IN THE SUPREME COURT OF APPEAL
OF SOUTH-AFRICA

SCA Case No: 992/2015
NGHC Case No: 30123/2011

In the matter between:

CONSORTIUM FOR REFUGEES AND MIGRANTS	**Appellant**
and	
PRESIDENT OF THE REPUBLIC IN SOUTH AFRICA	**1ST Respondent**
MINISTER OF HOME AFFAIRS	**2ND Respondent**
MINISTER FOR INTERNATIONAL RELATIONS AND CO-OPERATION	**3RD Respondent**
MINSTER OF STATE SECURITY	**4TH Respondent**
DIRECTOR-GENERAL OF THE OFFICE OF THE PRESIDENCY	**5TH Respondent**
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**6TH Respondent**
DIRECTOR-GENERAL OF THE DEPARTMENT OF INTERNATIONAL RELATIONS AND CO-OPERATION	**7TH Respondent**
DIRECTOR-GENERAL OF THE DEPARTMENT OF STATE SECURITY	**8TH Respondent**
CENTRE MANAGER FOR THE CROWN MINES REFUGEE RECEPTION OFFICE	**9TH Respondent**
THE CHAIRPERSON: THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	**10TH Respondent**

THE REFUGEE STATUS DETERMINATION OFFICER RESPONSIBLE FOR GRANTING REFUGEE STATUS TO THE TWELFTH RESPONDENT — **11TH Respondent**

KAYUMBA NYAMWASA — **12TH Respondent**

FILING SHEET

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1. 12th Respondent's Practice Directions.
2. List of Authorities.
3. 12th Respondent's Heads of Argument.
4. 12th Respondent's certificate
5.

Filed by: Mr H Alberts
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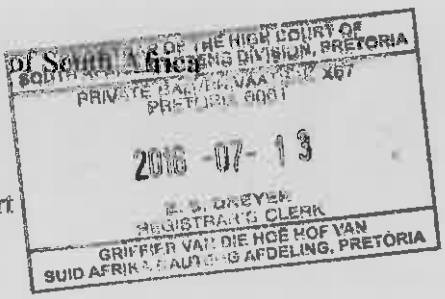

AND TO: The Registrar of the North Gauteng High Court
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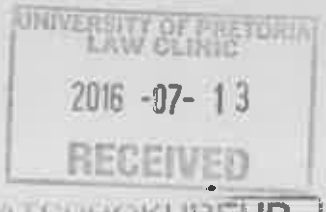

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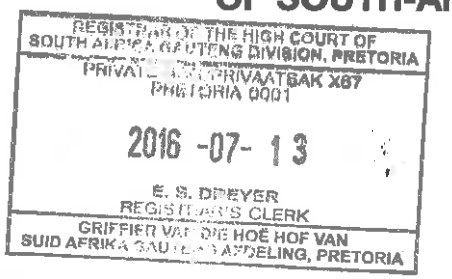

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KAYUMBA NYAMWASA **12TH Respondent**

12TH RESPONDENT'S PRACTICE NOTE

1. Nature of the Appeal:

This is an Appeal against the whole of the order and judgment of Judge Mngquibisa-Thusi on 20 October 2014 in the Gauteng Division, Pretoria. Leave to Appeal was granted by the Honourable Wallis *et* Mathopo JJA, on 8 December 2015.

2. Issues on Appeal:

2.1 The following issues are pertinent to the appeal:

2.1.1 The consideration whether the Court *a quo* was correct in dismissing the Application.

2.1.2 The consideration whether the Honourable Court *a quo* was correct in ruling that the Appellant did not make out a case for the relief sought.

2.1.3 The consideration whether the Respondents adequately met the allegations by the Appellant.

2.1.4 The consideration whether the test for refusing refugee applications was properly applied.

2.1.5 The consideration whether the confidentiality of the 12th Respondent's asylum application was properly preserved.

2.1.6 The consideration whether the Court *a quo* was justified in granting a cost order against the Appellant.

3. Estimate of the duration of the argument:

1 Day.

4. Urgency for the precedence on the Roll:

None.

5. Parts of the record which is in the opinion of Counsel irrelevant to the determination of the appeal:

The 12th Respondent is of the view that the Founding Affidavit, Opposing affidavits and Replying affidavits are particularly apposite for the determination of this Appeal. (Pages 1 – 34, 54 – 94, 414 – 452, 460 – 476, 508 – 512 and 596 – 645)

6. Summery of argument on behalf of the 12th Respondent:

6.1 It will be submitted on behalf of the 12th Respondent; that the Court *a quo* was correct in dismissing the Application.

6.2 It will be submitted on behalf of the 12th Respondent that the Appellant did not lay a reliable factual foundation for the relief sought.

6.3 It will further be submitted on behalf of the 12th Respondent; that the Respondents, and particularly the 12th Respondent, raised uncontroverted evidence which compelled the Court *a quo* to dismiss the Application.

6.4 It will further be submitted on behalf of the 12th Respondent; that the Court *a quo* correctly applied the test of "reason to believe" in the current matter.

6.5 It will further be submitted on behalf of the 12th Respondent that the Court *a quo* properly held that the confidentiality of his asylum application should be preserved.

6.6 It will finally be submitted on behalf of the 12th Respondent that the Court *a quo* was justified in granting a cost-order against the Appellant, particularly in favour of the 12th Respondent being a private individual.

7. Compliance with Rule 8(8) and (9):

It is submitted that no specific agreement had been reached between the parties as to the documentation to be excluded from the record.

8. The authorities to which particular reference will be made during the cause of argument:

Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd (1984 (3) SA 623 (A)

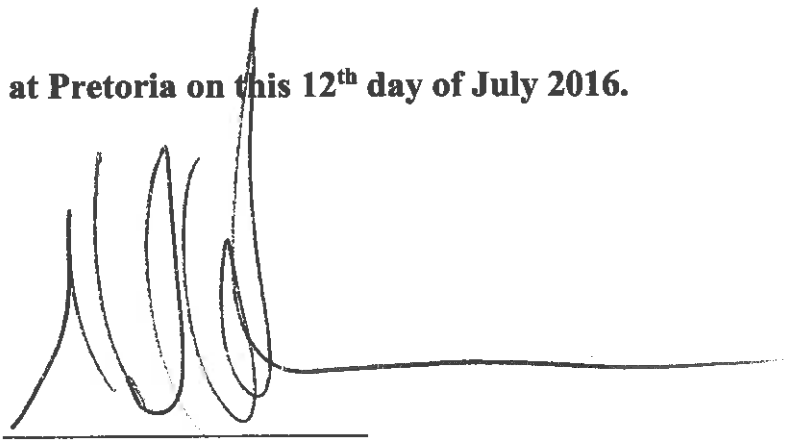
Mail and Guardian Media Limited and others v Chipu NO and others 2013 (11) BCLR 1259 (CC)S v Payachee 1973 (4) SA 534 (NC) at 535 F

Tantoush v Refugee Appeal Board and others 2008 (1) SA 232 (T) at par 111

Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC)

Ferreira v Levin NO and Others; 1996(2) SA 621 (CC)

Dated at Pretoria on this 12th day of July 2016.



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TWELFTH RESPONDENT'S HEADS OF ARGUMENT

1.

A BACKGROUND

1.1 On 27 May 2011 the Appellant applied to North Gauteng High Court for *inter alia* the following orders:[1]

1.1.1 Reviewing and setting aside the decision taken by the tenth of eleventh respondent acting under the supervision and control of the second and sixth respondents during June 2010 to grant the twelfth respondent refugee status,

1.1.2 Declaring the impugned decision to be unlawful, inconsistent with the Constitution and invalid.

1.1.3 Remitting the question of the twelfth respondent's refugee status in terms of the Act to the tenth and eleventh respondents, under the supervision and control of the second and sixth respondents, for reconsideration and under directions that the relevant respondents immediately reconsider the twelfth respondent's refugee status in terms of South African and international law and with due consideration to be given to the evidence provided by the twelfth respondent, should he choose to provide it.

[1] Record p 3; Notice of Motion p. 3

1.2 The documentation already filed in these Applications is voluminous and to avoid unnecessary repetition I will attempt to confine myself to the salient facts, in order to avoid undue prolixity.

1.3 The Twelfth Respondent, KAYUMBA NYAMWASA was granted refugee status on 22 June 2010, in terms of the **Refugees Act, 130 of 1998 (the Act)**. The granting of the twelfth respondent's refugee status formed the subject of the application.[2]

1.4 Throughout these proceedings the First to Eleventh Respondents were referred to as "The Respondents", whereas the Twelfth Respondent was referred to as the Twelfth Respondent. For the sake of continuity I will proceed to refer to the parties as such.

1.5 On 26 September 2014 the application was dismissed by her Honourable Justice Ms Mnqibisa-Thusa.

1.6 The Appellant brought and application for conditional leave to appeal against the whole of the order and judgment of Judge Mngquibisa-Thusi on 20 October 2014. The Appellant simultaneously applied for direct access to the Constitutional Court. The Respondents opposed the application in the Constitutional Court whereby the Twelfth Respondent accordingly filed and served his answering affidavit.

1.7 On 12 November 2014 the Constitutional Court dismissed the application.

1.8 The Appellant accordingly proceeded with the application for leave to Appeal to the Supreme Court of Appeal against the whole of the order and judgment of Her Honourable Justice Ms Mngqibisa-Thusi; which Application was dismissed on 26 September 2014.

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[2] Record p 16; Founding affidavit p 8 para 19

1.9 The Appellant, subsequently lodged a Petition for Leave to Appeal to this Honourable Court; which was granted on 8 December 2015.

2.

INTRODUCTION:

2.1 It is submitted that the Appellant' Appeal should be dismissed with costs.

2.2 It is evident from the relief sought by the Appellant; that the Appellant does not seek the Twelfth Respondent's deportation as contemplated in the Immigration Act, merely the withdrawal of his refugee status and granting him permanent residence.

2.3 The relief sought in the notice of motion is not competent and it is submitted that the Appellant's appeal be dismissed:

2.3.1. It is common cause that any person who applied for asylum and whose application is rejected, or who subsequent to being granted asylum, has the refugee status withdrawn, becomes an illegal foreigner liable to deportation as contemplated in the **Immigration Act**.

2.3.2. The Twelfth Respondent faces a real risk of persecution, if deported; since the attempts on his life is not disputed, furthermore, the relief sought is contrary to the principle of non- refoulement.

2.3.3. **Section 21 (5)** of the **Refugees Act** is phrased in peremptory terms and the Respondents have no discretion. Individuals seeking refugee status constitute a vulnerable group and ought to be afforded the full protection of the law.

2.3.4. Eleventh Respondent has confirmed the facts and circumstances that led him to grant asylum to the Twelfth Respondent. It is evident that the Twelfth Respondent qualified in terms of the provisions of **section 3(a)** of **the Act.**

2.3.5. The attempts that were made on the Twelfth Respondent's life are common cause. Foreign nationals were arraigned on charges of attempted murder and subsequently convicted and sentenced to eight years imprisonment. The trial court remarked that the attack appears to be politically motivated as there was no connection between the Twelfth Respondent and the suspects.

2.3.6 Only days after the Twelfth Respondent was shot in the stomach a Rwandan journalist, Jean Leonard Rugambage, believed to be investigating links between the Twelfth Respondent's shooting and the Rwandan government was shot dead in Rwanda in mysterious circumstances.[3] This amplified that the confidentiality of the asylum application is paramount due to the special circumstances of this case, taking **section 21 (5)** of the **Refugees Act** in consideration. It is evident that not only the life of the Twelfth Respondent, but also other parties are risk.

2.3.7. The relief sought by the Appellant is not of general application, but is directed at the status of one vulnerable individual. The relief sought by the Appellant will further have the result that the safety and lives of other persons may be at tremendous risk.

2.4 The court should also take into account what practical effect or result can be achieved by the appeal. [4]

2.5. **Section 16(2) (a) (i)** stipulates:

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[3] Rwanda: Stop Attcks on Journalist,Opponents article published by Human Rights Watch, 26 June 2010.
[4] The new Superior Courts Act 10 of 2013, Section 16(2)(i)

"When at the hearing of the appeal the issues are of such nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."[5]

2.6 It will accordingly be submitted that the grounds of appeal offered by the Appellant do not meet the test in terms of **Section 16(2) (a) (i)** of the **Superior Courts Act.**

2.7 The Twelfth Respondent's main contentions could be summarized as follows:

- The Appellant's Application is based on unsubstantiated allegations.
- The Respondents, and in particular the Twelfth Respondent, countered these allegations with factual averments which gainsays each of the pillars of the Appellant's case.
- The Appellant failed to gainsay or refute any of the principal factual allegations in the answering affidavits; and those allegations must therefore stand uncontested.
- It stands uncontested that the African Union rejected the allegations upon which the Appellant's case are founded.
- Interpol placed a caveat on the indictments; declaring that it could never sanction it, unless it goes through a normal judicial process which would render it enforceable.
- The United Nations mapping exercise did not implicate the Twelfth Respondent.
- The International Criminal Tribunal for Rwanda never suggested that the Twelfth Respondent was involved in the alleged crimes.
- The Appellant did not provide a shred of tangible evidence; which could serve as evidence in a South African Court, or other tribunal; upon which the Respondents could have relied.

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[5] Helen Suzann Foundation v Minister of Police 2015 JDR 0249 (GP)

- There is no evidence gainsaying the Respondent's denial of any extradition request; and the Appellant could not provide tangible proof of any such request that complies with the applicable instruments.
- The French indictment on which the Appellant relied was overtaken by events; in that a new investigation was opened and the warrants for arrest were lifted.
- The Spanish indictment was, similarly, overtaken by events prior to this Appeal; in that the Spanish indictment was dismissed by two higher courts.
- Apropos the questions of confidentiality and the test to be applied the Honourable Trial Court came to the correct conclusions.
- The Honourable Court *a quo* properly granted an order for costs in favour of the Twelfth Respondent; being a private individual, in whose favour the judgement went.

2.8 The Twelfth Respondent will, therefore, submit that the Respondents justified their decision to grant him refugee status; to the extent that the Court *a quo* was correct in law to dismiss the application.

2.9 The Twelfth Respondent will in the alternative submit that, in addition, he responded to the allegations in a manner that justified, and compelled, the Court *a quo* to dismiss the Application.

2.10 The Twelfth Respondent will specifically contend that the Appellant failed to show that the refugee application should not enjoy confidentiality.

2.11 The Twelfth Respondent I will further submit that the Appellant's contentions apropos the test for "reason to believe" that he committed crimes were wrong in law.

2.12 The Twelfth Respondent will lastly submit that the Court *a quo* was correct in granting a cost order, especially in his favour, being a private individual who was forced to incur substantial legal costs in order to protect personal interest.

3.

AD APPELLANT'S CASE

3.1 The Appellant in seeking to Review the decision to grant refugee status; should at least establish a foundation to suggest that the decision was irrational, unlawful, inconsistent with the Constitution and invalid.

3.2 It will be submitted that the Appellants did not make out a case for the relief sought in their Application, and that the Court *a quo* was correct in refusing the Application.

3.3 The Appellant rely on indictments issued in Rwanda, France and Spain to support the averment that the Respondents should have formed the firm view that there are reasons to believe that the Twelfth Respondent committed war crimes, disqualifying him from refugee status.

3.4 The test for "reason to believe" and the right to confidentiality will be addressed more fully in due course, but disregarding the arguments forwarded, by the Appellant, in those regards; it will be shown that the information relied on to establish the factual matrix is both tenuous and unreliable.

3.5 It is notorious that the great lakes area in general, and Rwanda in particular, has suffered from great political and military unrest and violence over the previous decades, and still does. This has culminated in numerous rebellions and cross border wars, where different countries were allies and foes, respectively, at different times.

3.6 It is further a well-known fact that different detractors blame different parties, or groups, for perpetrating these atrocities.

3.7 The United Nations endeavoured a mapping exercise of this genocide without attempting to identify the perpetrators, which does not implicate the Twelfth Respondent.

3.8 The International Criminal Tribunal for Rwanda (ICTR) was established for the designated purpose of investigating and prosecuting perpetrators of genocide in this area.

3.9 The ICTR investigated, indicted and prosecuted individuals, but the Twelfth Respondent was never a suspect, or person of interest, in the investigations and his name never featured in the investigations.

3.10 This is particularly apposite considering the high profile the Twelfth Respondent maintained as senior government official, and even later ambassador.

3.11 It is submitted that if any credible suggestion exists that the Twelfth Respondent was implicit in any crime against humanity the ICTR would have investigated any allegations and if reason to believe that he was involved exists this UN sanctioned body would have divulged it.

3.12 The Appellant attempts to trivialize this submission by stating that "A number of the allegations" made against the Twelfth Respondent fall outside the jurisdiction of the ICTR[6]. The fact of the matter is that the Spanish indictment alleges his complicity in crimes committed in the territory of Rwanda during the year 1994; and if there were any credence to these allegations, the ICTR would have investigated it.[7]

3.13 The suggestion; that it is unsurprising that this body did not act against the Twelfth Respondent, since some of the allegations fall outside the ITCR's jurisdiction is disingenuous; since many of the allegations does fall in that court's jurisdiction.

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[6] Paragraph 96 of the Appellant's heads of Argument.
[7] Record p 71; Paragraph 32 of the Appellant's briefing paper and the footnotes there sited.

3.14 During the Application in the Court *a quo* it was common cause that South African law would not permit an extradition to Rwanda and, therefore, this extradition request is immaterial to the issues at hand. In addition, the Rwandan allegations does not relate to offences the Appellants contend would disqualify the Twelfth Respondent from refugee status.

3.15 The Spanish and French indictments are the product of tribunals convened in Europe, who relied on evidence supplied by political dissidents in exile seeking asylum. It is submitted that this is a forceful motive to falsely implicate persons in the government from which you arrived, seeking refugee status.

3.16 It is an historical fact that the French indictment was discredited by a subsequent investigation; conducted by two French Judges, who conducted a detailed examination with the aid of *inter alia* expert evidence.[8] The upshot is that the French indictment is of no consequence to these proceedings. Moreover, the discredited indictment would serve as a caveat to treat the Spanish indictment with circumspection; since it is the result of an analogous process.

3.17 Turning to evaluate the Spanish indictment it is abundantly clear, *ex facie*, the document that this tribunal relied on evidence which would ordinarily carry no weight in an ordinary court. This is evident from the commencement of the summary of the evidence where the following is said concerning the source of this witness, who incidentally also purport to implicate the Twelfth Respondent:

"Witness TAP-006 provided detailed information regarding the responsibilities for the crimes of which he became aware, differentiating the facts that he had witnessed himself or those he had found out for himself, from those facts that came to his knowledge indirectly, or were reported to him by persons that he trusted"[9]

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[8] Record p 510 – 511
[9] Record p 128 l 22 – 25

It is notable that the indictment does not, similarly, differentiate between these sources of information relating to allegations by this witness.
Later in a direct reference to the Twelfth Respondent the following is stated:

"However, the witness stated that he had no doubts, given which he found out later as Chief of the Civilian Secret Service, that behind those violent deaths would be, at least, the following persons: MAJOR GENERAL KAYUMBA NYAMWASA..." (My underlining)[10]"

3.18 It is not intended to analyse the whole of the Spanish indictment, but it is clear that this indictment has its origins on a dubious footing and could not form the foundation for a reasonable belief that the Twelfth Respondent is guilty of crimes against humanity.

3.19 In addition, it will be contended that this indictment does not provide any information that will at all be useful in establishing the factual situation. The witnesses, implicating the Twelfth Respondent, are anonymous and there is no point of departure to even begin to investigate the allegations, especially with the view of instigating an investigation in the Republic of South Africa.

3.20 From what is currently available from the Appellant, and it must be assumed that they disclosed as much information as they have at their disposal; the only avenue to prosecute the Twelfth Respondent, for the time being, would be a request for extradition.

3.21 The recent developments in Spanish law has now rendered the submissions in this regard moot, since the indictment was overturned by two Higher Courts; and the Spanish authorities has advised Interpol that they no longer request the warrants to be executed. The Appellants conceded the amendments in Spanish law, but contend that the subsequent development were unknown to the Court

[10] Record p 133 l 1 – 3

a quo; therefore the Appeal should be adjudicated on the facts as it existed at the time of the Judgement.

3.22 The Appellant will however submit that the adjustments does not relate to a factual situation, but to the legal position; and this Appeal has to be adjudicated having regard to the law as it currently stands.

3.23 It will respectfully be submitted that the French indictment suffers from the same inadequacies. Further aspects regarding these indictments which will emerge from the Twelfth Respondent's version of the events will be dealt with *infra*.

3.24 The allegations of extradition requests from France and Spain were denied, but the Appellants certainly do not allege that there are formal applications for the extradition of the Twelfth Respondent which complies with the requirements of the **Extradition Act (Act 67 of 1962)** or the **European Convention on Extradition (Paris, 13.XXI.1957)**.

The Spanish request attached to the Appellant's replying affidavit, indeed suggest the contrary.[11] The Spanish indictment and prospective extradition has, anyhow, been overtaken by events; as the Spanish law on universal jurisdiction has since been repealed. This indictment was since overturned by two higher courts.[12]

3.25 The information relating to requests for extradition, relied on by the Appellant, dates from August 2011[13]. Since then no proceedings in terms of the **Extradition Act (*supra*)** were instigated, which militates against any suggestion that sincere attempts to have the Twelfth Respondent extradited to Spain or France are afoot. From the Twelfth Respondent's version of the events, *infra*, it would be clear that no such request would be forthcoming.

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[11] Record p 648 – 654
[12] Record p 1198 – 1204; Judgement of Spanish Supreme Court
[13] Record p 655 – 656

3.26 The Minister of Justice and Constitutional Development is not a party to these proceedings and it is, therefore, not possible to explore the veracity of any extradition request any further.

3.27 The Twelfth Respondent will, moreover, submit that refugee status would be no bar to an extradition; should such an application be forthcoming, at any time in the future. Therefore, any authority, in possession of credible evidence implicating him in any crime, could still request his extradition and prosecute him; if such evidence exists.

3.28 In the result it will be argued that the Appellants failed to prove that there is any reliable foundation on which the Twelfth Respondent should be excluded from refugee status.

4.

AD CASE FOR THE GOVERNMENT RESPONDENTS

4.1 In evaluating the Response on behalf of the government Respondents the allegations were decisively denied, but the response cannot be separated from the allegations by the Twelfth Respondent; which provides context to the facts alluded to by the Respondents.

4.2 The Court *a quo* accepted that this reply effectively put paid to the Appellant's case; apparently without deeming it necessary to deal with the averments made by the Twelfth Responded, since the Judgement does not deal with those averments in much detail.

4.3 Each and every averment by the Respondents does not require repetition, but it will be useful to refer to specific allegations which could not be gainsaid by the Appellant and which justifies the Court *a quo*'s dismissal of the Application.

4.4 The Respondents highlighted that they have a duty under the Constitution, as well as under domestic and international law, to protect and safeguard persons

seeking protection in the Republic of South Africa.[14] These duties are further underscored by various treaties and international instruments the Republic acceded to.

4.5 There could be no doubt that the Appellant would agree that refugee status should only be refused where there are compelling considerations to do so.

4.6 Once refugee status was granted it can only be withdrawn on limited grounds. Those provisions finds no Application in the current matter and the Respondents properly declined to endeavour to have the Twelfth Respondent's status revoked.

4.7 The Respondents' contention that asylum seekers' confidentiality is especially important[15] is supported, such as in this case, where the claims are based on persecution by the authorities in the country of origin. This aspect will extensively dealt with presently.

4.8 The contention of the Respondents that there needs to be acceptable evidence, to substantiate "a reason to believe" that an asylum seeker has committed war crimes, is particularly agreed with.[16] It would be astonishing if the Appellant does not hold the same view. This term will, likewise, be extensively dealt with presently.

4.9 The Respondents stated that the contents of the Appellant's briefing paper are "obviously the opinions of the authors of the documents, who cannot possibly swear to the truth thereof, and, *a fortiori*, neither can the deponent to the affidavit."[17]

4.10 The Respondents take the view that nothing in the notice of motion suggests that the Appellant is seeking to review its decision to grant me refugee status;

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[14] Record p 423 – 427
[15] Record p 427 – 430
[16] Record p 432; par 39.2
[17] Record p 437; par 47.2

as such an Application should have been brought in terms of the **Promotion of Administrative Justice Act, Act 3 of 2000**.[18]

4.11 The Respondents specifically challenge the Appellant to provide tangible proof that the Twelfth Respondent is the subject of extradition applications by Spain and France.[19]

4.12 The Respondents stated that they were aware of the allegations, considered it; and came to the conclusion that the allegations are based on unreliable, contradictory information.[20]

4.13 It is an undisputed fact that the Respondents publicly announced that the Twelfth Respondent was awarded refugee status. This would have alerted any foreign agency interested in an extradition and prosecution to take any steps they deemed fit. Any tangible evidence, which would justify a prosecution in South Africa, could have been placed before the South African Police Services and Director of Public Prosecutions for further action. It is again notable that neither of these institutions are a party to these proceedings.

4.14 It would, in addition, be open to any foreign government to formally object to the grant of refugee status through diplomatic channels. No such objections were recorded.

4.15 It must be accepted that the result of each and every application for asylum is not publicly announced. It will therefore be argued that the fact that a deputy director-general of the Department of Home Affairs made such an announcement corroborates the contention that the Respondents were well aware of the circumstances surrounding the application and gave due consideration to such.

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[18] Record p 434; par 43.1
[19] Record p 434; par 44.1
[20] Record p 439; par 52.1 – 52.4 Record p 441; par 54.1 – 54.2

4.16 In the circumstances the decision to grant the Twelfth Respondent asylum could only be reviewed on limited grounds, which are not extant in the current Application.

4.17 The Respondents definitively state that they were aware of the allegations against the Twelfth Respondent; which were considered at the time the refugee status was considered. The briefing document provided by the Appellant therefore contributed nothing to the information at the disposal of the Respondents when the application was considered by them.

4.18 The Respondents contended that the allegations were vague and contradictory, this contention is supported.

4.19 In the result the Respondents stated under oath that they considered all relevant information in exercising their discretion. It must be emphasized that the word discretion is used in its widest possible sense in this context, as it will be contended that once a person qualify, and there is no legal bar to refugee status, the Respondent would be obliged to grant asylum.

4.20 The Respondents further state that, in exercising their discretion, they formed the view that they could not rely on mere unsubstantiated allegations and conflicting reports to justify an exclusion from asylum.

4.21 The Respondents challenged the Appellant to provide tangible evidence upon which it could rely, but none was forthcoming.

4.22 This factual allegation, which is at odds with suggestions by the Appellant, should put paid to the Application. See: **Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd (1984 (3) SA 623 (A)**

4.23 The Appellant failed to meet the factual averments, more particularly, those advanced by the Twelfth Respondent; in their replying affidavit; and the respondent's version should, therefore be accepted in view of the authority stated above.

4.24 In view of the above submission; the Appellant's contentions apropos common cause fact, and incorrect factual findings,[21] could not be sustained; since these facts were not rebutted, in reply.

4.25 In view of the above authority the Court *a quo* came to the correct conclusion, and was fully justified in dismissing the Application already on the version of the Respondents.

4.26 The Appellant take issue with a remark by the Court *a quo*, in paragraph 22[22] of its Judgement that the Respondents must have been aware of the allegations; in view of the fact that the Fourth Respondent was cited. This, however, appears to be an incidental remark; since the Court had already ruled in the previous paragraph; that the Appellant had not made out a case, for the relief sought.

4.27 The Application could, on the version of the Respondents, not be substantiated and the Court *a quo* had no need of considering the Twelfth Respondent's version.

4.28 Although this should essentially be the end of the enquiry, some further facts in the Respondents' affidavit requires to be highlighted.

4.29 The Respondents' contention that the Appellant is not in a position to provide information that the Twelfth Respondent's refugee status should be withdrawn due to fraud or misrepresentation is supported.

4.30 If refugee status were revoked the Twelfth Respondent would be an illegal foreigner in the Republic of South Africa; which could not be deported as a result of the principle of non-refoulement. The result would be that no legal

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[21] Paragraph 75 – 79 of the Appellant's heads of argument
[22] Record p 712

basis for the Twelfth Respondent's continued stay in the Republic would remain.

4.31 The suggested solution contained in the briefing paper is not legally competent under immigration, or refugee law.

4.32 There is no precedent for the requirement for "truth-telling" as a prerequisite for permanent residence and the notion appears contrived. The Appellant realized that the Application would achieve no practical effect and attempted to introduce this novel notion; in order to justify their insistence that the Twelfth Respondent's refugee status should be rescinded.[23]

4.33 The disturbing feature of the suggested remedy proposed by the Appellants; is that full disclosure should be made to a non-governmental organisation. In addition to the Twelfth Respondent's unwillingness to disclose sensitive information, as discussed apropos confidentiality, he has difficulty in comprehending how "truth-telling" would be "strictly enforced in order to pass muster"; and who would be the judge of whether any information passed muster.

5.

AD CASE FOR THE Twelfth Respondent

5.1 Although it is submitted that the Respondents definitively dealt with the issues and that there are no grounds to consider that a different Court could come to a different conclusion, certain aspects in the Twelfth Respondent's case; which underscores the legitimacy of the decision and the reasoning in that regard, should be highlighted.

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[23] Record p 91 -- 93; Paragraph 98 – 105 of the Appellant's briefing paper.

5.2 The argument will be that, even in the event that it is ruled that the Respondents does not sufficiently contradict the contentions of the Appellant, the Twelfth Respondent provide a factual matrix which would have compelled the Court a quo to arrive at the same conclusion, as it did *in casu*.

5.3 The Twelfth Respondent provided evidence that he is an asylum seeker who is particularly vulnerable as a result of the circumstances under which he was forced to flee Rwanda. Since then there were repeated attempts at his life, which eventually led to political tension and the recall of Rwandan diplomats from the Republic of South Africa, and *vice versa*. It is common cause that I was wounded in one of these attacks shortly before refugee status was granted and that he is under strict protection. [24]

5.4 The confidentiality of the refugee application will be extensively dealt with *infra*, but the Twelfth Respondent did make it clear that he is not prepared to disclose the content of the information publicly.[25]

5.5 The Twelfth Respondent made it emphatically clear that he is not aware of any extradition proceedings instituted against him.[26]

5.6 The Twelfth Respondent further denied the veracity of the Spanish and French indictments with facts corroborating his version; thereby supplementing the version of the government Respondents.

5.7 The salient facts should demonstrate that these allegations are insufficient to substantiate even a suspicion, not to mention reason to believe, that the Twelfth Respondent was involved in crimes against humanity.

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[24] Record p 463 – 464; par 4.2 – 4.5
[25] Record p 465; par 5.2
[26] Record p 466; par 6

5.8 The Twelfth Respondent quoted from a paper delivered at a meeting of the African Union on 18 April 2008, in Addis Ababa. He reiterated that the Minister of Justice and National Director of Public Prosecutions of the Republic of South Africa attended this meeting.[27]

5.9 The salient portions quoted made it clear that the Spanish and French indictments were condemned; *inter alia*, since that authors of the genocide were called the victims and *vice versa*. The report criticized the "political judges" who had never been to Rwanda and never interviewed the so-called suspects; in questioning the basis of these indictments.

5.10 The Twelfth Respondent stated that the Ministers of Justice and Attorneys General accepted a draft declaration sanctioning the basis of this paper. The Republic of South Africa was, therefore party to this declaration; which the Respondents were obliged to have regard to in terms of **section 6** of **the Act**.

5.11 The Twelfth Respondent, moreover, stated that the Assembly of the African Union endorsed the previous decisions and called for the immediate termination of all pending indictments. The First Respondent was present at the meeting and this resolution would, similarly, inform the Respondent's failure to consider the allegations to be credible and reliable.

5.12 In addition to the condemnation of the indictments by the African Union, the headquarters of Interpol in Lyon, France, has placed a caveat on these indictments, declaring that it can never sanction it before it goes through a judicial process; and meet the minimum conditions that would render them enforceable under international law and the rules and regulations of Interpol.

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[27] Record p 466 – 468; par 7.1 – 7.7

5.13 Clearly it would follow that the Respondents would be acting irrational; and contrary to international law, if they were to take the drastic measure of excluding the Twelfth Respondent from refugee status; on the basis of the indictments.

5.14 The African Union, of which South Africa is a member state, has adopted a resolution condemning these indictments. It is, therefore, difficult to see how these indictments could enjoy any credence in the decision making of South African government institutions. The African Union has since reaffirmed its position and noted that the Spanish High Court overruled this indictment and nullified all arrest warrants.[28]

5.15 The South African authorities would be precluded from instituting a prosecution in the Republic of South Africa, even if credible evidence were available; which was denied. The alleged offences were committed before the implementation of the Rome Statute of the International Criminal Court (17 July 1998 which came into effect in 2002), in the **Rome Statute of the International Criminal Court Act, Act 27 of 2002**, and by virtue of **section 5 (2)** of the Act no prosecution may be implemented for acts committed before the commencement of the Act.

5.16 It was contended that a country would only incur international obligations regarding the prosecution of crimes against humanity if it has "reason to believe" (which will be dealt with in more detail *infra*) or possess "acceptable evidence" that such crimes were committed. It is submitted that the South African government has neither.

5.17 The Spanish indictment contains contradictory allegations regarding the position the Twelfth Respondent held, in the context of "command responsibility". The report identifies him as the commander of the Gendarmarie, which is the police. The report, however, also identify him as the commander of the Rwandan forces in the Democratic Republic of the Congo. Clearly a

[28] AU Communique of the 519th PSC meeting on Universal Jurisdiction, 26 June 2015 par. 3 7 and 12

police official would not command a military force. The United Nations report correctly identifies General Kaberebe (then Colonel) as the commander of military operations. In the result it should be clear that he cannot be held liable on the principle of command responsibility, by virtue of a position he did not hold. The Twelfth Respondent drew the Court *a quo*'s attention to this fact in his opposing affidavit.[29]

5.18 The Spanish indictment have, likewise, been overtaken by events. Since the Spanish law on universal jurisdiction was amended, to exclude persons outside Spanish territory; the Spanish Court dismissed the indictment, prior to the Application for Leave to Appeal. The Spanish Supreme Tribunal has since dismissed an Appeal against the above decision and confirmed that Spanish law would exclude investigation and persecution *in absentia*[30]. There will, therefore, no Application for extradition to Spain.

5.19 It is an historical fact that the first French indictment was the upshot of the downing of the aeroplane carrying the then President of Rwanda, Mr Habyarimana, which led to political tension and reciprocal accusations between France and Rwanda. Diplomatic ties between the two countries were severed and the French investigators did not set foot in Rwanda.[31]

5.20 It is accepted that Justice Brugueire never set foot in Rwanda and relied on the testimony of genocide perpetrators, most of them imprisoned at the ICTR in Arusha.

5.21 This indictment was widely renounced by the wider international community.

5.22 The Twelfth Respondent filed a supplementary affidavit; explaining what occurred when France conducted a subsequent investigation in Rwanda, with

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[29] Record p 470 – 471; par 11

[30] Record p 1198; Annexure "KNSCA 1" original and translated copy of the Judgement of the Spanish Supreme Tribunal dated 24 September 2015 *Inter alia* at p. 5 II. Fundamentals of Law Second: In bold (The Spanish Court employed a rather incredulous practice of allocating pseudonyms to the suspects, but the just of the judgement is clear.)

[31] Record p 471 – 474; par 12

the assistance of numerous experts. This resulted in a contrary finding based on, *inter alia*, expert witnesses that the presidential plane was shot down by dissident members of President Habyarimana's own party, intent on destabilizing the country and sabotaging the peace accord.

5.23 The upshot of the finding by Justices Trévidic and Poux was that international arrest warrants for the Twelfth Respondent and others could be lifted and that is still the current position.

5.24 Although the Appellant contended that these events occurred after the impugned decision, it will be submitted that these events vindicate the Respondent's view that the information suggesting that the Twelfth Respondent is guilty of war crimes are unreliable.

5.25 The Twelfth Respondent emphasised that he travelled extensively to countries, including the United Kingdom, and served as ambassador to India. It will be submitted that there would be no reason for the Twelfth Respondent's arrival in South Africa to trigger investigations and prosecutions; where the international community was previously content with his presence in those countries.

5.26 The Twelfth Respondent emphatically denied that he was involved in any crimes against humanity and specifically stated that he was never invited by either the Spanish, or the French Judges, to comment on the allegations against him.

5.27 The Appellant failed to refute the factual averments by the Twelfth Respondent in its replying affidavit; and those averments remain uncontested.

5.28 In view of the previous discussion it will be contended that the allegations by the Appellant were refuted to the extent that no case was made out for the relief sought in the Court *a quo*.

6.

CONFIDENTIALITY OF THE TWELFTH RESPONDENT'S ASYLUM APPLICATION

6.1 For cogent reasons it is internationally accepted that applications by asylum seekers enjoy confidentiality.

6.2 **Section 21 (5)** of **the Act** provides that "The confidentiality of asylum applications and the information contained therein must be ensured **at all times**" with a proviso apropos the Refugee Appeal Board. It should therefore be clear that the intention was a blanket confidentiality.

6.3 Contrary what the Appellant seems to believe; such an application requires substantive motivation. Such an application would typically deal with the security situation in the country of origin, the reasons for leaving the country of origin and particularly the position of the asylum seeker a propos the fear of political persecutions. The asylum seeker would be required to divulge the sources of the information that caused him to flee his country of origin. He might, in addition, disclose the means of entering the Republic and fleeing from his country of origin. This could clearly have the effect of putting people remaining in the country of origin's lives at risk in certain circumstances.

6.4 It is submitted that there could be no argument that this is such a case. This is borne out by paragraphs 11 to 23 of the Appellant's briefing paper[32]. The murder of the journalist, Jean Leonard Rugambage, who died under mysterious circumstances; while investigating the link between the attempt on the Twelfth Respondent's life and the Kigali regime is evidence of this.

6.5 The attempts that were made on the Twelfth Respondent's life are common cause and subsequent to the incident where the Twelfth Respondent was shot on 19 June 2010 six foreign nationals who sought asylum in the Republic were arraigned on charges of attempted murder. One of these persons was

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[32] Record p 62 -- 67

previously a member of the Rwandan military. Four of the six were subsequently convicted and sentenced to eight years imprisonment. The trial court remarked that the attack appears to be politically motivated as there was no connection between the Twelfth Respondent and the suspects.

6.6 In the circumstances it would even endanger the lives of the Twelfth Respondent's associates in South Africa if information relating to his asylum application were to be divulged.

6.7 Therefore the judgement in **Mail and Guardian Media Limited and others v Chipu NO and others (2013 (11) BCLR 1259 (CC))** should not find any application in the current matter, due to the clear distinction between the facts. It would be inconceivable that the public interest would demand that this sensitive information; which could endanger many lives, be made public.

6.8 The Legislator amended **section 21 (5)** in response to the above Judgement, but the considerations suggested by the Constitutional Court was retained; only in relation to the Refugee Appeal Board. The absolute confidentiality of regular applications were, therefore, retained.

6.9 Clearly a number of factors, militating against disclosure, the Constitutional Court enunciated in that matter find application in the current matter, not least of which: "pose a credible risk to the life or safety of the asylum seeker or his or her family, friends or associates".

6.10 The confidentiality of the information operates in favour of the refugee and the Twelfth Respondent will submit that he was justified in refusing to have this information disclosed to a faceless consortium.

6.11 Even in foreign jurisdictions where the confidentially of asylum applications is not considered to be absolute; each matter is required to be considered on its own merit.

6.12 **Section 8 (2)** of the **Canadian Privacy Act, 1985**, as well as **section 151 (2)** of the **Immigration Act of New Zealand** allows for a discretion on the part of the assessor to decide whether confidential information should be disclosed.

6.13 The Respondents exercised their discretion and correctly came to the conclusion that publication of aspects of this asylum application would pose a real risk to the lives of persons both in the Republic of South Africa and Rwanda.

6.14 In terms of **Regulation 6 (3)** of the **Regulations to the Refugees Act** the confidentiality does not apply between government officials requiring information for purposes of investigations into aspects relating to the asylum seeker, including criminal matters. This provides an important safety net; which reinforce the integrity of the asylum process.

6.15 Therefore the confidentiality of the asylum application should be paramount in the special circumstances of this case, and even without having to rely on **section 21 (5)** of the **Refugees Act**.

6.16 The Twelfth Respondent would submit that the authorities;[33] relied on by the Appellant to suggest that the Court *a quo* should have fashioned some form of a balancing order, are distinguishable from the current factual matrix. Those authorities relate to interactions between rival business entities; concerned about protecting business intelligence from competitors. Those matters concerned, *inter alia*, cases where the Applicant would ordinarily have a clear right to the information; or where the Applicant disclosed confidential information and the Respondent failed to reciprocate

6.17 The current matter concerns highly sensitive information, regarding a vulnerable individual; who has already survived various attempts at his life.

6.18 The relevant information regarding allegations of wrongdoing by the Twelfth Respondent are in the public domain; and included in the Appellant's briefing

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[33] Paragraph 105 – 109 of the Appellant's heads of argument

paper. The Twelfth Respondent met these allegations head on, with additional information; which is, likewise, available in the public domain. In the result it is not clear how confidential information regarding his asylum application would, moreover, be required by the Appellant; since it would not contribute to the issues in question.

6.19 The Twelfth Respondent will submit that it would be particularly problematic to fashion an appropriate balancing order where, at least some of the Appellant's member organisations are prone to regular media statements; and making all material in the matter available on the internet, including the Twelfth Respondents opposing affidavits[34]

6.20 It is difficult to conceive how confidentiality could be maintained; while being required to provide information to an entity that prosecutes their case in the media; and on the internet.

7.

AD INTERPRETATION OF "REASON TO BELIEVE"

7.1 The standard of "reason to believe" is widely accepted to be a lower standard than "a balance of probabilities" or "beyond reasonable doubt" which are applied in civil and criminal law. This, however, does not imply that "reason to believe" could be established on a whim, or tenuous allegations.

7.2 In the matter of **Kanyamwiba v Canada (Minister of Public Safety and Emergency Preparedness) ([2010] F.C.**[35] the following passage from the

[34] http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Legal-Papers-12th-Respondents-Answering-Affidavit.pdf.
[35] Paragraph 51 of the Appellant's heads of argument; footnote 30

Australian judgement of **Arquita v Minister of immigration and Multicultural Affairs [2000] 106 FCR 465**,[36] at **par. 54**, is quoted with approval at **66**:

"To meet that requirement the evidence must be capable of being regarded as 'strong'."

7.3 The standard applied in terms of South African refugee legislation refers to "reason to believe", whereas the international standard, which has its origin in the **United Nations Convention relating to the status of refugees, 1951**, phrase the standard as 'serious reasons to consider".

7.4 The United Nation High Commissioner for Refugees (UNHCR) provided guidance regarding the test to be applied in **UNHCR Statement on Article 1F of the 1951 Convention** in July 2009. It is stated *inter alia* that "As with any exception to human rights guarantees, and given the possible serious consequences for the individual, the exclusion clauses enumerated in Article 1F should always be interpreted in a restrictive manner and applied with utmost caution."[37]

The standard of proof is inter alia described as setting "a high standard of proof for establishing that an individual has committed" these acts; and "Thus, in UNHCR's view, reliable, credible and convincing evidence, going beyond mere suspicion or allegation.", requiring "rigorous procedural safeguards" which is considered to be particularly important.[38]

7.5 In the Court *a quo* the Appellant sought to suggest that South Africa deliberately adopted a lower standard, and that refugee status could therefore be refused on less significant foundations than the international standard. Again it is difficult to see how this contention could be designed to be in the interest of a broader refugee population.

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[36] Paragraph 54 of the Appellant's heads of argument; footnote 34
[37] Record p 1221; 2.1 at the top of p. 7
[38] Record p 1223 – 1224; at 2.2.2 p. 9 – 10

7.6 Be that as it may, this argument sought to rely on the omission of the word "serious" to indicate that less is required under South African law. The misconception of this argument lies in the substitution of the word "consider" by the word "believe".

The Oxford Advanced Learners Dictionary (eighth edition) defines "consider" as:

"to think about something carefully, especially in order to make a decision"
And "believe" inter alia as:
"to feel certain that something is true or that somebody is telling you the truth"
It is submitted that this is the intended meaning of the word as suggested by the context of its usage.

7.7 It should be clear that the **United Nations Convention** requires serious consideration of the facts; which has to be based on the reasons in issue. It will be contended that a belief, founded in reasons advanced, is in fact a higher test than mere consideration. Facts substantiating such a belief are required, as the word "reason" indicates.

7.8 The only South African authority which dealt with the concept of "reason to believe", albeit in a different context, is **Tantoush v Refugee Appeal Board and others (2008 (1) SA 232 (T) at par 111)** where Murphy J defines the test as follows:

"The reason to believe must be constituted by facts giving rise to such belief and blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice... The phrase thus imposes a jurisdictional pre-condition that there must exist a reasonable basis for the factual conclusion that the Appellant committed a crime before the discretion to exclude can be exercised."
(My underlining)

7.9 In international law it is commonly held that such a "reason to believe" cannot be equated to a mere suspicion. In **Mugesera v Canada (Minister of Citizenship and Immigration) (2005 SCC 40)**[39] the test is elucidated as follows at **114**:

"an objective basis for the belief which is based on compelling and credible information."

In **Arquita (supra at 62)** the following is stated:

"If there is some evidence capable of supporting such a conclusion, but that evidence is so tenuous or inherently weak or vague that no trier of fact, acting properly could be satisfied beyond a reasonable doubt of the guilt of the Appellant... A case which is built around nothing but suspicion will not be sufficient..."

7.10 It should be clear that the allegations levelled against the Twelfth Respondent do not even approach to meet the standard of "reason to believe".

8.

COSTS:

8.1 The Appellant seems to be a conglomeration of non-governmental organisations; who proclaim to have the interest of all refugees and asylum seekers at heart.

8.2 It is, however, difficult to comprehend how the interest of future asylum seekers would be served by insisting that the asylum process should be more rigorously applied, than the government's current policy.

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[39] Paragraph 54 of the Appellant's heads of argument; footnote 33

8.3 The court *a quo* correctly found that Appellant has not established that it has a clear right to the relief sought and that the Appellant is not legally entitled to such information under the Constitution. The Appellant furthermore does not purport to be vindicating any rights in terms of the Bill of Rights and failed to establish the legal connection between itself and the relief sought.

8.4 It is unclear why the Appellant would commit any resources to a challenge to the Twelfth Respondent's refugee status. It is, particularly, difficult to comprehend how the solution, suggested in paragraphs 104 and 105 of the Appellants briefing paper[40], would in any manner, way or form contribute to the integrity of the asylum regime.

8.5 This case has progressively been overtaken by events and even if the Appellant is successful, there is even less reason to refuse the Twelfth Respondent's refugee status now. The Appellant must be aware of the recent developments; and is still forcing the issue apropos refugee status. The suggestions that the Twelfth was complicit in the alleged crimes are today even more tenuous, than when the Application was initiated.

8.6 The Appellant elected to expend donor funding on, what the Twelfth Respondent perceives to be a witch-hunt, and are persisting to do so.

8.7 Furthermore the Appellant failed to prove that the relief sought by the Appellant would promote advancement of constitutional justice.

8.8 The twelfth respondent is a private individual, forced to deplete his resources and subsequently requested a private attorney to assist *pro bono*; before Legal Aid South Africa became involved.

8.9 The Appellant's persistence to pursue a non-meritorious application is draining public funds, especially since the resources of Legal Aid South Africa are tied up in opposing the applications.

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[40] Record p 92 – 93

8.10 At the Application for Leave to Appeal, in the Court *a quo* the submission was made that the Twelfth Respondent should not be entitled to costs; since he was represented by Legal Aid South Africa. Although the submission was not repeated in the Appellant's Heads of Argument for this Appeal, the Twelfth Respondent deems it prudent to deal with this submission; lest it again be raised in reply, rendering the Twelfth Respondent incapable of addressing the issue.

8.11 This submission was ill-informed, since Legal Aid South Africa is entitled to recover costs; which is, by law, deemed to be ceded to Legal Aid South Africa.[41]

8.12 The principles relating to cost orders in public interest litigation should not be apposite to private individuals who, through no fault of their own, are drawn into meritless disputes.

8.13 It is therefore submitted that the factual matrix is so vastly different from the facts in **Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC)** that this authority referred to by the Appellant should not find application *in casu*.

In **Biowatch (*supra*)** the Appellant achieved substantial success in its application whereas the Appellant in the court *a quo* was entirely unsuccessful.

8.14 Furthermore the judicial officer's discretions should not be straitjacketed by inflexible rules.

8.15 Ackerman J pointed out in **Ferreira v Levin NO and Others; 1996(2) SA 621 (CC) (1996) (4) BCLR 441** that courts have over the years developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless otherwise enacted, is in the discretions of the

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[41] Section 8A of the Legal Aid Act, 22 of 1969 was Applicable at the time of the Application and re-enacted, with essentially the same provisions, in section 20 of the Legal Aid South Africa Act, 39 of 2014; on 9 December 2014.

presiding judicial officer and second that the successful party should, as a general principle, have his or her costs.

8.16 Ackermann J was of the view that these principles were sufficiently flexible to apply to constitutional litigation and, to the extent required, adaptation could occur on a case-by-case basis.

8.17 The Appellant seems to be a conglomeration of non-governmental organisations; who proclaim to have the interest of all refugees and asylum seekers at heart. This, however, should not protect the Appellant from and adverse cost order as **Section 9 (1)** of **the Constitution** provides that everyone is equal before the law and has the rights to equal protection and benefit of the law.

8.18 The court held in **Biowatch (*supra*)** that a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conducts as any other party, particularly if it has had legal representation.

In **Biowatch (*supra*)** Sachs J held that:

"*merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule…The issues must be genuine and substantive, and truly raise constitutional consideration relevant to the adjudication.*"

8.19 It is difficult to find examples of these cases referred to in **Biowatch (*supra*)**; the reason being that the Constitutional Court will ordinarily dismiss frivolous constitutional claims in the absence of a formal hearing and, therefore, formal judgments are not delivered. It follows that matters actually heard by the

Constitutional Court would almost always concern a plausible constitutional claim.

8.20 Referring to random references to the Constitution should not protect any litigant from cost orders. The issues of fact and law raised by the Appellant do not affect the rights or interest of the general public.

8.21 Merely labelling litigation as Constitutional, or protecting the rights and interest of the general public, should not, without more, shield an Appellant from an adverse cost order. Such an approach might have the adverse effect of opening the floodgates to burden the Courts with non-meritorious claims.

8.22 The issues of fact and law raised by the Applicant do not affect the rights or interests of the general public and the Application merely sought to invoke **section 36** of the **Refugees Act**, in order to have an individual's refugee status revoked.

8.23 The Applicant does not purport to be vindicating any rights in terms of the **Bill of Rights** and the Applicant failed to establish the legal connection between itself and the relief sought. The relief sought is thus not of general application, but directed at the status of a vulnerable individual.

8.24 The Twelfth Respondent will, moreover, submit that he should be entitled to a cost order in these proceedings as well.

8.25 The Applicant appears to press ahead with this litigation while the pillars for its claim against my refugee status are crumbling around it. This Honourable Court

has recently confirmed that the principle in **Biowatch** (***supra)*** would also interrogate a litigant's conduct in the proceedings[42].

"[64] The award of costs in this case requires no judicial fulmination. The principles relating to the strict application of the 180 day guillotine in respect of bringing applications for review in terms of PAJA are now trite. The late bringing of the application has been the unanswerable reason why the SADA cannot succeed, even though there are other substantive issues that operate against it. It cannot be said, in the words of **Biowatch**, that this application was „fresh constitutional terrain for all" or that „all the parties have had to feel their way" or that the State has been shown „to have failed to fulfil its constitutional and statutory obligations". For this reason, the ordinary principles relating to the award of costs in litigation should apply."

The majority Judgement in this matter, likewise quoted extensively from **Biowatch** (***supra)*** in granting a cost order against an unsuccessful litigant, purporting to vindicate constitutional rights[43].

8.26 It is therefore submitted that the cost order, which followed the result of the proceedings in the court *a quo*, was proper.

Signed at Pretoria on this 12th day of July 2016

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[42] South African Dental Association v Minister of Health (20556/2014) [2015] ZASCA 163 (24 November 2015)
[43] At par. 20 and 24

IN THE SUPREME COURT OF APPEAL
OF SOUTH-AFRICA

SCA Case No: 992/2015
NGHC Case No: 30123/2011

In the matter between:

CONSORTIUM FOR REFUGEES AND MIGRANTS
Appellant

and

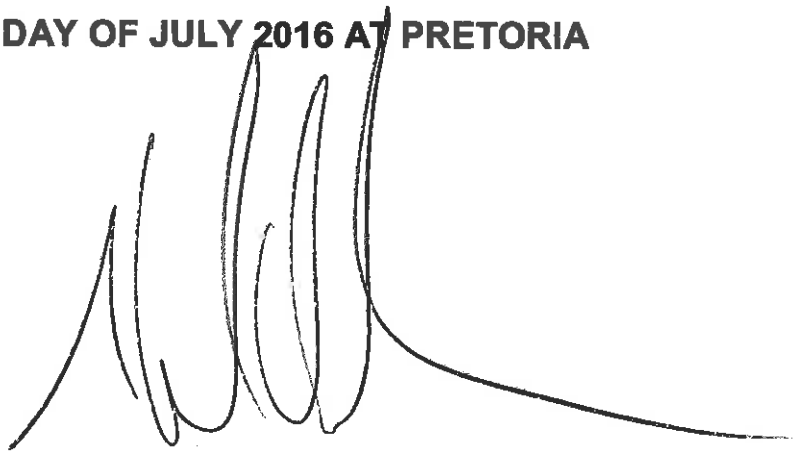
PRESIDENT OF THE REPUBLIC IN SOUTH AFRICA	**1ST Respondent**
MINISTER OF HOME AFFAIRS	**2ND Respondent**
MINISTER FOR INTERNATIONAL RELATIONS AND CO-OPERATION	**3RD Respondent**
MINSTER OF STATE SECURITY	**4TH Respondent**
DIRECTOR-GENERAL OF THE OFFICE OF THE PRESIDENCY	**5TH Respondent**
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**6TH Respondent**
DIRECTOR-GENERAL OF THE DEPARTMENT OF INTERNATIONAL RELATIONS AND CO-OPERATION	**7TH Respondent**
DIRECTOR-GENERAL OF THE DEPARTMENT OF STATE SECURITY	**8TH Respondent**
CENTRE MANAGER FOR THE CROWN MINES REFUGEE RECEPTION OFFICE	**9TH Respondent**
THE CHAIRPERSON: THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	**10TH Respondent**
THE REFUGEE STATUS DETERMINATION OFFICER RESPONSIBLE FOR GRANTING REFUGEE STATUS TO THE TWELFTH RESPONDENT	**11TH Respondent**

KAYUMBA NYAMWASA **12TH Respondent**

12TH RESPONDENT'S CERTIFICATE IN TERMS OF RULE 10A(b)

I, HERMAN ALBERTS, attorney representing the 12th Respondent in this Appeal, herewith certify that Rules 10 and 10A have been complied with in the preparation of the heads of argument.

SIGNED ON THIS THE 12TH DAY OF JULY 2016 AT PRETORIA



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