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

CASE NO: CCT 23/2004

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

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THE RESPONDENTS' WRITTEN SUBMISSIONS

Citation

We refer to,

- the Constitution of the Republic of South Africa as "*the Constitution*";

- the court below as "*the TPD*";

- the judgment in respect of which the application for leave to appeal is sought, as "*the judgment of the TPD*";

- the government of the Republic of South Africa as "*the Republic*".

A. <u>Introduction</u>

1. The applicants have brought an application for leave to appeal directly to the above Honourable Court against *the judgment of the TPD.* By direction of the above Honourable Court the respondents were directed to file written submissions on the application as well as to address the merits in the matter. We make these submissions on behalf of the respondents, pursuant to the directions.

2. We deal with the following issues:

2.1 the allegations that the South African and Zimbabwean authorities collaborated in setting up a trap;

2.2 absence of causal connection between the allegations violation of the fundamental rights of the applicants and the conduct of the South African government;

2.3 the exchange of intelligence information between the South African and Zimbabwean authorities;

2.4 the effect of the exchange of intelligence information on the fundamental rights asserted by the applicants;

2.5 the interpretation of the provisions of sections 2 of *the Constitution,*

2.6 the interpretation of the provisions of section 7(2) of *the Constitution*;

2.7 Constitutional obligations to take positive steps;

2.8 possible sources of obligation to take positive steps described in the notice of motion;

2.9 interpretation of sections 7(2), 8(1) and 237 of *the Constitution*. We will, in that regard, deal with the applicants' contentions that:

2.9.1 the provisions of section 7(2) impose a positive duty on the respondents to take steps that are described in the notice of motion;

2.9.2 the contention that chapter 2 of *the Constitution* has extra-territorial application or effect;

2.10 Mohamed's case;

2.11 foreign policy pursued by *the Republic*;

2.12 extradition requests and extradition proceedings;

2.13 urgency of the present application;

2.14 orders sought in the notice of motion;

2.15 other reasons why the orders sought are incompetent;

2.16 costs.

B. The alleged trap

3. We submit it useful to address the allegation of a trap within a legal matrix that explains the content of a trap and whether or not the facts in the applicants' papers make out the necessary elements to sustain their claim that the South

African authorities were involved in a trap. A useful definition by Holmes JA[1] to the following effect –

> "*A trap is a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words, he creates the occasion for someone else to commit the offence.*"

4. The applicants were arrested by the Zimbabwean authorities on 7 March 2004 at Harare International airport. They claim that they were in transit to the Democratic Republic of Congo, but had stopped at Harare International airport to refuel the aircraft and to pick up some cargo at the airport. They do not, however, indicate what sort of cargo was to be picked up. It is common cause however that the cargo concerned comprised military equipments of some sort.

5. The applicants say that "as part of a carefully orchestrated plan" the South African authorities co-operated with their counterparts in Zimbabwe to "set a trap", for the arrest of the applicants.[2] The applicants rely upon media reports

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1 S v Malinga and Others 1963 (1) SA 692 (A), at 693F-G.

2 Volume 2: p.19, para 22;

Volume 8: p.517, para 20

to support their claim that the authorities in *the Republic* had set up a trap in collaboration with their counterparts in Zimbabwe.[3]

6. The media reports relied upon by the applicants do not support the claim that a trap was set up by the South African and Zimbabwean authorities, in collaboration with each other. At best for the applicants, the media report relied upon (annexure "AG27" of the founding affidavit) refers to a suspicion entertained by the South African authorities that the applicants were involved in a plot to overthrow the government of Equatorial Guinea. Based on that suspicion the South African and Zimbabwean authorities exchanged intelligence information which enabled the Zimbabwean authorities to arrest the applicants. This does not mean that the applicants were tricked into a commission of an offence and were arrested as a result of such a trick.

7. The co-operation between the South African and Zimbabwean authorities cannot sensibly be construed as one of a trap. None of the authorities concerned tricked or misled the applicants, in a way which caused the applicants to act to their own disadvantage. In other words, the applicants did not leave *the Republic*, as a result of a misleading conduct on the part of the authorities in *the Republic*; the applicants did not land in Harare International airport by reason of any misleading conduct on the part of the South African or

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[3] Volume 4: p.287, annexure "AG27".

Zimbabwean authorities. The flight plan, the course of destination and their landing in Zimbabwe were voluntary action by the applicants, under the command of the flight officer in charge of the aircraft.

8. In their written submissions, the applicants still persist with the claim of a trap.[4] They rely, in that regard, on a newspaper article annexed to their written submissions.[5] In the newspaper article concerned, the fourth respondent categorically denies that *the Republic* was involved in a trap. Properly construed, the statements attributed to the fourth respondent in the newspaper article indicate that there was a regional co-operative effort between the authorities in Zimbabwe and *the Republic*, which led to the arrest of the applicants. We submit that such co-operative effort cannot be described as a trap.

9. We submit therefore that there is no evidence to show that the authorities in *the Republic* and their counterparts in Zimbabwe set up a trap for the applicants, and that the applicants were arrested as a result of a trap.

10. On the contrary, under the principle of "obligation to give notice of dangers threatening foreign states", there are obligations on state not to allow knowingly its territory to be used for acts contrary to the rights of other states.

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4 Applicants' written submissions: pp.12 to 13, para 20.

5 Annexure "SJ1" of the applicants' written submissions.

The obligation of states is said to arise from certain general and well recognised principles, namely: elementary considerations of humanity, even more exacting in peach than in war and the principle of the freedom of maritime communication.[6]

11. We submit therefore that the exchange of intelligence information (if so found) by the South African authorities and the Zimbabwean authorities would be lawful conduct.

C. The absence of a causal connection

12. In *the TPD*, the applicants adopted the simple approach that they were entitled to the relief sought by virtue of the fact that "the Constitution is supreme", and by virtue of the foreign policy pursued by *the Republic*.[7] In the present application, they repeat the same approach, but in a moderated way. They say the respondents have a duty to "assist" the applicants to exercise the fundamental rights asserted by them. They rely, without more, on the

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6 The Corfu Channel case 1949 I.C.J. 4.

7 The applicants' written submissions: p.17, para 37.

provisions of sections 7(2), 8(1) and 237 of *the Constitution*, the Mohamed judgment, and foreign policy pursued by *the Republic*, in support of the duty contended by them.[8]

13. We submit, at the outset, that the fundamental rights asserted by the applicants have not been infringed by the South African authorities in *the Republic* or in a territory over which the South African government is in or has control. There is further no threat by the South African authorities to infringe the fundamental rights of the applicants in *the Republic* or in territory over which the South African government is in or has control. None of the respondents, any organ of state or public functionary is engaged or alleged to be engaged in any conduct which infringes or threatens to infringe the fundamental rights asserted by the applicants.

14. All of the conduct complained of, as the infringement or threat of infringement of the fundamental rights asserted by the applicants has taken place or is likely to take place outside *the Republic*, and has been carried or will be carried out by persons or agencies over whom the government of *the Republic* has no control.

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[8] The applicants' written submissions: p.16, para 31 to p.17, para 37.

D. Exchange of intelligence information

15. In their replying affidavit, the applicants referred to several newspaper articles which indicate that the South African intelligence alerted the Zimbabwean authorities about the arrival of the aircraft at Harare International airport.[9] Further newspaper articles were annexed to a supplementary affidavit filed on behalf of the applicants.[10]

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9 Volume 8: pp.559 and 560, annexures “AG40” and “AG41”.

10 Volume 9: annexure “AG42”.

16. *The TPD* dealt with the media reports on exchange of intelligence information between the authorities in Zimbabwe and *the Republic*. It found that the media reports did not constitute evidence of the truth of the contents of such reports. It also found that the exchange of intelligence information was legitimate and could not give rise to a duty to take steps described in the notice of motion.[11]

17. Whilst there is a dispute of fact on whether there was exchange of intelligence information between the authorities in *the Republic* and Zimbabwe, the respondents submit that even if it is found that such information was exchanged prior to the departure of the applicants from *the Republic*, that in itself was not unlawful.

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[11] Volume 1: *judgment of the TPD,* pp.12 to 13, para 21.

E. Effect of exchange of intelligence information

18. The applicants do not contend that the finding by *the TPD* that the exchange of the intelligence information was legitimate. We submit that that finding was correct. Moreover, it is consistent with the recognised principle of international law that every State is under an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[12]

19. We therefore submit that the exchange of intelligence information was not unlawful or improper. The arrest of the applicants, even if it resulted from such exchange of information, did not violate any of the fundamental rights asserted by the applicants.

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[12] Chandra Sekhara RAO 1995: The Indian Constitution and International Law: State jurisdiction, p.47 and Corfu Channel, Merits, 1949 I.C. J. 4.

F. Interpretation of section 2 of *the Constitution*

20. Section 2 of *the Constitution*, read together with section 172(1)(a), is a bedrock of the power and duty of this court to uphold the fundamental rights set out in chapter 2 of *the Constitution*. That section requires this court to declare law or conduct inconsistent with *the Constitution* to be invalid, to the extent of the inconsistency. It also requires this court to ensure that constitutional obligations imposed in terms of *the Constitution* are upheld.

21. We submit that the provisions of section 2 provide the limits of its application. There must be law or conduct which is inconsistent with *the Constitution*, before this court invokes its powers under section 172(1)(a). There must also be a failure to discharge obligations imposed under *the Constitution*, before this court invokes its powers under section 172(1)(a).

22. We submit therefore that supremacy of *the Constitution* in itself does not provide a substantive ground of judicial intervention in the exercise of powers by and conduct of other branches of government. The supremacy of *the Constitution* becomes engaged and provides a basis of judicial intervention in the exercise of powers by and actions of other branches of government, whenever such exercise of powers or actions are inconsistent with *the Constitution*.

23. The applicants do not point to any specific positive conduct by any of the respondents, as being inconsistent with *the Constitution*. The applicants do not rely on the exchange of intelligence information as conduct which is inconsistent with *the Constitution*, as to attract the positive obligation to take steps described in the notice of motion.[13] They merely contend that mere inaction on the part of *the Republic*, in the circumstances of the present application, constitute a violation of the fundamental rights asserted. This, we submit, is ill-conceived.

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[13] The applicants' written submissions: pp.61 go 62, paras 116 and 117.

G. **Interpretation of section 7(2) of *the Constitution***

24. The provisions of section 7(2) of *the Constitution* impose the obligation of the state to respect, protect, promote and fulfil the rights in chapter 2 of *the Constitution*. We submit that the obligation imposed upon the state, is not without territorial limit, or context.

25. The territorial limitation of the obligations imposed upon the state under section 7(2) is to be found in section 7(1) of *the Constitution* which provides that –

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

26. We submit that reference, in section 7(1), to "South Africa" and "to all people in our country" provide clear indication as to the territorial application of the obligations imposed upon the state in terms of section 7(2). We submit

therefore that the rights set out in the Bill of Rights, and the obligation of the state to respect, protect, promote and fulfil those rights, apply to *the Republic*, unless the nature of the right asserted has no territorial limitation.

H. Constitutional obligations to take positive steps

27. The applicants claim that the fundamental rights asserted by them are infringed in Zimbabwe. They also claim that those rights, particularly the right to life, will be violated, in Equatorial Guinea, should they be extradited to that country. They contend that the violation, and threat of violation of those rights, impose a constitutional obligation on the respondents to take the positive steps described in the notice of motion. They rely on section 7(2) of *the Constitution*, as the source of the obligation.

28. We submit that the language of section 7(2) of *the Constitution*, however broad, does not support the obligation contended by the applicants. Section 7(2) must be interpreted in the context of section 7 as a whole, more particularly section 7(1), which, as we have pointed above, contain clear indications as to the territorial limits of the obligations imposed on the state in terms of section 7(2).

29. There are other considerations which militate against the interpretation urged by the applicants. They are, first, the general rule that laws of a country apply

within the territory of that country; secondly, orders made by a court apply within the territory of that country; thirdly, the complex issues of choice of law. We deal with each of these considerations separately.

Territorial application of the Bill of Rights

30. Insofar as we were able to establish, courts in other countries have accepted that the fundamental rights contained in their constitutions do not have extra-territorial application. We refer to the following judgments.

31. In United States v Burns[14] the Supreme Court of Canada emphasized that the interpretation of the rights guaranteed in the Canadian Charter of Rights, the court must avoid extra-territorial application.[15]

32. In Reid v Covert[16] the Supreme Court of the United States of America held, in respect of the constitution of the United States of America –

> "*As I have already stated, I do not think that it can be said that these safeguards of the Constitution are never operative without the United*

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14 [2001] 1 SCR 283.

15 Para 56.

16 354 U.S. 1 (1956).

States, regardless of the particular circumstances. On the other hand, I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. For Ross and the Insular Cases do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution "does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in our circumstances in every foreign place. In other words, it seems to me that the basic teaching of Ross and the Insular Cases is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what conditions and considerations are that would make adherence to a special guarantee altogether impracticable and anomalous …

I think the above thought is crucial in approaching the cases before us. Decision is easy if one adopts the constricting view that this constitutional guarantees as a totality do not 'apply' overseas. …"[17]

33. Recently, the Supreme Court of the United States of America indicated that the exception to the general rule will arise in regard to causes of action which arose in foreign territories in respect of which the United States exercise control.[18]

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17 Para B of that judgment;

See also – Johnson v Eisentrager 339 U.S. 763 (1949).

34. We submit that there are no specific provisions in *the Constitution*, or other compelling considerations which require the adoption of an approach different to the one adopted by the courts in Canada and the United States of America. Should we however be mistaken, we submit that the extra-territorial application of the Bill of Rights should be limited to instances of violations of constitutional rights, over which *the Republic* has control.

The effectiveness of the court order

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[18] Rasul v Bush (not yet reported), 28 June 2004, parts iii to iv of that judgment;
Sosa v Alvarez-Machain (not yet reported), 29 June 2004.

35. Effectiveness of a judgment of a court is a recognised basis of exercising jurisdiction.[19] The constitutional violations alleged by the applicants will not take place in *the Republic*. Yet the applicants request this court to make an order which will require, by virtue of its implementation, interference with judicial processes in other countries, whose sovereignty, is not in dispute. We submit that such a court order lacks the necessary effectiveness, in order to enable this court to exercise proper jurisdiction.

Choice of law

36. The applicants are presently facing criminal proceedings in accordance with the laws of Zimbabwe. Should they be extradited to Equatorial Guinea, they

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19 Steytler N.O. v Fitzgerald 1911 AD 295, at 346;

Forbes v Uys 1933 TPD 362, at 369;

Oppenheim's International Law (9th Ed) Vol.1, p.456, para 136.

will face criminal proceedings in accordance with the laws of that country. The legal systems of those countries are put to question on the basis that they are not consistent with the fundamental rights set out in *the Constitution*.

37. It is not altogether clear to us on what basis the applicants choose the provisions of *the Constitution* as the standard measure against which the validity of the legal systems in Zimbabwe and Equatorial Guinea must be measured. Whatever the basis may be, this court is invited to make pronouncement of the legal systems of other countries by relying on the provisions of *the Constitution*.

38. We submit that such an approach is fraught with difficulties. It assumes, without more, that the provisions of *the Constitution* provides norms and standards which are of universal or regional application. Even so, it also assumes that the legal system in Zimbabwe does not have norms and standards which are necessary to advance the constitutional rights such as those contended by the applicants.

39. We submit therefore that the interpretation urged by the applicants is mistaken.

I. Sources of obligations to take positive steps

40. In their written submissions, the applicants indicate that the orders sought in the notice of motion are in the nature of a "mandatory relief", directing the respondents to take positive steps described in the notice of motion.[20] They rely on three bases for the orders sought: the first is that *the Constitution* imposes the duty on the respondent to act; the second is that the judgment of

[20] The applicants' written submissions: p.2, para 1.1.

Mohamed supports the duty contended by the applicants, the third is that the foreign policy pursued by *the Republic* imposes on the respondents the duty to act.

41. Before we deal with the applicants' contentions, we submit that the duty, if any, on the respondents to take positive steps such as those described in the notice of motion may arise in one of the following ways.

Bilateral treaties

42. Where *the Republic* and Zimbabwe, or *the Republic* and Equatorial Guinea are parties to a bilateral agreement which impose a duty to act. Bilateral treaties which impose obligations to act are often contained in extradition treaties which provide that a country requested to extradite a fugitive to a requesting country is entitled to make representations that the requesting country may not impose the sentence of death, of if imposed, it would not be carried out. We

submit that bilateral treaties of this sort constitute the fundamental basis of decisions in Burns[21] and Soering.[22]

43. The applicants do not contend that *the Republic* and Zimbabwe or Equatorial Guinea have concluded a bilateral extradition treaty which impose upon *the Republic* the obligation to take the positive steps described in the notice of motion, including the obligation to request either or both countries not to impose death sentence, or if imposed, not to implement such a sentence.

44. We deal more fully below with the extradition arrangements between *the Republic* and Zimbabwe, and we shall submit, in that regard, that the extradition arrangements are not based on extradition treaties, but on Extradition Acts of both countries. We submit however that under the legislative schemes of both countries there is no obligation to make a request urged by the applicants.

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21 United States v Burns [2001] 1 S.C.R. 283;

22 Soering v United Kingdom 1989 11 EHRR.

Multilateral agreement

45. The obligation to act will also arise where *the Republic*, Zimbabwe and Equatorial Guinea are state parties to multilateral treaties which impose upon them the obligation to act in a particular way. For instance, the African Charter on Human and People's Rights, Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment.[23]

[23] Prof. Dugard: International Law, A South African Perspective (2nd Ed) (2000), pp.242 to 259.

46. We submit that the basis of the judgment in Soering's case is that government of the United Kingdom was a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and was required to discharge the obligations contained in that convention.

47. The applicants refer to the judgment of Inter-American Court of Human Rights in Hilaire v Trinidad and Tobago as a persuasive authority in support of their claim that the South African government has a positive obligation to take steps described in the notice of motion.[24]

48. Apart from the obvious factual distinction, the basis of the decision in Hilaire's case is that the government of Trinidad and Tobago was, at the relevant time, a state party to the regional convention which imposed obligations upon it, and that it was not free to disregard those obligations.

49. We submit that the applicants do not rely on any regional, continental or global treaty or convention to which the government of *the Republic* and Zimbabwe are state parties and which impose obligations on them to act in a particular way, including the positive steps described in the notice of motion. The

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[24] The applicants' written submissions: p.63, paras 123 to p.64, para 125.

applicants cannot therefore claim support from the Hilaire's case as persuasive authority in support of their contention.

50. The applicants do not rely upon any specific convention to which *the Republic*, Zimbabwe and Equatorial Guinea are state parties, and which requires them to carry out obligations such as those described in the notice of motion.

Domestic law

51. Other the provisions of sections 7(2), 8(1) and 237 of *the Constitution*, the applicants appear to suggest that the provisions of the Extradition Act impose the obligation upon *the Republic* to request their extradition from Zimbabwe to *the Republic*. We submit that the extradition arrangements between *the Republic* and Zimbabwe are governed by the Extradition Act, and also the Zimbabwean Extradition Act. None of these Acts impose an obligation upon the respondents to request the extradition of the applicants. We submit more fully below that a request for extradition, is by its very nature, a diplomatic act, but not an obligation. The provisions of the Extradition Act and the

Zimbabwean Extradition Act do not transform the diplomatic nature of a request for extradition into an obligation.

52. But even if it did, there is no provision in the Zimbabwean Extradition Act and the Extradition Act in *the Republic* which require the latter to take the positive steps described in the notice of motion.

53. Even if the provisions of the Extradition Act are construes as imposing the obligation on the respondents, we submit that the implementation of that obligation would be premature, for two reasons, first, there is no evidence to show that the applicants have committed an extraditable offence, secondly, even if they did, investigations into extraditable offence have not yet been completed.

54. We therefore submit that there is no domestic law which impose an obligation of *the Republic* to take positive steps described in the notice of motion.

J. **Sections 7(2), 8(1) and 237 as sources of duty to act**

55. It seems to us that the other basis relied upon by the applicants for the contention that *the Constitution* imposes a duty on the respondents to intervene in the present matter is their interpretation of the above provisions of *the Constitution*. We submit that the contention is flawed for the following reasons:

55.1 the provisions of these sections do not expressly impose a positive obligation on the respondents to take steps described in the n notice of motion. We submit that the absence of such a positive obligation is consistent with the express language of section 7(1) of *the Constitution*, because the duty imposed on the state in terms of

that section is not to perform an act that infringes any of the rights provided in the Bill of Rights.[25]

55.2 we submit that the provisions of sections 7(2) can be interpreted as imposing a positive duty, whenever the nature of the fundamental right concerned imposes such a duty. It follows therefore that the applicants cannot rely, without more, on section 7(2) as the basis of the positive obligation on the respondents to take positive steps described in the notice of motion.

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[25] Carmichele v Minister of Safety and Security and Another 2001 (10) BCLR 995 (CC), paras 44 and 45.

K. Mohamed's case[26]

56. The applicants argue in their written submissions that the Mohamed's judgment is both applicable and decisive of present matter.[27] We agree that the judgment is decisive of the present matter, but disagree that it supports the applicants' contentions. It is useful to extrapolate aspects of the Mohamed's judgment that bear relevance, albeit tangentially, to the present matter. We propose to demonstrate those aspects that are clearly distinguishable from the applicants' case.

57. Relevant in Mohamed's judgment are the following facts and legal principles:

57.1 at the time of the adjudication of the Mohamed's judgment, Mohamed (a Tanzanian citizen) was standing trial on a number of capital charges in a Federal Court in New York;

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[26] 2001 (3) SA 893 (CC).

[27] The applicants' written submissions: p.44, para 84.

57.2 prior to his deportation to the United States, he was in the Republic of South Africa (enjoying the protection of the South African Constitution, in particular, chapter 2 rights);

57.3 both the South African officials and the Federal Bureau of Investigation (FBI) exchanged information leading up to the arrest, detention and handing over of Mohamed by the South African authorities to the FBI agents and his removal by them to the United States;

57.4 the above Honourable Court found and declared the handing over of Mohamed by agents of the South African government to agents of the United States so that he (Mohamed) should stand trial in New York on criminal charges in respect of which he could, if convicted, be sentenced to death, was unlawful in that:

57.4.1 Mohamed's rights under sections 10, 11 and 12(1)(d) of *the Constitution* were infringed in as much 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;

57.4.2 there was 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 in terms of the provisions of the Aliens Control Act, 96 of 1991 read with Regulation 23 of the Act;

57.4.3 the removal of Mohamed from *the Republic* could not validly be effected before the expiry of the period of three days after he had been declared a prohibited person;

57.5 the fact that Mohamed was then facing a possibility of a death sentence was a direct failure by the South African authorities to secure an undertaking from the United States government that in the event of a conviction, the sentence would not be imposed, but if imposed, that it would not be executed;

57.6 the obligation of the government under *the Constitution* will depend on the facts of a particular case and the provisions of *the Constitution*;

57.7 **in contrast**, the applicants are detained and standing trial in Zimbabwe having left the Republic on their own accord;

57.8 the applicants' departure from South Africa was lawful;

57.9 it is alleged the arrest of the applicants in Zimbabwe was as a result of exchange of information by the South African authorities and the authorities in Zimbabwe;

57.10 alternative to paragraph 2.9 above, it is alleged that the arrest and detention of the applicants in Zimbabwe was as a result of a trap by the South African authorities;

57.11 it is not contended on behalf of the applicants that the South African authorities when exchanging information with the Zimbabwean authorities knew or reasonably ought to have known that the applicants would face extradition and/or deportation to Equatorial Guinea where a death sentence would be imposed.

58. We elaborate more fully below on the distinguishing features between the present application and the Mohamed's case.

59. This court has made it clear that there may well be circumstances where the state and its organs have a positive duty to take steps to protect the rights contained in the Bill of Rights. We submit however that the question whether a duty to take positive steps arises is not a pure legal question, to be determined

upon the mere consideration of the provisions of section 7(1). It is a matter which requires consideration of the facts and circumstances of each case. That was made clear in Mohamed's case, when this court held that –

> *"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 African 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 the extradition treaty under which the 'deportation' or 'extradition' is carried out."*[28]

60. We therefore submit that the applicants must show that the nature and circumstances of the present application require a positive duty to act should be imposed upon the respondents. We will submit more fully below that such a duty should not be imposed, having regard to the facts and circumstances of the present application.

61. The applicants argue that the Mohamed's case is decisive in the present application.[29] *The TPD* held that the Mohamed's case was materially

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[28] Carmichele, para 44;

Mohamed's case, para 42.

[29] The applicants' written submissions: p.44, para 84.

distinguishable to the facts of the application before it.[30] We submit that the finding of *the TPD* is correct and that the applicants' criticisms of that finding are unfounded, for the following reasons:

61.1 the applicant in the Mohamed's case was in *the Republic* at the time of his arrest. As an alien in *the Republic*, he was entitled to the statutory protection afforded to him in terms of section 52 of the Aliens Control Act;[31]

61.2 for as long as he was in *the Republic*, the applicant in Mohamed's case was entitled to fundamental rights which accrue to everyone in *the Republic*, including the right to life,[32] and the right to dignity and the right to freedom and security of the person;[33]

61.3 the fundamental rights which the applicant in Mohamed's case enjoyed, whilst he was in *the Republic* were violated by members of the Aliens Control Unit when they handed the applicant to agents of the Federal Bureau of Investigation for removal to the United States of America –

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30 Volume 1: *the judgment of the TPD,* pp.16 to 17, para 24.

31 Mohamed's case: para 17.

32 Mohamed's case: para 47.

33 Mohamed's case: para 54.

> *"In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities [in South Africa] failed to give 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, inhumane or degrading punishment."*[34]

61.4 there was a causal link or connection between the removal of the applicant in Mohamed's case from *the Republic*, without securing the necessary assurance that death sentence would not be imposed upon him in the United States, or would not be implemented if imposed, and the threat of a death sentence which the applicant faced, once convicted in the United States.[35]

62. On the facts the Mohamed's case dealt with a violation of fundamental rights by public functionaries which the applicant was entitled to enjoy, for as long as he was in *the Republic*, regardless of his status as an alien. There was clear evidence of control exercised by South African authorities over Mohamed

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34 Mohamed's case: paras 48 and 52.

35 Mohamed's case: para 53.

when they violated his fundamental rights in the circumstances described in that case.

63. In sum, by their own actions, which were unlawful and unconstitutional, the South African authorities removed Mohamed from the constitutional protection to which he was entitled, and exposed him to a trial where he would no longer enjoy such constitutional protection. They therefore had a duty to take positive steps, within their means, to ensure that the right to life of Mohamed was not violated in the United States. We therefore submit that the Mohamed's case is fundamental distinguishable, at least in the following respects:

63.1 in the present application, the applicants were at liberty to remain in *the Republic* or to leave as they choose;

63.2 none of the respondents or any other state organ exercised control over the applicants during their stay in *the Republic* and when they departed from Polokwane;

63.3 the departure of the applicants from Polokwane was not an act of "removal" perpetrated by the South African authorities;

63.4 the fundamental rights asserted by the applicants in these proceedings were not violated at all by the respondents or any state

organ, when they were in *the Republic* and when they departed from Polokwane;

63.5 the South African authorities did not engage in any unlawful activities or unconstitutional behaviour which led to the arrest of the applicants at Harare International airport. There was therefore no causal connection between an unlawful or unconstitutional conduct on the part of South African authorities and the arrest of the applicants at Harare International airport.

64. We submit that in the circumstances of the present application, there is no basis to impose a duty on the respondents to take the positive steps described in the notice of motion, or to "assist" or "intervene", in whatever manner desired by the applicants.

65. The applicants also contend that the provisions of *the Constitution*, or rather the fundamental rights they assert, have "extra-territorial effect".[36] They seem to argue that the provisions of *the Constitution*, have extra-territorial application, because that is what Mohamed's case decided.[37]

66. *The TPD* did not make a finding that the provisions of *the Constitution*, more particularly the fundamental rights asserted by the applicants have an extra-

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36 The applicant's written submissions: p.15, para 27; p.59, para 108; p.66.
37 The applicants' written submissions: p.66, para 131.

territorial effect or application. The applicants however say that *the judgment of the TPD* implies that such a finding was made by *the TPD*.

67. Whatever the finding of *the TPD* may be, we submit that Mohamed's case did not hold that the rights asserted by the applicants, more particularly the right to life has extra-territorial application. Mohamed's case cannot be construed as authority to support the proposition that the South African authorities have a positive duty to protect the fundamental rights asserted by the applicants, regardless of wherever the applicants may be, and regardless of who violated the applicants' rights and where those rights were violated. That issue did not arise and was not decided in Mohamed's case.

68. We therefore submit that the applicants' contention that Mohamed's case decided that fundamental rights asserted by the applicants have extra-territorial application or effect.

L. Foreign policy

69. In their written submissions the applicants argue that the foreign policy of the South African government entitles them to the relief sought.[38] The sole basis on which the contention is made is that the foreign policy pursued places

[38] The applicants' written submissions: p.53, para 93.

priority on protection of property and human rights of South African citizens abroad.

70. The *amicus curiae* invokes foreign policy of the state, but in different terms, for its contention that the respondents have a positive duty to protect the applicants, or have, "at a minimum", created a legitimate expectation, based on that policy, that they will protect the human rights and property of the South African citizens abroad.[39]

71. We submit that the applicants and the *amicus curiae* are mistaken as to the nature and extent of the foreign policy pursued by the South African government. That policy is explained by Ntsaluba in his supporting affidavit, who says that *the Republic* will not intervene in or interfere with domestic judicial processes, and will work through multilateral organs to influence changes in domestic policies of other countries.[40]

72. Annexure "AN1" also describe the nature of that policy.[41] The allegations of Ntsaluba and the content of annexure "AN1" are not disputed by the applicants and the *amicus curiae*. We submit therefore that the ambit of the foreign policy pursued by *the Republic* must be determined on the basis of the respondents' version.

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39 Volume 10: the submissions of the *amicus curiae,* p.31, para 56 to p.35, para 65.

40 Volume 6: pp.445 to 446, paras 4 to 6.

41 Volume 7: pp.457 to 482, particularly pp.469 to 471.

73. We submit that nowhere in the foreign policy pursued by *the Republic* is there a manifestation of a duty to intervene, or take steps such as those described in the notice of motion. The allegations of the *amicus curiae* that the South African government has assumed a duty are misleading. The relevant passage of the then Minister of Foreign Affairs relied upon clearly indicates that the South African government will address the property rights and human rights of their citizens abroad "through diplomatic channels".[42]

74. We submit, that on its version, the South African government is required to invoke diplomatic channels in addressing violations of property and human rights of its citizens abroad. Recourse to diplomatic relations as a means to address the property and human rights of South African citizens abroad cannot be a matter of an obligation, but a right which reposes in a state, in a conduct of its foreign relations.[43]

75. *The TPD* held that the executive authority of *the Republic* was well placed to decide when and how it would resort to diplomatic channels, should it decide to intervene on behalf of the applicants. It also held that it would be

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42 Volume 10: p.33, para 58.

43 R (on the application of Abbasi and Another) v Secretary of State for Foreign and Common Wealth Affairs and Secretary of State for Home Department [2003] 3 LRC (Const), 297 (CA), paras 69, 78, 80 and 101.

inappropriate to restrain the powers of the executive by means of a court order, and for that reason it exercised its discretion against the applicants.[44]

76. We submit that the approach of *the TPD* is correct because: first, diplomatic powers require, by their very nature, a measure of diplomacy, secondly, factors which are often taken into account in the exercise of such powers include access to information and local knowledge and relationship with foreign states which the executive itself is appropriately well suited to take into account.[45]

77. We submit therefore that it will be inappropriate to order the respondents to intervene, as if they have a duty to do so, in terms of foreign policy pursued by them. It follows therefore that the reliance on the judgment of this court in Bato Star[46] by the *amicus curiae* is mistaken.

The rule of customary international law

78. We are not aware of any rule of customary international law which imposes a duty on the part of a state to intervene on behalf of its nationals or their

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44 Volume 1: *the judgment of the TPD*, p.23, para 30.

45 The Abbasi judgment: para 37.

46 Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism and Others 2004 (7) BCLR 687 (CC), paras 101 and 102.

properties in distress abroad. Insofar as we are able to establish, the rule of customary international law is that the state has a right, and not an obligation, to intervene, on behalf of its nationals. In Barcelona Traction's case, the rule was authoritatively expressed in this way –

> *"78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.*
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> *79. The State must be viewed as the sole judge to decide whether its protection will be granted, tow hat extent it is granted, and when it will cease. It retains in this respect a discretionary*

> *power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that."*[47]

79. From an international law perspective, the doctrine of "acts of state" also supports the discretion vested upon the state, and not an obligation, to elect whether to invoke diplomatic protection on behalf of its nationals or their properties in distress abroad. The doctrine is explained in Underhill v Hernandez as follows –

> *"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be*

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[47] Barcelona Traction, Light and Power Company Limited 1970 ICJ reports 3, paras 78 and 79;

Prof. Dugard: International Law, supra, pp.213 to 214;

See also - Hopkins: Diplomatic protection and the South African Constitution: Does a South African citizen have an enforceable constitutional claim against the government? – SA Public Law Vol 16: No.2 2001, at p.387.

obtained through the means open to be availed of by sovereign powers as between themselves."[48]

80. We submit therefore that there is no obligation on the respondents, as a matter of customary international law to intervene, on behalf of the applicants, in pursuit of diplomatic protection.

M. Extradition

81. One of the positive steps which the applicants claim the respondents are obliged to take is that the respondents must request the extradition of the applicants from Zimbabwe to *the Republic*.[49] *The TPD* found that there is no extradition treaty between *the Republic* and Zimbabwe. We submit that that finding is correct. It follows that any request for extradition, and subsequent judicial proceedings to determine the request for extradition will be regulated by the Zimbabwean Extradition Act, insofar as *the Republic* is entitled to request the extradition of a fugitive in Zimbabwe.

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48 168 U.S. 1897 250, at 252.

49 Volume 1: p.2, para 2 of the notice of motion.

82. We submit that the relevant provisions of the Zimbabwean Extradition Act make a clear distinction between a request for extradition, on the one hand, and judicial proceedings which are necessary to adjudicate upon such a request, on the other.

83. In the absence of an extradition agreement, a request for extradition may be entertained by the relevant authorities in Zimbabwe, whenever such a request is made by a foreign country which is designated in terms of section 13 of the Zimbabwean Extradition Act. It is common cause that *the Republic* has been designated in terms of section 13 of the Zimbabwean Extradition Act.[50] *The Republic* therefore is entitled, in appropriate circumstances, to make a request for extradition of a fugitive held in Zimbabwe.

84. A request may only be entertained if it relates to an extraditable offence committed in *the Republic*. That must be an offence which is punishable in the Republic by imprisonment of 12 months or more, and which would constitute an offence also punishable in Zimbabwe, had such an offence been committed in Zimbabwe.[51]

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[50] Volume 6: p.372, para 9.8; p.441, annexure "EB4".

[51] Section 14(2)(a) and (b) of the Zimbabwean Extradition Act.

85. The applicants say that the conduct of which they are accused constitutes an offence in *the Republic* in that it would contravene the provisions of the Regulation of Foreign Military Assistance Act, 15 of 1998.[52] That may be so, but it does not necessarily follow that a request for their extradition will be competent.

86. The applicants do not say that the conduct of which they may be accused, tried and convicted or acquitted in *the Republic*, under the Regulation of Foreign Military Assistance Act is also an offence and triable in Zimbabwe. They do not say that Zimbabwe has, within the range of offences under its criminal legal system, an offence of a similar nature. The charges they face in Zimbabwe do not include such an offence or of a similar kind.

87. We submit therefore that the applicants have not shown that a request by *the Republic* for their extradition from Zimbabwe to *the Republic* is competent. They have therefore failed to show that the request for extradition which they urge will relate to an extraditable offence in terms of section 14(2)(b) of the Zimbabwean Extradition Act.

88. Even if a request for extradition is competent, we submit that such a request is by its very nature a diplomatic act. There is no statutory or constitutional obligation which compels the relevant authorities in *the Republic* to make a

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[52] Volume 1: p.20, para 23.

request for extradition. Neither the provisions of the Zimbabwean Extradition Act nor the Extradition Act of *the Republic* impose an obligation to make a request. We also submit that the applicants do not have a right to be extradited from Zimbabwe to *the Republic*. It follows therefore that the order sought in paragraph 2 of the notice of motion is not competent.

89. Even if it is found that the respondents have a duty to make a request for the extradition of the applicants, such a request may lawfully be made once the investigations into the conduct of the applicants have been concluded, and the seventh respondent has formed an opinion that there is a prima facie case against the applicants.

90. *The TPD* held that it could not make a finding that the necessary investigations have been completed.[53] We submit that that finding is correct. The evidence of Mr Henning SC and Dr Pretorius that such investigations were ongoing and had not yet been completed, were not seriously contested by the applicants. Moreover, their invitation to the applicants to assist in the investigation so as to complete them were not taken up by the applicants.[54]

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53 Volume 1: *the judgment of the TPD*, p.26, para 31.

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

Volume 6: p.374, para 12.3 ;

Volume 7: p.492, annexure "EB8";

Volume 9 (unpaginated): p.2, paras 3 and 4 of the affidavit of Dr Pretorius.

91. It would be, in the words of *the TPD*, "a move not befitting a country of the stature and reputation" of *the Republic*, to make a request for extradition of the applicants, despite the clear evidence that the investigations into the offences in respect of which the extradition is sought have not yet been completed. An order to compel the Republic to make a request for extradition under those circumstances, will be inappropriate.

N. <u>Urgency</u>

92. In the court below the allegations made in support of the claim of urgency was that the extradition of the applicants to Equatorial Guinea was "imminent". In this court, the applicants say that that extradition still remains imminent.[55] We do not accept that the extradition of the applicants is imminent.

93. We submit that the applicants' claim is based on two factors, the first is that the government of Zimbabwe has recently designated Equatorial Guinea as a country with the necessary competence to make a request for extradition, and the second is that the government of Equatorial Guinea has made a request for extradition of the applicants and such a request will inevitably be approved, having regard to the fact that the extradition of the applicants was already discussed and agreed upon between the heads of state of the two countries.

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[55] The applicants' written submissions: p.6, para 9.

94. We submit that the applicants' claim conflates two separate issues, the request for extradition and the acceptance thereof, which as we have indicated are diplomatic actions of executive authorities, on the one hand, and the necessary judicial proceedings which must be undertaken in order to determine the grant or refusal of extradition, on the other.

95. Section 17 of the Zimbabwean Extradition Act provides for an extradition inquiry to be held by a magistrate. It also requires the magistrate concerned to be satisfied, amongst others, that the person sought to be extradited has committed an extraditable offence.[56] If the magistrate is not satisfied, he or she may refuse to grant the extradition.[57] The decision of the magistrate to grant or refuse an order for extradition is subject to appeal to the High Court.[58]

96. We submit that the judicial inquiry itself indicates that the extradition of the applicants to Equatorial Guinea is not imminent at all. There is therefore no basis to claim that the present application merits urgent attention of this court.

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[56] The necessary jurisdictional facts about which the magistrate must be satisfied are set out in section 17(1)(a) to (c) of the Zimbabwean Extradition Act.

[57] Section 17(2) of the Zimbabwean Extradition Act.

[58] Section 18(1) of the Zimbabwean Extradition Act.

O. The orders sought in the notice of motion

97. *The TPD* refused to grant the orders sought. It dealt with each of the prayers and gave reasons for refusing to grant the prayers. We deal with each of the prayers sought in the notice of motion. We submit, in respect of each prayer sought, that *the TPD* was correct for the reasons set out in its judgment and others which we advance more fully below.

Prayer 2

98. This prayer has two distinct separate elements. The first is that the respondents must take all reasonable and necessary steps to seek "the release" of the applicants from Zimbabwe and/or Equatorial Guinea. The second is that the respondents must take all reasonable and necessary steps to seek the extradition of the applicants from Zimbabwe and/or Equatorial Guinea.

99. It is common cause that the applicants have not yet been extradited to Equatorial Guinea, and that the orders sought in that regard would be meaningless.

100. There is no legal basis for the respondents to request the release of the applicants. The applicants themselves have not indicated what is the legal basis for such a request. An order directing the respondents to request the release would:

100.1 firstly, be inconsistent with the doctrine of acts of state, to which we have referred above;

100.2 secondly, impose an obligation upon the respondents to act in violation of the sovereignty of the independent state, when there is no basis to do so;

100.3 thirdly, constitute an unwarranted interference in judicial processes which are currently taking place in Zimbabwe.

101. We submit that this court has no jurisdiction at all to make such an order, but even if it did, it will not lightly make such an order.

102. Insofar as prayer 2 relates to the request for extradition of the applicants, we repeat our submissions that such a request is not competent, and will in any event, be premature.

103. We therefore submit that *the TPD* correctly rejected that prayer.

Prayer 3

104. *The TPD* found that there was never a dispute between the parties which would have justified the grant of a declaratory order sought in prayer 3. We submit that the approach by *the TPD* is correct.

105. Even if there was a dispute as to require the making of the declaration, the declaration sought was incompetent, simply because *the Republic* has no right at all to request the release of the applicants who are facing criminal proceedings. The applicants themselves have not suggested at all a legal basis for such a declaration.

106. To the extent that the declaration related to the entitlement to request the extradition of the applicants, that in itself is a matter of law which cannot become a subject-matter of a declaratory order. A declaratory order to confirm such a legal principle would amount to a mere advisory opinion or gratuitous legal advice.

107. The applicants have not indicated at all what misdirection *the TPD* committed when it refused to exercise its discretion to grant the declaratory order sought.

108. On a proper construction of its wording, that relief has a substantive effect beyond the mere declaration of rights. Its predicate is an entitlement, which *the Republic* supposedly have, to seek the release or extradition of the applicants from Zimbabwe to Equatorial Guinea, as they case may be. But the entitlement on which the declaration is sought, carry with it the sting of a positive obligation, namely, the request for the release or extradition of the applicants. That in itself widens the scope of the prayer beyond its declaratory effect.

109. In dealing with a relief not entirely dissimilar to prayer 3 in the notice of motion, the Court of Appeal in the Abbasi case had this to say –

> "*Although the formulation of this relief was the result of a process of amendment and re-amendment, it was almost comprehensively abandoned by Mr Blake in the course of oral submissions. He had, so it seemed to us, great difficulty in advancing his claim to relief in a form which could readily be transposed into an order of the court. There essence of his submission was that Mr Abbasi was subject to a violation by the United States of one of his fundamental human rights and that, in this circumstances, the Foreign Secretary owed him a duty under English Public Law to take positive steps to redress the position,*

> *or at least to give a reasoned response to his request for assistance. Mr Blake accepted that no legal proceedings established such a duty, but submitted that the increased regard paid to human rights in both international and domestic law required that such a duty should be recognised."*[59]

Prayer 4

110. Prayer 4 has the same effect as prayer 2. It contemplates the execution of a positive obligation by *the Republic* which is manifestly impossible of

[59] Abbasi, supra, pp310 to 311, para 25.

performance. It was, for the reasons advanced in regard to prayer 2, likewise correctly dismissed by *the TPD.*

111. We add that there is no legal or constitutional obligation of the kind contemplated in prayer 2. The absurd dimensions of prayer 2 become apparent when regard is had to the fact that the arrest of the applicants was effected in Zimbabwe and the applicants do not contend, at all, that that arrest was unlawful. Certainly, no such contention has been advanced during a series of criminal proceedings which have thus far taken place in Zimbabwe.

Prayer 5

112. The relief sought in this paragraph is predicated upon the mistaken premise that *the Republic* has an obligation to seek the assurance referred to in this

paragraph. The relief was correctly refused by *the TPD*, as it was, firstly premature and no factual basis for that relief had been shown. We have already submitted that the extradition of the applicants from Zimbabwe to Equatorial Guinea is not imminent and it is not necessarily the inevitable outcome of the applicants' arrest in Zimbabwe. On this ground alone, the prayer was correctly refused by *the TPD.*

113. We repeat our submissions that there is no constitutional or statutory obligation on *the Republic* to seek the assurance claimed in this prayer, and that the relief sought was correctly dismissed on that ground, too.

Prayers 6 to 8

114. The relief in these paragraphs contemplate positive obligations which are in themselves impossible of performance. *The TPD* was correct when it stated that this order is couched in broad and vague terms and it did not precisely spell out what it is that the respondents should do to ensure that the dignity of

the applicants is respected at all times.[60] *The TPD* was correct in stating that the remarks in respect of prayer 6 were applicable to prayers 7 and 8.

115. We submit that *the TPD* was therefore correct in dismissing these prayers also.

Prayer 9

116. This prayer contemplates some of supervisory regime by the registrar of *the TPD* to ensure the performance of the order which *the TPD* was requested to make. We submit that the comments made by *the TPD* in regard to this prayer should be repeated in this regard.[61]

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60 Volume 1: *the judgment of the TPD:* pp. 30 to 31, para 35.
61 Volume 1: *the judgment of the TPD:*, p.33, para 38.

P. **Other reasons which make the orders sought incompetent**

117. We submit that the relief sought by the applicants is impermissible. Accepting, as trite law, that the conduct of the executive arm of the government is subject to judicial review, we submit that the powers of the court to review the conduct of the executive in matters of foreign affairs would go no more than investigating whether the conduct is consistent with the obligations of the executive under *the Constitution* and whether such conduct has a rational basis.

What the court will not do is to examine the appropriateness or adequacy of a decision relating to foreign relations.[62]

118. The above approach is also consistent with the approach of foreign jurisdictions on the subject.[63] In Germany,[64] the courts have recognised the broad discretion enjoyed by governmental organs in dealing with political matters. It was observed that matters of foreign relations that the Constitution confers considerable discretion on foreign affairs agencies in assessing the practicality and feasibility of certain policies or actions.

119. In Baker v Carr[65] Justice Brennan, cited, with approval, the following passage from Oetjen v Central Leather Co.[66] –

> "*The conduct of foreign relations of our Government is committed by the Constitution to the Executive and Legislative- 'the political' – Departments of the Government, and the propriety of what may be*

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62 Prof. Barrie: Is the absolute discretionary prerogative relating to the conduct of foreign relations alive and well and living in South Africa? TSAR 2001.3, pp.409 to 410.

63 Donald P Kommers: Separation of powers (2nd Ed).

64 Rudolf Hess case (1980);

Schleyer Kidnapping case (1977).

65 369 U.S. 186, 82 S.Court. 691, 7 L.Ed.@d 663 (1962), on remand 206 F. Supp.341 (M.D.Tenn.1962).

66 246 U.S. 297, 302, 38 S.Ct 309, 310-311, 62 L.Ed. 726 (1918).

done in the exercise of this political power is not subject to judicial inquiry or decision."

120. The orders sought by the applicants will have a destabilising effect on the constitutional balance predicated on the principle of separation of power. Those orders will require this court to intervene in matters which repose in the executive branch of government, when there is no evidence to show that executive functionaries have failed to discharge constitutional or statutory duties imposed upon them, and when there is no evidence to show that such functionaries have engaged in any conduct which is inconsistent with *the Constitution*. In the absence of such evidence, the present application must be disposed of without further delay.

121. The South African legal position recognises judicial restraint in pronouncing upon alleged unlawful conduct of foreign states.[67] We submit that the authorities cited in the Swissborough Diamond Mines case are equally applicable where the applicants are inviting the above Honourable Court to make pronouncement on the conduct of Zimbabwe and Equatorial Guinea when no proper basis exists for doing so.

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[67] Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 (T), at 330D-334C.

Q. Costs

122. The present application for leave to appeal has been launched on an urgent basis and during recess. It involves issues that are complex and require substantial consideration. The respondents were entitled to engage the services of three counsel. We submit that it was reasonable and necessary for the respondents to do so. In the event the application is dismissed, the costs order should cater for the costs occasioned by the engagement of four counsel.

123. We therefore request the following order:

123.1 the application for leave to appeal be dismissed with costs;

123.2 the costs should include those consequent upon the engagement of four counsel.

DATED at JOHANNESBURG on this the 13th day of JULY 2004.

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I A M SEMENYA SC

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I V MALEKA SC

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M MPHAGA

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E MOKUTU