IN THE CONSTITUTIONAL COURT FOR THE REPUBLIC OF SOUTH AFRICA

CASE NO. CCT 23/01

In the matter between:

DAVID ASHLEY PRICE Applicant

and

THE STATE Respondent

REPLYING AFFIDAVIT

I, the undersigned,

DAVID ASHLEY PRICE

do hereby make oath and say that:

1. I am the Applicant herein.

2. I refer to the Answering Affidavit of LESLIE JAMES ROBERTS filed of record in the application. I wish to reply thereto as follows:

2.1 AD PARAGRAPH 4 THEREOF:

2.1.1 The deponent was clearly not aware of the error in paragraph 1.3 of my original Notice of Motion. I refer to my supplementary affidavit and Notice of Application to

amend the Notice of Motion filed herewith in this regard. In the main the relief which I am seeking is for the declaration of an unfair trial and the setting aside of my convictions on two counts of fraud in the High Court of South Africa (South Eastern Cape Local Division) under case number CC54/99 on 11 September 2000; alternatively granting me special leave to appeal to the above Honourable Court against my convictions; further alternatively for leave to appeal to the Supreme Court of Appeal against my convictions. Further orders are sought declaring the petition procedure in the Supreme Court of Appeal as invalid and inconsistent with the Constitution and directing the Respondent to pay the costs of the application. I respectfully refer to my Notice of Application and Amended Notice of Motion filed herewith.

2.1.2 I respectfully submit that the Application, in respect of the main relief sought by me is in terms of Rule 10 of the Rules of the above Honourable Court, and in respect of the alternative relief sought, in terms of Rule 17. Further argument will be adduced on my behalf in this regard at the hearing of the matter.

2.2 AD PARAGRAPH 5 THEREOF:

2.2.1 In respect of the provisions of Rule 17(2)(c) and (d), I respectfully submit that the matter can be dealt with by the above Honourable Court without the hearing of oral

evidence. I apologise for not dealing with this aspect in my Founding Affidavit and respectfully pray that it may please the

above Honourable Court to condone my failure in this regard.

2.2.2 In respect of the requirements set out in Rule 17(2)(a) and (b), these have been dealt with in my Founding Affidavit, but in amplification and/or clarification:

(i) Various aspects of unfairness have been highlighted both pre- and post trial. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted. The various infringements of this fundamental right of mine have resulted in such wrongful convictions and the impairment of my rights, *inter alia,* to liberty and dignity. I respectfully submit that without the intervention of the above Honourable Court to enforce and protect my constitutional rights, I will be left to languish in prison for crimes of which I am innocent and in respect of which I should never have been convicted.

(ii) There is no other court which I may approach, except in respect of my appeal against the sentences imposed on me. The petition procedure in the Supreme Court of Appeal has in effect closed the door on my constitutional right of review by, or appeal to, a higher court; and

(iii) There are good prospects of a successful appeal against my convictions should I be granted leave to appeal to this Honourable Court, alternatively to the Supreme Court of Appeal.

2.2.3 In the premises I respectfully submit that it is in the interests of justice that I be allowed, with the leave of the above Honourable Court, to approach it directly for the relief which I seek in the amended Notice of Motion.

2.3 AD PARAGRAPHS 6 AND 8 THEREOF:

2.3.1 The reported judgment of Christian Education South Africa vs Minister of Education 1998(12) BCLR 1449(CC) is distinguishable from mine. Except in respect of the appeal against my sentences to the Supreme Court of Appeal, there is no other court which I can approach for the relief which I seek. This cannot be in the interests of justice.

2.3.2 I do not believe that Rule 18 is of application. Mr Justice Jansen has refused me leave to appeal against my convictions. It is inconceivable that he should now grant me leave to approach the above Honourable Court. In any event Rule 18 presupposes that Mr Justice Jansen has ruled on a constitutional matter, which he has not.

2.4 AD PARAGRAPH 7 THEREOF:

I respectfully submit that Rule 20 is also not of application as the Supreme Court of Appeal has not ruled on a constitutional matter.

2.5 AD PARAGRAPH 10 THEREOF:

2.5.1 The deponent misses the point that my right to a fair trial, both pre-trial, during and after, are tainted with constitutional

irregularities which is fact infringed *inter alia* my fundamental right to a fair trial.

2.5.2 I am advised that the above Honourable Court has adopted a more flexible approach in respect of the submitting of further evidence on appeals to it. I respectfully submit that it is in the interests of justice in the circumstances of my matter to have the evidence of LUBBE placed before the above Honourable Court.

2.5.3 It is significant I respectfully submit, that the deponent has not sought to deny that the police tampered with the video evidence. This is an astounding indictment of the South African Police Service and one which supports the contention that I was wrongfully convicted.

2.6 AD PARAGRAPHS 11 AND 15 THEREOF:

It is my respectful contention that the deponent has an obligation as an officer of the court to vigilantly protect and enforce an accused's rights in terms of the Constitution. All and any infringements under the Constitution must be regarded seriously, whether they are brought to the deponent's attention during or after the trial.

2.7 AD PARAGRAPH 12 THEREOF:

I respectfully submit that the "new material" is significant in the context of the issues presented to this Honourable Court and that it is in the interests of justice that I be allowed the opportunity to submit same.

2.8 AD PARAGRAPH 13 THEREOF:

I respectfully submit that the fact of the infringement of my right to a fair trial is the crux of the matter. This again lends favour to the contention that I was wrongly convicted. This too is a startling indictment of the South African Police Service and one which should, with respect, sound alarm for the deponent.

2.9 AD PARAGRAPH 17 THEREOF:

I repeat my contention that my pre-trial right to silence is absolute. Further argument will be adduced on my behalf at the hearing of the application in this regard.

2.10 AD PARAGRAPH 18 THEREOF:

The misdirections are substantial and in my respectful opinion clearly demonstrate the extent to which I will be prejudiced unless I am afforded a right of review by, or appeal to, a higher court.

2.11 AD PARAGRAPHS 19 AND 24 THEREOF:

I am aware that the validity of section 51 of Act No. 105 of 1997 has been pronounced upon by the above Honourable Court. I agree that the issue of the correct application of the relevant section will fall to be determined by the

Supreme Court of Appeal in the appeal against my sentences.

2.12 AD PARAGRAPH 21 THEREOF:

Further argument will be adduced on my behalf at the hearing of the application.

2.13 AD PARAGRAPH 22 THEREOF:

I do not agree that my complaints are based on unwarranted assumptions. A litigant who has been aggrieved by the decision of the Supreme Court of Appeal on a constitutional matter may approach the above Honourable Court in terms of Rule 20 for Special Leave to Appeal to it. Why then should I not be allowed to approach the above Honourable Court as an appeal court on the basis of my complaint of constitutional irregularities where the Chief Justice has refused me leave to appeal against my convictions pursuant to a procedure which I respectfully contend does not pass constitutional muster.

GENERAL:

3. I further respectfully request the above Honourable Court to condone my failure to comply with the Rules of the above Honourable Court in respect of the late filing of my Replying Affidavit.

4. BELINDA HARTLE who was my local attorney and who acted *pro amico* for me closed practice at the end of June 2001 and has commenced pupillage at the Bar. As a result she could not deal with my outstanding Reply or instruct my attorneys of record at the seat of the above Honourable Court to apply for my application to be enrolled for hearing.

5. Presently I have made other arrangements for my continued representation in the matter by local attorney, CHARL VAN ROOYEN.

6. Wherefore I respectfully pray that it may please the above Honourable Court to grant me the relief prayed for in the amended Notice of Motion.

DEPONENT

SIGNED and SWORN at PORT ELIZABETH before me on this 27TH day of JULY 2001, the Deponent having acknowledged that he knows and understands the contents of this Affidavit which was deposed to in accordance with the regulations governing the administration of an oath as more fully set out in Government Notice R 1258 of the 21st July 1972, as amended by Government Notice 1648 dated the 19th August 1977.

COMMISSIONER OF OATHS