**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**(HELD AT CONSTITUTIONAL HILL)**

**CASE NO.**

In the matter between:

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| **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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**APPLICATION FOR LEAVE TO APPEAL IN TERMS OF CONSTITUTIONAL COURT RULE 19**

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**INTRODUCTION**

1. BE PLEASED TO TAKE NOTICE that the applicants hereby apply to the above Honourable Court in terms of Constitutional Court Rule 19 for leave to appeal directly to the above Honourable Court against the whole of the judgment and order of His Lordship Mr Justice Ngoepe, the Honourable 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.

And further

2. That the Honourable Court dispense with the usual forms and service provided for in the Constitutional Court Rules, and allow this application to be brought forthwith as a matter of urgency.

3. That the costs of this application be costs in the appeal to the above Honourable Court.

4. Granting further and/or alternative relief.

**DECISION AGAINST WHICH APPEAL IS BROUGHT**

5. As aforestated, the appeal is brought against the judgment of His Lordship Mr Justice Ngoepe delivered on 9 June 2004 in the High Court of South Africa, Transvaal Provincial Division, under Case No 12967/2004. A copy of the said judgment is annexed to the affidavit of Alwyn Griebenow ("Griebenow"), which is annexed hereto, marked “CC1”.

**THE CONSTITUTIONAL MATTERS INVOLVED**

6. The main constitutional matters in issue are the following:

6.1. The supremacy of the Constitution;

6.2. The extra-territorial effect of the Constitution;

6.3. The interpretation of the above Honourable Court’s judgment in *Mohamed and Others v The President of South Africa and Others* 2001 (3) SA 893 (CC) (“the *Mohamed* judgment”);

6.4. The separation of powers between the Judiciary and the Executive;

6.5. The applicants’ right to life (section 11 of the Constitution), right to dignity (section 10 of the Constitution), right to freedom and security of person including the right not to be subjected to torture, violence, or cruel, inhuman or degrading treatment or

punishment (section 12 of the Constitution), right to fair detention and fair trial (section 35 of the Constitution) and the South African Government's ("the Government") obligation to protect such rights of the applicants, its nationals, particularly whilst the applicants are in foreign countries.

**OTHER ISSUES**

7. Other issues are:

7.1. Whether there is a legal duty on the Government to make representations on behalf of the applicants.

7.2. Whether a Court can request the Government to ensure that the constitutional rights of South African citizens are protected.

7.3. The content and effect of Government's foreign policy and whether Government is bound to adhere to such foreign policy.

7.4. The relief to be ordered.

**GROUNDS OF APPEAL**

8. The grounds of appeal are that the learned Judge *a quo* with respect erred in law and in fact in the following respects:

8.1. The learned Judge President erred in not attaching sufficient weight to the supremacy of the Constitution and adopted an overly restrictive approach in regard to the applicants' constitutional rights.

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.

8.2. The learned Judge President erred in finding, by implication, that the Constitution does not have extra-territorial effect.

8.3. The learned Judge President erred, in paragraph 16 (p10) of the judgment, in holding that sufficient evidence was not produced before the Court in regard to the efficacy and quality of the legal and judicial systems of Equatorial Guinea and Zimbabwe to entitle the applicants to the relief sought, and that "expert evidence" would be required in this regard, and in doing so, failing to attach any or sufficient weight to the following reports:

8.3.1. The report of the International Bar Association Human Rights Institute;

8.3.2. The report of Amnesty International dated 19 March 2004 headed "Equatorial Guinea – Alleged Mercenaries And Opposition Activists At Grave Risk Of Torture And Death";

8.3.3. The report of Advocate J S M Henning SC – Deputy National Director of Public Prosecutions and the Head: National Prosecution Services in South Africa;

8.3.4. The report of Mr Alejandro Artucio, Special Rapporteur of the Commission on Human Rights of the United Nations on Equatorial Guinea;

8.3.5. The report of Dato Param Cumaraswany, the former UN Special Rapporteur on the Independence of Judges and Lawyers;

8.3.6. The report of the Human Rights Committee of the General Council of the Bar;

8.3.7. The report of the Executive Director of Zimbabwe's Lawyers for Human Rights, Mr Arnold Tsunga; and

8.3.8. Various press releases concerning the situation in Zimbabwe issued by the International Bar Association.

8.4. The learned Judge President erred in not attaching any or sufficient weight to:

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

8.4.2. 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;

8.4.3. 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;

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

8.4.5. 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;

8.4.6. 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.

8.5. 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 is no prospect of the applicants receiving a fair trial in Zimbabwe;

8.6. The learned Judge President erred in finding by implication, 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 trial as set out in the Constitution, and in doing so

not attaching any or sufficient weight to the fact that such rights cannot be waived (paragraph 20, p12);

8.7. The learned Judge President erred in finding (paragraph 21, p12) 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. In this regard the learned Judge President further failed 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;

8.8. The learned Judge President erred in failing to attach sufficient weight to the overwhelming evidence that the South African

Government acquiesced in and assisted in the arrest of the applicants in Zimbabwe;

8.9. The learned Judge President erred in finding, by implication, that as the exchange of intelligence information between South African and Zimbabwe was legitimate, the applicants were not entitled to the protection of the Constitution and therefore not entitled to the relief sought. In this regard the learned judge erred in not attaching sufficient weight to the fact that the relief requested by the applicants was not dependent upon the exchange of information, but upon the terms and provisions of the Constitution itself;

8.10. The learned Judge President erred (paragraph 22, p13) in holding that the issuing of Government policy does not give rise to a legal duty;

8.11. The learned Judge President erred (paragraph 23, p14) 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;

8.12. The learned Judge President erred (paragraph 24, p16) in finding that the unlawful removal of the applicants from South Africa was the cornerstone of the Mohamed judgment and that this entitled Mohamed to the relief sought in that matter, and in failing to find that the Constitution and the right to life, dignity and the like formed a cornerstone of the Mohamed judgment and entitled the applicant in that matter to the relief sought therein,

The learned Judge President erred in not finding that the right to life and dignity is absolute and that the effect of the Mohamed judgment is clearly extra-territorial;

8.13. The learned Judge President erred (paragraph 25, p18) in finding that there was "*no evidence that the Government has refused or is refusing to make the requested interventions*". In view of the fact that it was not at any stage suggested in the affidavits filed on behalf of the respondents or in submissions made on their behalf during the hearing that the Government had in fact done so or intended doing so, the learned Judge ought to have taken

into account the fact that it was the Government's case that it is not legally obliged to make the requests sought in the application. The learned Judge further ought to have had regard to the fact that mandatory interdicts are often issued by our Courts.

8.14. The learned Judge President erred (paragraph 27, p20) in finding that the Government had complied with its own foreign policy in relation to its nationals and other countries, and in doing so not having regard to the fact that it was common cause 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 countries;

8.15. The learned Judge President erred (paragraph 8, p22) in finding, by implication, that it would be appropriate for the Government to intervene only after the death sentence has been imposed, and not before, and not attaching any or sufficient weight to the fact that if this approach were to be followed it would amount to an infringement of various of the applicant's constitutional rights, and any action taken by the Government after the imposition of the death sentence would, on the probabilities, be too late to prevent the applicants' death.

8.16. The learned Judge President erred (paragraph 30, p23) in not finding that the Mohamed judgment is not, in principle, distinguishable from the present matter.

8.17. 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.

8.18. The learned Judge President erred (paragraph 31, prayer 2) 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. In this regard the learned Judge also erred in attaching no or sufficient 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 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.

8.19. The learned Judge President erred (paragraph 32, prayer 3) in finding that the applicants are not entitled to the declarator sought as it was only in the answering affidavit that the respondents for the first time conceded that South Africa is in law entitled to seek the extradition of the applicants from Zimbabwe.

8.20. The learned Judge President erred (paragraph 33, prayer 4) in finding that the request sought was "strange" particularly in view of the fact that the applicants' lives are threatened and that in terms of the Mohamed judgment, they are entitled to request

Government to seek the assurance sought, and in not attaching any or sufficient weight to the fact that all that was sought is that Government **seek** an assurance, and not to enforce the request.

8.21. The learned Judge President erred (paragraph 34, prayer 5) in likening the position to a South African citizen facing a charge of theft of a packet of cigarettes in Zimbabwe as the applicants are in fact facing the death penalty in Equatorial Guinea;

8.22. The learned Judge President erred (paragraphs 35, 36, and 37; prayers 6, 7 and 8) in finding that the applicants are not entitled to the relief sought, and in doing so not having regard to the fact that what the applicants have sought, in simple and non-prescriptive terms, is the enforcement of their constitutional rights as guaranteed in the Constitution.

**SUPPLEMENTARY INFORMATION OR ARGUMENT**

9. Copies of the application brought before His Lordship Mr Justice Ngoepe ("the main application"), the applicants' heads of argument, the respondents' heads of argument and the *amicus curiae* heads of argument, in the Court *a quo*, are annexed to Alwyn Griebenow's affidavit annexed hereto, marked respectively "CC2", "CC3", "CC4" and "CC5". (In

order not to unnecessarily burden the record, copies of the authorities referred to in the heads of argument have not been annexed).

10. It will not be necessary to have the record of the hearing transcribed as the application was brought on affidavit.

11. In view of the length of the record and the complexity of the issues involved, it is respectfully submitted that that the circumstances may require a hearing of two days.

12. **INVOLVEMENT OF ANY OTHER COURT**

The applicants have not applied for leave to appeal to any other Court and do not intend to do so, unless of course if so directed by the Honourable Court.

**CONCLUSION**

13. Wherefore it is respectfully prayed that the Honourable Court grant an order in terms of paras 1 to 3 above.

DATED AT SANDTON THIS DAY OF JUNE 2004

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**GRIEBENOW ATTORNEYS**
Applicants' Attorneys

CARE OF:
**WEBBER WENTZEL BOWENS**
Applicants' Attorneys
10 Fricker Road
ILLOVO BOULEVARD
Johannesburg
Tel: 5305000
Fax: 5305111
Ref: Mr C Giliomee

TO : THE REGISTRAR OF THE ABOVE HONOURABLE COURT

AND TO : **THE STATE ATTORNEY**
First to seventh respondents' attorneys
Fedsure Building
Cnr van der Walt / Pretorius Streets
PRETORIA
Ref: MB/KF 2071/2004/Z4

AND TO: **THE EMBASSY OF ZIMBABWE**
798 Merton Avenue
ARCADIA
Pretoria

AND TO: **THE EMBASSY OF THE REPUBLIC OF EQUATORIAL GUINEA**
48 Florence Street
COLBYN
Pretoria

AND TO : **THE SOCIETY FOR THE ABOLITION OF THE DEATH PENALTY**
Intervening Party
CARE OF
Mr William Kerfoot

Legal Resources Centre
54 Shortmarket Street
CAPE TOWN