 4th Edition (2001 pp81 – 91;

Chaskalson et al supra pp8-1 to 8-12;

Cf. also *Wade and Forsyth Administrative Law 8th Edition (2000) pp723 – 725*

110. 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.

111. It is respectfully submitted that the constitutional rights involved, i.e. the rights to life, to dignity, to freedom and security of person and to fair detention and fair trial, cannot be waived.

Cf. *Maimela v Motimele NO and Others [2003] JOL 11546 (T) on p41 of the report*. (A copy of the relevant pages is annexed to the applicants' list of authorities);

Transnet Ltd v Goodman Bros (Pty) Ltd 2001 (1) SA 583 (SCA) paras [46] – [48];

Cheadle et al supra pp49 and 50; and

De Waal et al supra pp43 and 44

112. 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

113. It is respectfully submitted that the learned Judge President erred in finding that there was insufficient evidence to indicate that the Government had passed intelligence information to Zimbabwe before the arrest of the applicants, and in so doing failing to have regard to the fact that it became common cause during the hearing that this had in fact happened, and in doing so not attaching weight to the inference that the contents of media statements attributed to Government officials, including the then Minister of Intelligence Affairs, and the Minister of Defence

would, on the probabilities have been correct, and that if this were not so, the Government would have publicly put the record straight.

114. In this regard the learned Judge President further failed, it is respectfully submitted, to attach any or significant weight to the fact that, on the probabilities, without the information provided to the Zimbabwean authorities by the South African authorities, the Zimbabwean authorities would not have been in a position to detain the applicants;

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

116. 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.

117. 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

118. 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

119. It is respectfully submitted that the learned Judge President erred in finding that there is no legal duty on the Government to intervene to protect a persons' constitutional rights once he is outside the country "particularly if there is no extradition treaty to enforce, or any other legal instrument" in view of the fact that it became common cause during the hearing that Zimbabwe is in fact a designated country in terms of the Extradition Act, and that all things being equal, the Government would be entitled to request the extradition of the applicants from Zimbabwe to South Africa.

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

121. 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.)

122. 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 (cf. *Harper v Morgan Guarantee Trust Co of New York, Johannesburg, 2004 (3) SA 253 (WLD) at para [13.2])*. 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*.

123. 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.

(The Honourable Court has previously regarded decisions of the Inter-American Court of Human Rights as being helpful. Cf. *Makwanyane supra at para [35]*)

124. 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.

125. 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 the Court *inter alia* ordered unanimously :

125.1 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;

125.2 that the State should order a re-trial;

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

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

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

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

125.7 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

125.8 that the Court should oversee implementation of the judgment.

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

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

128. 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.

129. 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, this, in spite of the Zimbabwean Supreme Court judgment in *Blanchard supra*, which is supposed to have been adhered to by the Zimbabwean authorities, but clearly has not been.

Ad para 24 thereof

130. 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.

131. 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. It is respectfully submitted that rights such as the right to life and dignity are not territorially bound, and are absolute. Reference is also made to the *Hilaire* judgment referred to above.

Ad para 25 thereof

132. 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".

133. There was absolutely no evidence in the main application that Government was prepared to make the requested interventions. Various demands were made on Government before the application was brought. In fact, it was Government's case that it was not legally obliged to make the requested interventions.

134. 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

135. 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.

Ad para 28 thereof

136. 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.

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

138. To act only after the death sentence has been imposed, may very well also be too late. Reference is made to the well-known case of *Mariette Bosch*, who was executed in Botswana on 31 March 2001.
Volume 1 Griebenow para 110 p44

Ad para 30 thereof

139. 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.

140. It is respectfully submitted that the learned Judge President further erred in finding "that there is no extradition treaty between the two countries" and in not having regard to the fact that Zimbabwe is gazetted in terms of the Extradition Act and in finding that the lack of an extradition treaty would make the enforcement of the proposed *mandamus* particularly difficult. In this regard, the learned Judge ought to have had regard to the fact that it was common cause during the hearing that the South African Government could request the Zimbabwean Government to extradite the applicants to South Africa and that there was no legal obstacle in the Government's way in this regard.

141. Further reference is made to the case of *Ncube and Another v Minister of Home Affairs and Another [2003] JOL 11686 (ZH)* which is referred to in the applicants' replying papers (*Volume 8 pp540 – 544*). This judgment speaks for itself and is a clear indication that the respondents accept unequivocally that the Government is entitled in law to seek the extradition of the applicants from Zimbabwe.

142. 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 we 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.

143. 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, it is respectfully submitted.

Ad para 31 / prayer 2

144. It is respectfully submitted that the learned Judge President erred in finding that the applicants are not entitled to the relief sought in the light of the uncontested evidence that Equatorial Guinea has already requested the extradition of the applicants from Zimbabwe, the Department of Foreign Affairs in Zimbabwe has requested that such request be considered favourably and that the applicants have been advised that should the South African Government request the extradition of the applicants, such a request would be acquiesced to by Zimbabwe.

145. In this regard the learned Judge also erred, it is respectfully submitted, in attaching no or insufficient weight to the fact that the applicants have indicated that they would consent to being extradited from Zimbabwe to South Africa and that in the circumstances, and in terms of the Extradition Act of Zimbabwe, the other requirements of that Act would not have to be met with. In this regard, the learned Judge further erred, with respect, in failing to attach any or sufficient weight to the fact that should the South African Government not request the

extradition of the applicants from Zimbabwe they will be extradited to Equatorial Guinea.

Ad para 32 / prayer 3

146. It is respectfully submitted that the learned Judge President erred in finding that the applicants are not entitled to the declarator sought, as it was only in the answering affidavits that the respondents for the first time conceded that South Africa is in law entitled to seek the extradition of the applicants from Zimbabwe.

Ad para 33 / prayer 4

147. It is respectfully submitted that there is nothing strange about such a request. The applicants' lives are threatened and, it is respectfully submitted, 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.

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

149. 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

150. It is respectfully submitted that the learned Judge President erred in likening the position to a South African citizen facing a charge of theft of a packet of cigarettes in Zimbabwe. Regard must be had to the facts of the present matter, it is respectfully submitted. The matter is extremely serious for the applicants.

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

151. 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

152. Wherefore it is respectfully prayed that the application for leave to appeal be granted and the appeal be allowed, including the costs of three counsel.

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Z F JOUBERT SC

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B J PIENAAR

_____

T PRICE

Counsel for applicants

Chambers

PORT ELIZABETH

5 JULY 2004