

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 136/12

In the application of:

SOUTHERN AFRICA LITIGATION CENTRE

Applicant

To be admitted as *amicus curiae* in the matter of:

MAIL AND GUARDIAN MEDIA LIMITED

First Applicant

INDEPENDENT NEWSPAPERS (PTY) LIMITED

Second Applicant

MEDIA 24 LIMITED

Third Applicant

and

**M J CHIPU N.O. (CHAIRPERSON
OF THE REFUGEE APPEAL BOARD)**

First Respondent

KREJCIR, RADOVAN

Second Respondent

MINISTER OF HOME AFFAIRS

Third Respondent

FOUNDING AFFIDAVIT IN APPLICATION FOR ADMISSION AS *AMICUS CURIAE*

I, the undersigned,

NICOLE FRITZ

state under oath as follows:

INTRODUCTION

1. I am the Executive Director of the Southern Africa Litigation Centre ('SALC'), which has its office at President Place, 1 Hood Avenue, Rosebank, Johannesburg.
2. The allegations in this affidavit are true and correct and, save where the context indicates to the contrary, are within my personal knowledge.
3. I am duly authorised to bring this application on behalf of SALC, which has resolved to institute these proceedings.
4. The purpose of this application to seek the leave of the Constitutional Court for SALC to be admitted as *amicus curiae* in this matter in terms of Rule 10 of the Rules of the Constitutional Court.
5. I deal with the following issues in turn:

- 5.1. The consent of the parties;
- 5.2. The interest of SALC;
- 5.3. How SALC contends it can assist the Court;
- 5.4. A summary of the submissions that SALC wishes to advance before this Court – in writing and orally – should leave be granted to participate as an *amicus curiae*;
- 5.5. Conclusion.

CONSENT

6. On 20 March 2013, SALC's attorneys of record requested the written consent of all the parties to SALC's admission as *amicus curiae*. Parties were requested to respond by 25 March 2013 at 10h00. A copy of this letter is **NF1**.
7. On 22 March 2013 the first, second and third applicants consented to SALC's request. A copy of the letter of consent is **NF2**.
8. The second respondent consented to SALC's request on 24 March 2013. A copy of this letter of consent is **NF3**.
9. On 25 March 2013, the State Attorney telephonically advised Alicia Raymond, an attorney at the Wits Law Clinic, SALC's attorneys of record, that the first and third respondents have consented to SALC's participation as *amicus curiae* and that a letter of consent would be supplied in the near future. A copy of the letter

of consent will be supplied to the Registrar of the Court as soon as it becomes available.

10. The second respondent filed its heads of argument on 18 March 2013. This application will be served and filed within the time frames prescribed by Rule 10 of the Rules. In view of the fact that the parties have indicated their consent to this application, no opposition is anticipated.

THE INTEREST OF SALC

11. SALC is a regional human rights non-governmental organisation that seeks to promote and advance human rights and the rule of law in Southern Africa through research capacity building, training and advocacy, and strategic litigation.
12. Pursuant to SALC's Deed of Trust its objectives are three-fold:
 - 12.1. To offer rapid response support relating to human rights, constitutional and public interest cases;
 - 12.2. To support and act as a catalyst to lawyers on prospective cases for the timeous preparation and resolution of human rights cases;
 - 12.3. To promote awareness of human rights litigation frontiers and capacity building and to stimulate advocacy for law reform, human rights and constitutionalism.

13. A copy of SALC's Deed of Trust is attached as **NF4**.
14. SALC works, primarily, within the following thematic areas: HIV/AIDS; international criminal justice; media defence; prisoners' rights; regional advocacy; sex worker/LGTBI rights and securing the right to information. It also works on other issues falling within its mandate where the need arises.
15. SALC works closely with several law societies and bar associations throughout Southern Africa and several of the most pre-eminent human rights defence institutions in the region. SALC has observer status at the African Commission for Human and People's Rights.
16. SALC monitors relevant laws and practices in Southern Africa, in the light of international human rights standards, including the development of national case law which, as in this case, can contribute to the development of international human rights protection.
17. Since its establishment in 2005, SALC has supported and participated in a number of high profile human rights related cases in South Africa, Namibia, Botswana, Lesotho, Swaziland, Zimbabwe, Zambia and Malawi.
18. SALC's mandate recognises the role that domestic recognition, observance and application of international law can play in providing content to national obligations to respect, protect and promote human rights within a variety of contexts.

19. Through its involvement in the promotion of human rights in Southern Africa and through public interest litigation, SALC aims to assist domestic courts to provide practical and substantive content to national obligations that are sourced in or informed by a variety of international instruments and the interactions between them. In this regard, SALC believes that public interest litigation has the potential to develop jurisprudence and set precedents applicable to hundreds of other cases, both in South Africa and beyond. Litigation of this nature can serve to foster respect for the rule of law and can contribute to the creation and maintenance of an environment conducive to the promotion, protection and realisation of human rights.

20. Through its international criminal justice programme, SALC monitors international justice and its development in Southern Africa. SALC's objective is to ensure that Southern African states are fully aware of their legal obligations, and through litigation, research and advocacy, to encourage Southern African states to give effect to these obligations. SALC's work in the international criminal justice programme is in keeping with a widely-shared acceptance that the realisation of international criminal justice will primarily be in domestic forums through complementary initiatives. SALC seeks to uphold and strengthen domestic legal systems to the advantage not only of international criminal justice but the rule of law generally.

21. SALC is particularly cognisant of the importance of a refugee system offering maximum protection to those meeting the requirements for or qualifying for such status. However, the abuse of the refugee system can put at risk recent global advances aimed at securing accountability for serious international crimes. It is in part in light of this concern that SALC seeks to participate in these proceedings.
22. In light of the above, it is respectfully submitted that SALC has an interest in these proceedings and is well placed to assist the Court in its consideration of the matter before it.

ASSISTING THE COURT

23. SALC is of the view that this matter raises fundamental questions which South African courts have not yet had the opportunity to consider. In short, it concerns the constitutionally permissible ambit of confidentiality in the context of refugee law. The decision of the Court will ultimately assist those responsible for the administration of the Refugees Act and provide guidance to South African courts faced with similar questions.
24. SALC's participation will be directed at assisting the Court to consider the important questions that arise in light of relevant principles of international law and more particularly South Africa's international criminal justice obligations and their interaction with refugee law. It will also be directed at assisting the Court to consider relevant foreign law. It is thus SALC's work in the area of international

criminal justice and its exposure to foreign law norms that will inform its participation as *amicus curiae*.

25. SALC's motivation to participate in this particular matter stems more particularly from a concern that a system in which confidentiality is absolute potentially renders the refugee and asylum system more susceptible to abuse by placing its administration beyond the purview of constitutional safeguards designed to prevent such a state of affairs. Put differently, absolute confidentiality may, in certain circumstances, negatively impact upon South Africa's ability to adhere to its obligations assumed under international law and more particularly those relating to international criminal justice.
26. The parties do not address these dimensions in their submissions.
27. The case before the Court raises issues of considerable public importance which may have an impact far beyond the present litigants. Through its work, SALC has developed expertise in respect of the issues that arise in this case, which will allow it to make a number of relevant and new submissions on international law, which would, we submit, be of value and assistance to the Court.
28. SALC has, through its work, also been exposed to norms and precedents in other foreign jurisdictions which are relevant to the proceedings before the Court. Its exposure and understanding of foreign jurisdictions will also be of assistance to the Court in performing its obligations in terms of section 39 of the Constitution.

29. SALC has had the opportunity of considering the heads of argument submitted by the parties in this matter as well as the judgment of Fabricius J in the North Gauteng High Court. It will not repeat submissions advanced by the other parties.
30. SALC respectfully agrees with the parties that refugees are one of the most vulnerable groups in a society and that their well-being depends on the manner in which they are treated in the state to which they turn for protection. Adequate protection of refugee and asylum claimants depends on a number of factors, of which confidentiality is one of the most important. SALC's submissions will thus acknowledge the fundamental importance of confidentiality in the context of refugee applications.
31. However, SALC wishes to point out that in rare instances lifting confidentiality is necessary to achieve the same aims that confidentiality seeks to achieve and that doing so serves to enhance compliance with South Africa's international law obligations in the international criminal justice context.
32. To this end, SALC will advance relevant arguments dealing with the interface between South Africa's duties to protect refugees and its duties in the international criminal justice context. In doing so, it will deal with relevant international law as applied to the domestic context.

33. SALC will also refer to foreign case law and experience that has not been dealt with by the parties.

SALC'S SUBMISSIONS

34. I now deal briefly with the submissions the SALC intends to make. These can conveniently be summarised under two headings, being:

34.1. Limited instances in which absolute confidentiality may undermine other legal obligations and in particular those under international law;

34.2. Submissions relating to foreign law.

35. At the outset I point out that the approach SALC adopts is informed in part by the fact that this case will have far-reaching effects beyond the facts and circumstances of the particular case before it. South Africa's legal framework concerning refugees consists of a number of interrelated processes, all of which are subject to the confidentiality clause in section 21(5) of the Refugees Act 130 of 1998 (*the Refugees Act*). Consequently, the interpretation and validity of the confidentiality clause has implications not only for access to the media and refugee appeal hearings but for the refugee determination process more broadly.

36. In addition to the interests addressed by the parties such as the right to just administrative action, the principle of legality, open and transparent and

accountable decision-making and media freedom, other interests are implicated. This includes those that arise from international law and international customary law in particular in the international criminal justice context.

37. I now elaborate briefly on the submissions to be made under the two headings referred to above.

Limited instances in which absolute confidentiality may undermine other legal obligations

38. First, the submissions will deal with instances where absolute confidentiality may either frustrate the broader purpose and objectives of the Refugees Act or affect the credibility, integrity and sustainability of the refugee protection regime. In this regard, SALC will:

38.1.1. Highlight the interaction between international criminal law and refugee law; and

38.1.2. Address the impact that absolute confidentiality may have on South Africa's obligations under international criminal law.

39. In the 15 years since the enactment of the Refugees Act the issue of the confidentiality clause has received the attention of South African courts on only two occasions. The first is the present matter. The second is a case before the North Gauteng High Court in which the refugee status determination in respect of

an individual accused of international crimes was brought under judicial review in terms of section 4(1)(a) of the Refugees Act, which prohibits the granting of refugee status to those accused of serious international crimes. In this case the confidentiality clause is being relied on to withhold the record of the decision.

40. The fact that confidentiality so rarely arises in legal proceedings confirms the respect paid by those responsible for the administration of the Refugees Act. This is important in light of the protection that refugee laws provide to the vulnerable and persecuted.
41. There are however, circumstances, in which, in SALC's submission, absolute confidentiality is not justified.
42. Section 4 of the Refugees Act provides a clear example of such a circumstance. That section creates an exclusion clause by identifying persons not eligible for refugee status. The exclusion assessment is a mandatory assessment in the refugee determination process. Section 4(1)(a) provides that
"a person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes"
43. Refugee and immigration laws therefore, if administered properly, have the potential to safeguard a country from becoming home to persons attempting to evade justice for serious international crimes. Exclusion clauses feature in all national laws and international instruments dealing with refugees and prohibit

states from granting refugee status to persons accused of war crimes, crimes against humanity and genocide. The application of exclusion clauses is widely regarded as a central component of refugee law. However, if absolute confidentiality prevails, these processes will remain hidden. South Africa's duties under international criminal law warrant a more qualified approach to confidentiality viewed in this light.

44. The proper administration and application of the exclusion clause enables states to complement efforts at accountability for international crimes, whilst ensuring only those deserving of protection are provided with protection. Overburdened refugee systems however are susceptible to abuse and misadministration and may result in countries becoming safe havens for perpetrators of heinous crimes under the guise of being refugees.
45. All countries are under a legal duty to ensure that only the vulnerable, and not those who cause vulnerability, are afforded the protections and rights accorded by the grant of refugee status. The overarching importance of preserving refugee status for only those in genuine need of protection is integral to maintaining the credibility and integrity of the refugee protection regime, if not its sustainability.
46. Absolute confidentiality can have the effect of removing exercises of public power from public and judicial scrutiny. In turn, absolute confidentiality may frustrate South Africa's ability to comply with international and South African law. It may hinder the performance of exclusion assessments in accordance with international law and best practices. In a constitutional democracy transparency

is of the utmost importance and an accountable and transparent civil service is a foundational goal of South Africa's constitution.

47. Allowing applications and decisions of this nature to be shrouded by absolute confidentiality is, viewed in this light, potentially both dangerous and unlawful and can undermine accountability.

48. Exclusion crimes trigger other binding international law obligations that South Africa has assumed, either through ratification of relevant international law treaties or obligations that exist by virtue of their status under international customary law. These obligations have to be considered, and adhered to in conjunction with the country's international refugee law obligations.

49. In light of the above, absolute confidentiality therefore has the potential to allow South African authorities to withhold reasons for decisions granting perpetrators of international crimes refugee status which protects the authorities from accounting for controversial decisions and shields international criminal suspects from accountability for such crimes. This in turn may:
 - 49.1. Threaten to undermine the integrity and credibility of the refugee system;
 - 49.2. Compromise South Africa's adherence to its obligations under the Refugees Act, specifically section 4; and
 - 49.3. Jeopardise other binding international obligations South Africa has assumed under other international customary law and international agreements such as the Rome Statute, Geneva Conventions, Genocide

Convention and corresponding national legislation which require South Africa to ensure perpetrators of international crimes do not evade justice.

Foreign law

50. Secondly, SACL will in its submissions consider the manner in which other common law jurisdictions have sought to balance the need to maintain confidentiality while acknowledging that in certain circumstances confidentiality can be lifted in order to achieve other constitutionally permissible goals.
51. In this regard SALC will only deal with case law, and in some measure, legislation, of other jurisdictions that has not been put forward by other parties. SALC is very mindful that certain aspects of foreign law have been addressed by the parties. However, further assistance can be gleaned from foreign law to which the Court may have regard in terms of section 39 of the Constitution.
52. Questions about the ambit of confidentiality are by no means unique to South Africa as appears from an evaluation of legislation, practice and jurisprudence. South Africa's refugee regime is relatively young compared to other common law jurisdictions that have enacted refugee legislation.
53. Other jurisdictions have developed approaches that recognise the importance of maintaining confidentiality, but acknowledge that in rare and specific instances confidentiality can and should be lifted. The SALC wishes to place this

information before the Court insofar as it has not been addressed by other parties.

54. More particularly, SALC wishes to bring to the attention of this Court legislation and judicial pronouncements in which legislatures and foreign courts have evaluated confidentiality in refugee law within a variety of contexts.

55. In particular, SALC wishes to draw attention to:

55.1. A similar constitutional challenge brought in Canada that evaluates the constitutional implications of confidentiality in refugee hearings;

55.2. A case in which a New Zealand court found confidentiality to be waived by public statements made by a refugee claimant;

55.3. Cases in which refugee applications can be shared where such information points to serious criminal activity.

56. These cases have not been drawn to the attention of the Court.

CONCLUSION

57. Whether confidentiality is statutorily provided for or judicially endorsed, the approach must be one that maintains the integrity of the refugee system and is responsive to the vulnerability of refugees, but at the same time one that does not frustrate South Africa's ability to give effect to the objectives contained in the Refugees Act or that prevents South Africa from giving effect to other complementary or competing obligations it has assumed.
58. I respectfully submit that the nature of the submissions proposed to be advanced by SALC covers aspects that have not been traversed by any of the parties to these proceedings.
59. I submit that SALC's submissions will assist the Court in determining the issues before it and, in light of its interest in the subject matter of the proceedings, request that the relief sought in the notice of motion is granted.

NICOLE FRITZ

I certify that the above affidavit was signed and sworn to at _____ before me on this the _____ day of **MARCH 2013** by the deponent after she declared that she knew and understood the contents of this affidavit, that she had no objection to taking the prescribed oath which she regarded as binding on her conscience, and after she uttered the words: *"I swear that the contents of this affidavit are true, so help me God"*.

COMMISSIONER OF OATHS