

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO:

In the matter between:

<b>CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA</b>	Applicant
and	
<b>PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA</b>	First Respondent
<b>MINISTER OF HOME AFFAIRS</b>	Second Respondent
<b>MINISTER FOR INTERNATIONAL RELATIONS AND CO-OPERATION</b>	Third Respondent
<b>MINISTER OF STATE SECURITY</b>	Fourth Respondent
<b>DIRECTOR-GENERAL OF THE OFFICE OF THE PRESIDENCY</b>	Fifth Respondent
<b>DIRECTOR-GENERAL OF THE DEPARTMENT HOME AFFAIRS</b>	Sixth Respondent
<b>DIRECTOR-GENERAL OF THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION</b>	Seventh Respondent

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**DIRECTOR- GENERAL OF THE  
DEPARTMENT OF STATE SECURITY**

Eighth Respondent

**CENTRE MANAGER FOR THE CROWN  
MINES REFUGEE RECEPTION OFFICE**

Ninth Respondent

**THE CHAIRPERSON: THE STANDING  
COMMITTEE FOR REFUGEE AFFAIRS**

Tenth Respondent

**THE REFUGEE STATUS DETERMINATION  
OFFICER RESPONSIBLE FOR GRANTING  
REFUGEE STATUS TO THE TWELFTH RESPONDENT**

Eleventh Respondent

**FAUSTIN KAYUMBA NYAMWASA**

Twelfth Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned

**KAAJAL RAMJATHAN-KEOGH**

declare under oath as follows:

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- 1 I am an adult female and Chairperson of the first applicant, the Consortium for Refugees and Migrants in South Africa ("CoRMSA") and the head of the Refugee and Migrant Rights Programme at Lawyers for Human Rights. I am duly authorised to depose to this affidavit on behalf of the applicant.
- 2 The facts contained herein fall within my personal knowledge unless otherwise indicated by the context and are to the best of my knowledge both true and correct.

#### THE APPLICANT

- 3 The Applicant is the **CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA**, with its head office at 5<sup>th</sup> Floor, Braamfontein Centre, 23 Jorissen Street, Johannesburg. A copy of a resolution of the CoRMSA Executive Committee resolving to engage in the present litigation is attached marked Annexure "KR1" and a copy of CoRMSA's Constitution is attached marked Annexure "KR2".
  - 3.1 CoRMSA is a non-profit organisation registered in terms of the Non-Profit Organisation Act 71 of 1997, under registration number 010-387-NPO.

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- 3.2 CoRMSA is tasked with promoting and protecting refugee and migrant rights. It is comprised of a number of member organisations including legal practitioners, research units and refugee and migrant communities. CoRMSA's mandate involves strengthening the partnerships between refugee and migrant service providers to provide improved co-ordination of activities. This includes developing working relationships with other concerned organisations to provide an effective forum for advocacy and action. Among other functions, CoRMSA liaises with government and other stakeholders to keep them informed of the views of its members.
- 3.3 CoRMSA represents the interests of its member organisations and acts in a way which advances the interests and aims of its member organisations by way of advocating for the recognition and advancement of the rights of refugees, asylum seekers and other migrants.
- 3.4 CoRMSA brings this application:
- 3.4.1 in its own interests, as an organisation dedicated to upholding and protecting the constitutional rights of asylum seekers and refugees, pursuant to section 38(a) of the Constitution; and

3.4.2 in the public interest, pursuant to section 38(d) of the Constitution.

4. It is in the public interest that South Africa comports itself in a manner befitting this country's status as a responsible member of the international community.  
This would include interpreting and implementing the provisions of the Refugees Act, 130 of 1998 in a manner consistent with the rule of law and with due regard to South Africa's international obligations, including its obligations under international criminal law which make it clear that refugee status should not be granted to suspected war criminals.
5. Further, it is submitted that maintaining the integrity of the South African asylum regime by not diluting the qualitative value of the grant of refugee status and the rights associated therewith is in the public interest.
6. Moreover, the Applicant asserts a public interest in South Africa complying with its international and domestic legal obligations to act against the perpetrators of international crimes.
7. Finally, South Africa's failure to adhere to its international and domestic obligations by knowingly harbouring a suspected international criminal threatens national security. Ensuring South Africa's compliance with these obligations so as to avoid threats to national security is a matter of public interest.

## THE RESPONDENTS

8. The First Respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**. He is cited in his official capacity. In terms of Uniform Rule of Court 4(9), this application will be served on him at the Union Buildings, Government Avenue, Pretoria.
9. The Second Respondent is the **MINISTER OF HOME AFFAIRS**. The Second Respondent is cited in her official capacity. In terms of Uniform Rule of Court 4(9), this application will be served on her care of the State Attorney, Pretoria.
10. The Third Respondent is the **MINISTER FOR INTERNATIONAL RELATIONS AND CO-OPERATION**. The Third Respondent is cited in her official capacity. In terms of Uniform Rule of Court 4(9), this application will be served on her care of the State Attorney, Pretoria.
11. The Fourth Respondent is the **MINISTER OF STATE SECURITY**. He is cited in his official capacity. In terms of Uniform Rule of Court 4(9), this application will be served on him care of the State Attorney, Pretoria.
12. The Fifth Respondent is the **DIRECTOR-GENERAL OF THE OFFICE OF THE PRESIDENCY**. He is cited in his official capacity. In terms of Uniform

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Rule of Court 4(9), this application will be served on him at the Union Buildings, Government Avenue, Pretoria.

13. The Sixth Respondent is the **DIRECTOR-GENERAL OF THE DEPARTMENT HOME AFFAIRS**. He is cited in his official capacity. In terms of Uniform Rule of Court 4(9), this application will be served on him at the Department of Home Affairs, corner Maggs and Petroleum Street, Watloo, Pretoria.

14. The Seventh Respondent is the **DIRECTOR-GENERAL OF THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION**. He is cited in his official capacity. In terms of Uniform Rule of Court 4(9), this application will be served on him at the Department of International Relations and Cooperation, 460 Soutpansberg Road, Rietondale, Pretoria.

15. The Eighth Respondent is the **DIRECTOR-GENERAL OF THE DEPARTMENT OF STATE SECURITY**. He is cited in his official capacity. In terms of Uniform Rule of Court 4(9), this application will be served on him at the Department of State Security Musanda Complex, Comsec Building, Delmas Road, Pretoria.

16. The Ninth Respondent is the **CENTRE MANAGER FOR THE CROWN MINES REFUGEE RECEPTION OFFICE**, who is the official responsible for the administration of the office and the refugee reception officers and refugee status determination officers employed therein. Indeed, to the best of my knowledge, the Ninth Respondent is a refugee reception and status

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determination officer designated in terms of section 8 the Refugees Act, 130 of 1998. The official place of business of the Ninth respondent is 19 Planet Avenue, Crown Mines, Johannesburg.

17. The Tenth Respondent is the **CHAIRPERSON: THE STANDING COMMITTEE FOR REFUGEE AFFAIRS**, whose official place of business is the 16<sup>th</sup> Floor, Sanlam (Middestad) Centre, corner Pretorius & Andries Street, Pretoria. The Standing Committee for Refugee Affairs is a body established by section 9 of the Refugees Act 130 of 1998 and is, in terms of 11(g) of the Refugees Act responsible for: the review of decisions by Refugee Status Determination Officers ("RSDO"); deciding any matter of law referred to it by a RSDO and monitoring the decisions of RSDOs.
18. The Eleventh Respondent is the **RSDO**, an official unknown to the Applicant, who is responsible for granting Nyamwasa asylum in terms of section 24 of the Refugees Act. An RSDO, designated in terms of section 8 of the Refugees Act, is responsible for granting or refusing to grant an applicant asylum status. This application will be served on him or her care of the Ninth Respondent at 19 Planet Avenue, Crown Mines, Johannesburg, the place where refugee status was apparently granted.
19. The Twelfth Respondent is **FAUSTIN KAYUMBA NYAMWASA**, a recognised refugee in terms of the Refugees Act, 130 of 1998, whose grant of refugee status forms the subject of this application. He is cited as he has an interest in

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the relief sought. This application will be served on him care of the Ninth Respondent at 19 Planet Avenue, Crown Mines, Johannesburg, the place where refugee status was apparently granted.

### **THE BASIS FOR THIS APPLICATION**

20. I begin by detailing the factual basis for the relief sought by the Applicant.
21. The Applicant – acting in its own and the public interest and pursuant to its concern for the integrity of the asylum regime and the rule of law – is compelled to launch this application.
22. It is compelled to do so by the refusal and/or failure by the Respondents to initiate and take appropriate action in respect of the unlawful granting of refugee status to Lieutenant-General Faustin Kayumbe Nyamwasa (“Nyamwasa”), apparently by officials working in the Department of Home Affairs falling under the authority of the Second and Sixth Respondents (“the impugned decision”).
23. The Applicant first communicated with the Respondents regarding its intention to submit a comprehensive briefing paper via a letter dated **25 June 2010**. A copy of this letter is attached marked annexure “**KR3**”.

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24. This was done pursuant to the revelation on **24 June 2010**, by the Department of Home Affairs Deputy Director-General responsible for immigration, Jackson McKay, that Nyamwasa was granted refugee status in the Republic of South Africa. This was reported in the Business Day on Friday **25 June 2010**. A copy of the article is attached marked "**KR4**".
25. Two responses were received to the Applicant's fax. Both of them were dated **28 June 2010**, the one from the office of the Presidency and the other from the Ministry of International Relations and Cooperation. Copies are attached marked annexure "**KR5**" and "**KR6**", respectively.
26. The fax from the office of the Presidency advised that the matter had been referred to Dr Nkosazana Dlamini Zuma, the Minister of Home Affairs, for attention. The response from the Ministry of International Relations and Cooperation merely acknowledged receipt of the Applicant's fax.
27. As forewarned, a comprehensive legal briefing was prepared with the assistance of Counsel and sent to the Respondents via fax on 6 July 2010. A copy of this briefing paper is attached herewith marked annexure "**KR7**". The allegations made in this document are expressly adopted and incorporated herein.
28. By way of summary, the briefing paper makes the following clear:

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- a. That the Department of Home Affairs deputy Director-General responsible for immigration, Jackson McKay, confirmed on Thursday, 24 June 2010 that Nyamwasa had been granted asylum in South Africa.
- b. That reasonable grounds exist to suspect Nyamwasa of the commission in Rwanda and the Democratic Republic of the Congo ("DRC") of the gravest sorts of crimes – namely crimes against humanity and war crimes – and that such grounds are borne out inter alia by a United Nations Report of the Secretary-General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the DRC - S/1998/581, as well as Spanish and French indictments for Nyamwasa arising from such crimes. For ease of reference those indictments are attached hereto as annexure "KR8" and "KR9".
- c. That these sources establish, at the very least, a prima facie case against Nyamwasa which had to be taken into account by South African authorities in exercising their immigration and extradition powers regarding Nyamwasa.
- d. The preamble to the Refugees Act provides that South Africa has "assumed certain obligations to receive and treat in its

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territory refugees in accordance with standards and principles established in international law”.

e. In terms of section 6(1) of the Refugees Act, the Act must be interpreted and applied with due regard to—

“(a) the Convention relating to the status of Refugees (UN, 1951);

(b) the Protocol Relating to the Status of Refugees (UN, 1967)

(c) the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969)

(d) the Universal Declaration of Human Rights (UN, 1948); and

(e) any other relevant convention or international agreement to which the Republic is or becomes party to.”

f. Section 3 of the Refugees Act details the conditions under which a person qualifies for refugee status. It must be read together with Section 4 of the Act. Section 4 sets out reasons for non-qualification. We are concerned with Section 4 (1) (a) which provides:

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"(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she—

"(a) 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"

g. Article 1F of the 1951 Convention relating to the Status of Refugees and Article I(5) of the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa obliges South Africa to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees.

h. One of the key exclusions is in respect of individuals accused of international crimes. For example, Article 1F of the 1951 Convention relating to the Status of Refugees states that the provisions of that Convention "shall not apply to any person with respect to whom there are serious reasons for considering" that: "(a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the

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international instruments drawn up to make provision in respect of such crimes.”

- i. The rationale for the exclusion clauses, which had to be borne in mind when considering Nyamwasa's application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.
- j. The exclusion clauses must be applied “scrupulously” to protect the integrity of the institution of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997.
- k. It is thus incumbent on the South African authorities to determine whether an applicant for refugee status is eligible for refugee status and they are under a positive duty to ensure that persons excluded in terms of Section 4 of the Refugees Act are not granted refugee status.

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- l. In terms of the Refugees Act the primary responsibility for the grant of refugee status rests with the RSDO. Section 24 of the Refugees Act empowers a RSDO, on conclusion of a hearing, to grant asylum; reject the application as manifestly unfounded, abusive or fraudulent; or refer any question of law to the Standing Committee for Refugee Affairs ("SCRA"). In coming to a decision a RSDO, when considering an application for asylum, may request any information or clarification he/she deems necessary, and where necessary consult and invite a UNHCR representative to furnish information on specified matters. A decision must therefore be informed by a number of considerations and a thorough assessment of every application for asylum is therefore required.
- m. Although the decision to grant refugee status rests with the RSDO, the SCRA is required to monitor his/her decisions and must advise and decide on issues of law referred to it by the SCRA.
- n. The Refugees Act makes it abundantly clear that there is a positive duty under South African domestic law and its international and regional obligations to investigate and determine excludability.

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- o. By granting asylum to Nyamwasa the South African authorities undermined the integrity of the institution of asylum in South Africa by failing "scrupulously" to apply the exclusion clause in section 4 of the Refugees Act as read with South Africa's international and regional obligations.
- p. In light of Nyamwasa's alleged involvement in the commission of war crimes and crimes against humanity, the Department of Home Affairs, through its officials, failed to fulfil this duty by adequately investigating Nyamwasa's past history and his military involvement in atrocities committed in Rwanda and the DRC.
- q. Had the authorities performed such an investigation they would have had reason to believe that Nyamwasa has committed a war crime or crime against humanity (as defined in a number of international legal instruments dealing with such crimes) and would have concluded that he is thereby excluded under South Africa's domestic asylum law and international law from being granted refugee status because he is an excluded person and therefore does not qualify for refugee status.
- r. The South African authorities' decision to grant Nyamwasa refugee status not only undermines the integrity of the institution

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of asylum but also places South Africa in breach of its international criminal law obligations. The crimes Nyamwasa is accused of committing are crimes prohibited under customary international law and all states are bound to assist in bringing those who commit such crimes to justice. South Africa is therefore bound to either extradite Nyamwasa to a willing and able jurisdiction or to prosecute him.

- u. In affording Nyamwasa refugee status South Africa is facilitating his impunity and in doing so has not only acted in contravention of South African law but also contrary to its international customary law obligations.

29. As part of its conclusions the briefing paper made it clear that:

- a. There is reason to believe that Nyamwasa was involved in crimes against humanity and war crimes and thus Nyamwasa is an excluded person for purposes of section 4 of the Refugees Act and is not eligible for refugee status.
- b. The decision to grant Nyamwasa refugee status is therefore unlawful and in conflict with South Africa's domestic and international obligations.

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c. The South African authorities ought to take steps to withdraw Nyamwasa's refugee status so as to comply with the Refugees Act and South Africa's commitment to the principle of non-impunity for international crimes. Any decision on withdrawal of such status must be taken with due regard for Nyamwasa's rights to procedural fairness under the Refugees Act and the Promotion of Administrative Justice Act 3 of 2000.

30. Three responses were received acknowledging receipt of the legal briefing paper. None of these engaged meaningfully with the issues raised in the submission.

31. A fax from the Executive Office Assistant to the Director-General of the Department of Home Affairs dated **15 July 2010** was received, wherein the Applicant was advised that the matter had been referred to the Deputy Director-General responsible for Immigration Services, Mr Jackson McKay for further attention. A copy of this fax is attached marked annexure "**KR10**".

32. A fax dated **23 July 2010**, was received from the office of the Chairperson of the Standing Committee for Refugee Affairs, advising that the matter will be referred to the Chairperson for attention. A copy of this fax is attached marked annexure "**KR11**".

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33. Finally, a response dated **29 July 2010** was received from the Chief Director: Asylum Seeker Management, advising the Applicant that: *"the matter concerning the legal status of Faustin Kayumba Nyamwasa is being handled by the Department of Justice, South African Police Services and International Relations."* A copy of this fax is attached marked annexure **"KR12"**.
34. Five months after submitting the briefing paper the Applicant had yet to receive a meaningful response. Accordingly, the Applicant instructed the Wits Law Clinic to act on its behalf and a fax dated **17 December 2010** was sent to the Respondents. This fax signalled the Applicant's intention to proceed with legal action should the South African authorities fail to comply with their obligations under South African and international law. A copy of this fax is attached marked **"KR13"**.
35. No response was received until the Applicant's attorneys of record received a telephone call from Anthea Martin some time in early January 2011, apparently an employee of the Office of the Presidency, employed in the legal and executive services section. Further, an e-mail was received by the Applicant's attorneys, on behalf of the office of the Presidency, requesting an extension to **26 January 2011**, to reply to the Applicant's letter. Moreover, the e-mail indicated that the office of the Presidency is currently engaging other departments regarding this issue. A copy of this e-mail is attached marked **"KR14"**.

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36. No further response was received from the office of the Presidency, despite an e-mail requesting a response sent on **31 January 2011**, and a letter faxed on **15 February 2011**, attached marked "**KR15**", once again indicating the Applicant's intention to proceed with legal action should the South African authorities fail to comply with their obligations under South African and international law and notify the Applicant accordingly, on or before **28 February 2011**.
37. This elicited the following response to our attorneys by way of fax from the Ministry of State Security dated **10 February 2011** (but received on **21 February 2011**), attached marked annexure "**KR16**", wherein we were advised that:
- "This office has noted the above briefing, and will consider its contents when called to consider the matter."*
38. In response, a fax dated 28 March 2011, attached marked annexure "**KR17**", was sent to the office of the Presidency. This fax extended the date for compliance with the demand to 13 April 2011. This fax was directed to the Presidency as the head of government and on the understanding that, as indicated, by the Presidency, it is in contact with other Departments.
39. Then by way of letter dated 13 April 2011 we received a response from the Presidency (attached marked annexure "**KR18**") which indicated that the Departments of Home Affairs and International Relations and Cooperation are

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the relevant departments to deal with the Applicant's request, and we were urged "to liaise directly with the two departments".


40. This is a most surprising position for the Presidency belatedly to have adopted, where earlier it had indicated that it was engaging other departments in the matter and had noted the briefing paper and would consider its contents.

41. In any event, the Applicant thus wrote a further letter dated 20 April 2011 attached as annexure "KR19" in which the Applicant requested the Respondents:


*"... to advise on or before 30 April 2011 when they intend responding to our request to initiate proceedings to withdraw the refugee status of Faustin Kayumbe Nyamwasa as set out in paragraph 106 of the legal briefing paper.*

*Failure to comply with the above demand in writing will result in an application to the High Court without further notice."*

42. This letter was served by hand at the Ministry of Home Affairs and International Relations and Co-operation, respectively. A digital copy was also forwarded to the office of the Presidency. The letter contained all previous correspondence to date as attachments.

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43. Two responses to this letter have been received. An acknowledgment of receipt by e-mail from the office of the Presidency, attached marked annexure "KR20", and an e-mail, attached marked annexure "KR21", apparently directed to the office of the Presidency from the Business Unit (East Africa-Burundi and Rwanda) of the Department of International Relations and Cooperation, advising that the matter would receive attention. The second e-mail was forwarded to the Applicant's attorneys by the office of the Presidency.
44. To date there has been no meaningful response by any of the Respondents to the Applicant's letters. The Applicant has accordingly been left with no choice but to resort to this Court for the appropriate relief.
45. The briefing and the information contained therein provided the South African authorities with credible information to justify revisiting Nyamwasa's refugee status.
46. Once in possession of the briefing paper the South African authorities, and specifically the SCRA, were legally obliged to investigate the circumstances under which Nyamwasa was granted asylum.
47. The Refugees Act requires the SCRA to fulfil an oversight role ensuring that decisions made by RSDOs comply with the law and South Africa's international obligations.

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48. Furthermore, on receipt of the briefing paper the SCRA was in possession of credible information that may or may not have been disclosed in Nyamwasa's initial application. Any failure by Nyamwasa to disclose this information empowers the SCRA, in terms of section 36 of the Refugees Act, to withdraw his refugee status. Section 36 provides that:

"(1) If a person has been recognised as a refugee erroneously on an application which contains any materially incorrect or false information, or was so recognised due to fraud, forgery, a false or misleading representation of a material or substantial nature in relation to the application or if such person ceases to qualify for refugee status in terms of section 5-

(a) the Standing Committee must inform such person of its intention of withdrawing his or her classification as refugee and the reasons therefor".

49. In light of the nature of the crimes Nyamwasa is alleged to have committed, in terms of arrest warrants issued by the Spanish and French authorities, credible reports and the briefing paper, the SCRA was and is required, at the very least, to enquire into these allegations, with a view to invoking section 36 of the Refugees Act and withdrawing Nyamwasa's refugee status.

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50. Given the correspondence submitted thus far, and, the amount of time that has elapsed without a meaningful response, it is sadly apparent that the Respondents have failed to comply with their obligations under section 195 of the Constitution and will only take the appropriate action when directed to do so by this Honourable Court.

### **CONCLUSION AND RELIEF SOUGHT**

51. In the circumstances, I submit that despite having been extremely patient, and despite providing the Respondents with all the information necessary and with ample time to take the necessary steps, they have unlawfully refused, failed or omitted to review the grant of refugee status to Nyamwasa.

52. Therefore, the Applicant has been left with no other option but to bring this application in order to obtain the necessary relief from this Honourable Court as contained in the notice of motion.

53. Accordingly:

- a. For the foregoing reasons the Applicant respectfully submits that the impugned decision to grant Nyamwasa refugee status falls to be reviewed and set aside with appropriate declaratory relief by this Court in terms of this Court's review powers under section 172(1)(a) of the Constitution, alternatively sections 6

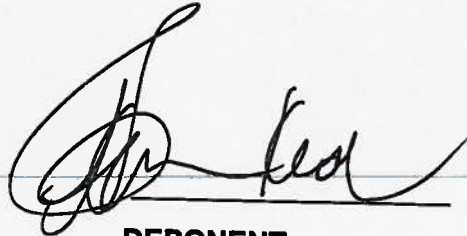
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and 8 of PAJA. Such review and declaratory relief is sought on the following grounds.

- i. The decision is unlawful since it is motivated by a material error of law, and furthermore, is a decision vitiated on the basis that the Department of Home Affairs and its officials failed to take into account obviously relevant considerations and failed to comply with a mandatory condition of the empowering legislation.
  - ii. It is furthermore unreasonable and irrational.
- b. The Applicant further asks this Honourable Court to order the Respondents to immediately reconsider Nyamwasa's refugee status in terms of South African and international law and with due consideration to be given to the evidence provided by Nyamwasa, should he choose to provide it. Furthermore the Applicant requests that the Court order that the reconsideration of Nyamwasa's refugee status be completed and that a notification of such completion with full reasons for the decision be provided to this Court within 30 days of this Court's order.

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**DEPONENT**

The Deponent has acknowledged that she knows and understands the contents of this affidavit/declaration, which was signed and sworn to/declared before me at JOHANNESBURG on this the of ..17...<sup>May</sup> 2011, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.



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**COMMISSIONER OF OATHS**

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