IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NUMBER: _____

NORTH GAUTENG HIGH COURT CASE NUMBER: 30123/11

In the matter between:

CONSORTIUM FOR REFUGEES AND MIGRANTS	Applicant
and	
PRESIDENT OF THE REPUBLIC IN SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
MINISTER FOR INTERNATIONAL RELATIONS AND CO-OPERATION	Third Respondent
MINSTER OF STATE SECURITY	Fourth Respondent
DIRECTOR-GENERAL OF THE OFFICE OF THE PRESIDENCY	Fifth Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT HOME AFFAIRS	Sixth Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION	Seventh Respondent
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 COMMITEE FOR REFUGEE AFFAIRS	Tenth Respondent
THE REFUGEE STATUS DETERMINATION OFFICER RESPONSIBLE FOR GRANTING REFUGEE STATUS TO THE TWELFTH RESPONDENT	Eleventh Respondent
KAYUMBA NYAMWASA	Twelfth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

ROSHANARA DADOO

do hereby make oath and state that:-

1. I am an adult woman and the Director of the Consortium for Refugees and Migrants in South Africa, the applicant in this matter. I am duly authorised to depose to this affidavit. The offices of the applicant are at 501 Heerengracht, 87 De Korte Street Braamfontein.

2. The facts set out in this affidavit are true and within my own personal knowledge unless the context indicates to the contrary. Where I make submissions of law, I do so on the advice of the applicant's legal representatives.

THE PARTIES

3. The applicant is the Consortium for Refugees and Migrants in South Africa ('CORMSA'). The applicant, a registered non-profit organisation, is comprised of a number of member organisations including legal practitioners, research units and refugee and migrant communities. Its mandate is to promote and protect refugee and migrant rights and to undertake initiatives which advance the interests and aims of its member organisations by advocating for the recognition and advancement of refugee and migrant rights.[1]

[1] The applicant's mandate is not limited to advancing the rights of refugees in South Africa, but extends to ensuring the integrity and sustainability of the refugee system in the country. The applicant is concerned with ensuring that the refugee system works in such a way that those who meet the criteria are granted asylum but also that asylum is not granted to those persons undeserving of it.

4. The first to eleventh respondents this matter are the various State parties that were joined in the High Court proceedings in which the applicant sought to challenge the grant of refugee status to the twelfth respondent.

5. All of the above state respondents shall be served care of the State Attorney (Pretoria), SALU Building, 316 Thabo Sehume Street, Pretoria.

6. The twelfth respondent is Kayumba Nyamwasa, an adult male whose address for the purpose of service is care of his attorney, Kennedy Gihana, 2nd Floor Office, Van Erkom Building, Pretorius Street, 217, Pretoria.

CONDONATION

7. I seek at the outset condonation from this Honourable Court as this application for leave to appeal is late. The reasons for this unfortunate delay include that the applicant was waiting for the court a quo's judgment denying leave to appeal. After realising that such judgment would be further delayed the applicant thought it best to file its application expeditiously. In addition, the activities of the applicant's attorneys of record, WITS Law Clinic have been severely disrupted by the student protests that began on 14 October 2015.

INTRODUCTION

8. The applicant applies to this Court for leave to appeal against the whole of the order and judgment of Judge Mngqibisa-Thusi J, delivered in the North Gauteng High Court on 26 September 2014, attached as Annexure **"RD1"** wherein she dismissed the applicant's application, and made an adverse costs order. In addition, Judge Mngqibisa-Thusi J dismissed leave to appeal with an adverse cost order on 15 September 2015 in the court order attached as Annexure **"RD2".**

9. The applicant contends that there is a reasonable prospect that this Court would come to a different conclusion to that of the court a quo, and that given the importance of the matter it should be heard by this Honourable Court.

10. The novelty and importance of the issues raised in this case for the rule of law and for South Africa's international obligations are clear. That will be apparent, with respect, from a short summary of the facts of this matter.

11. The principal issue before the court a quo was the legality of a decision by the eleventh respondent to grant the twelfth respondent refugee status in terms of the Refugees Act 130 of 1998 ('the Refugees Act').

12. The twelfth respondent, Mr Kayumba Nyamwasa, is a former general in the Rwandan Army. He is implicated in the commission of war crimes committed in the Democratic Republic of Congo between 1994 and 1998 and is the subject of three separate extradition requests from Rwanda, France and Spain.

13. The decision to grant the twelfth respondent refugee status was taken despite the provisions of section 4(1)(a) of the Refugees Act, which disqualify a person

from being granted refugee status if there is reason to believe that such a person has committed war crimes, crimes against peace or crimes against humanity.

14. The respondents' subsequent refusal to revisit this decision was also taken in the face of a Briefing Paper, attached as Annexure "**RD3"** which the applicant submitted to the respondents, which, in exhaustive detail, set out serious allegations of international crimes committed by the twelfth respondent.

15. The applicant's numerous attempts to elicit from the government respondents a meaningful response to its briefing paper concerning the twelfth respondent were unsuccessful. The matter was simply referred to another party or ignored.

16. As a result, on 27 May 2011 the applicant applied to the North Gauteng High Court for orders inter-alia setting aside the decision to grant the twelfth respondent refugee status, remitting the question of the twelfth respondent's refugee status to the respondents for reconsideration, and related relief.

17. The application was argued before Mnqibisa-Thusi J on 29 and 30 October 2012. It took the court a quo two years to hand down a thirteen-page judgment on 26 September 2014.

18. The court a quo decided that:

    18.1 The twelfth respondent was correctly granted refugee status because he fell within the provisions of section 3 of the Refugees Act;

    18.2 The applicant had failed to establish that there was reason to believe that the twelfth respondent was involved in the alleged crimes;

    18.3 The fourth respondent must have been aware of the allegations against the twelfth respondent and must have communicated them to the other

respondents. Accordingly, so the court a quo reasoned, the respondents must have taken the allegations against the twelfth respondent into consideration when taking the decision to grant him refugee status;

18.4 The information disclosed in the twelfth respondent's application for asylum was confidential and there was no reason to justify the disclosure of this information either to the applicant or the court itself.

19. The court a quo accordingly dismissed the application. It also ordered the applicant – an NGO which had clearly litigated in good faith and not frivolously – to pay the costs including the costs of two counsel, despite the court a quo's acceptance at paragraph 11 of the judgment that the matter was obviously brought in the public interest and despite the *Biowatch*[2] principle being drawn pertinently to the High Court's attention.

20. The court a quo took months to render judgment. The setting down of the application for leave to appeal took several months due to the apparent unavailability of the learned judge and after several letters to the Deputy Judge President, as confirmed in the supplementary affidavit of Ms Meg McIntyre, attached as **"RD4"** from WITS Law Clinic, (the applicant's attorney of record in this matter).

21. The learned judge is yet to provide judgment pertaining to the dismissal of the applicant's leave to appeal application and as a result it is currently not before this court. As expressed in the supplementary affidavit of Ms McIntyre, Mnqibisa-Thusi J's clerk informed her that the judgment would be made available. Upon further inquiry, Ms McIntyre was informed that an application would be required

[2] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC)

before judgment could be made available. Every effort is being made to obtain this judgment and the applicant undertakes to file it before this Honourable Court as soon as it is available. However, the applicant noted that during the hearing for leave to appeal, no substantive reasons were provided by the learned judge when she denied leave to appeal, as set out **RD4.**

22. The applicant contends that the court a quo was wrong to find that the twelfth respondent had correctly been granted refugee status and that the serious allegations of the twelfth respondent's complicity in war crimes had been properly considered by the respondents.

23. In their answering affidavits before the court a quo, the respondents contented themselves to assert the vaguest of justifications for the decision to grant the twelfth respondent refugee status. When called upon to produce the Rule 53 record of the decision making process which led to the twelfth respondent being granted refugee status, the respondents resolutely refused to do so, relying on what they contended to be the absolute confidentiality of asylum applications. Instead, they chose to oppose the application without producing the record.

24. In light of the respondents' failure to properly justify their decision and their failure to disclose the documents that were before the decision makers and which reflect the reasoning behind the decision to grant the twelfth respondent asylum, the applicant contends that the court a quo's conclusion that the twelfth respondent was correctly granted refugee status, is patently flawed.

25. The court held that that the respondents "must have" taken the allegations against the twelfth respondent into consideration when taking their decision. This finding, generously assuming, as it does, the probity of the respondents'

decision-making processes, is however, entirely unsupported by the facts. The court a quo appears to have reached this finding inter-alia on the questionable basis that from the applicant's citation of the fourth respondent in the proceedings, it can thereby be deduced that the fourth respondent must have communicated the allegations against the twelfth respondent to the other respondents. There was simply no evidence to this effect.

26. The court a quo's finding that the applicant was correctly granted refugee status because he, in the view of the court a quo, falls within the provisions of section 3 of the Refugees Act, cannot be sustained either. The issue before the court a quo was not whether the twelfth respondent should be returned to Rwanda, a country where he could be at risk of persecution due to his alleged political activities. Indeed, the relief sought by the applicant in the court a quo expressly disavowed any decision being taken to withdraw the twelfth respondent's refugee status without him being provided with a full and proper hearing by the tenth respondent.

27. The issue before the court a quo – and which, with respect, was not dealt with – was whether the rigorous legal and procedural standards required of an exclusion analysis in terms of section 4(1)(b) of the Refugees Act were in fact properly applied by the eleventh respondent in the determination of the twelfth respondent's application for refugee status.

28. South Africa is in this regard obliged under Article 1F(a) of the 1951 United Nations Convention Relating to the Status of Refugees and section 4(1)(b) of the Refugees Act, not to grant refugee status to a person if there is reason to believe that he or she has committed a crime against peace, a war crime or a crime

against humanity, as defined in any international legal instrument dealing with such crimes.

29. The court a quo failed to appreciate that irrespective of whether a person would otherwise qualify for refugee status and irrespective of how in need of protection from persecution such a person may be, international and domestic law excludes them from the protection afforded by refugee status.

30. The decision of the court a quo sends out the unfortunate message that suspected international criminals may find a safe haven in South Africa by being granted refugee status and that when required to justify the rationality of such decisions, the authorities responsible may simply hide behind bland denials and assertions of blanket confidentiality of asylum applications.

31. For all of these reasons and those set out in more detail below, the applicant respectfully submits that the court a quo erred in its initial findings, its order, and refusal to grant leave to appeal. Moreover, the exercise of public power to which this application relates, namely the granting of refugee status to a suspected war criminal, constitutes a novel point of law of general public importance which should be reconsidered by way of appeal.

32. If not corrected the court a quo's decision will, with respect, set a dangerous precedent, one that will effectively allow South Africa to use the confidentiality principle in refugee applications to shield perpetrators of international crimes from accountability and its own controversial decisions from scrutiny, sending a signal to war criminals the world over that they will find a safe haven in South Africa, a haven where they might be actively protected as refugees.

LEAVE TO APPEAL

33. There is a reasonable prospect that another Court would come to a different conclusion to that of the court a quo.

34. For the reasons set out below the applicant submits that the appeal has reasonable prospects of success and that the test in section 17 is met.

35. The court a quo's reasoning is reasonably likely to be corrected on appeal since it is manifestly inconsistent with South Africa's domestic law, and is wholly inconsistent with the Refugees Act and with South Africa's international criminal law obligations.

36. What is more, the matter is of great importance, of application to all refugees entering into South Africa, and pertaining to material questions of South Africa's international and domestic law responsibilities. This matter is also of interest to the public as it pertains to the prevention of South Africa becoming a safe haven for suspected perpetrators of international crimes and merits the attention this Honourable Court.

37. The applicant will first deal with the proper approach to evidence, then will establish that this court should hear this matter because the court a quo should have found that:

    a. The indictments issued against the twelfth respondent were based on credible investigations providing sufficient reason to believe he was involved in the commission of crimes against humanity and war crimes;
    b. The government respondents failed to properly consider the allegations against the twelfth respondent;

c. The lack of indictments issued against the twelfth respondent by the International Criminal Tribunal for Rwanda is irrelevant;

d. Confidentiality of the twelfth respondent's asylum application was inaccurately addressed.

38. Lastly, the applicant will address the cost order.

Generally: the proper approach to the evidence

39. It is respectfully submitted that the approach of the court a quo to the evidence was:

39.1 contrary to the established tests for solving factual disputes on motion;[3]

39.2 inconsistent with a recognition of the duties of organs of state in litigation;[4] and

39.3 incompatible with the principles of judicial review in relation to the role of the Rule 53 record.[5]

The indictments issued against the twelfth respondent were based on credible investigations providing sufficient reason to believe he was involved in the commission of crimes against humanity and war crimes

40. The court a quo at paragraph 20 of the judgement held that it was "*common cause*" that the initial investigation by French Judge Jean-Louis Bruguire, which led to the first indictment being issued against the twelfth respondent "*has been*

[3] *Wightman v Headfour* (Pty) Ltd 2008 (3) SA 371 SCA para 13.
[4] *Kalil N.O and Others v Mangaung Metropolitan Municipality* 2014 (5) SA 123 (SCA) para 30-31
[5] *Turnball Jackson v Hibiscus Coast Municipality* 2014(6) SA 592 (CC) at para 37.

discredited by Trevedic's conclusion that the Habyanimara's **[plane]** (sic) *was shot down by members of his own army*".

41. This finding related to an allegation by the twelfth respondent in his opposing affidavit that a 2012 report by a French judge (Trevedic) tasked with further investigations into the incident concluded that members of the President's own army were responsible for the crash, and that this report exonerated him.

42. It plainly was **not** common cause on the papers that the first indictment issued against the twelfth respondent had been discredited and the court a quo was wrong in concluding otherwise. In addition, even if a 2012 report discredited the investigation, which the applicant denies, that report was written after the decision was made to grant the twelfth respondent refugee status, and hence cannot be used subsequently to justify the decision, which was made on the evidence available to the respondents at the time.

43. The court a quo however went further and found, further erroneously, that the second indictment issued against the twelfth respondent by Andreu Merelles, an investigative judge in the Spanish High Court, "*was based on the discredited indictment*". The latter finding by the court a quo is not sustainable on the evidence. The first indictment issued against the twelfth respondent by French Judge Bruguire related to his alleged involvement in the shooting down of President Habyarimana's aircraft in 1994, an event which served as the trigger for the genocide which then engulfed Rwanda.

44. The second indictment, issued by Spanish Judge Merelles in February 2008, instead relates to entirely different crimes and implicates the twelfth respondent directly in violent killings of civilians in Rwanda and the DRC, allegedly orchestrated by RPA generals under his direct command. The briefing paper at paragraph 30 to 37 details the specific war crimes in which the twelfth respondent is alleged to have directly participated and/or be responsible for by virtue of the international criminal law doctrine of command responsibility – and these facts were drawn to the attention of the court a quo.[6]

45. The existence of the UN Report and the Spanish indictment provide reasonable grounds to believe that the twelfth respondent has been involved in the commission of war crimes and crimes against humanity – crimes which fall under the categories listed in the exclusion clause in section 4 of the Refugees Act.[7]

46. The Constitutional Court in *Basson*[8] emphasised the duty of courts to give proper weight and attention to charges of crimes against international law, and said the following:

> *"As was pointed out in Nuremburg, crimes against international law are committed by people, not abstract entities, so that only by punishing individuals who commit such crimes can the provisions of international law be enforced. Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the state. Given the extreme gravity of the charges and the powerful national and international*

[6] See applicant's High Court heads of argument: para 40-44.
[7] See applicant's High Court heads of argument: para 93-95.
[8] *S v Basson* 2005 (1) SA 171 (CC) at para 184

need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges."

47. The court a quo's terse dismissal of the detailed allegations in the Spanish indictment and its failure to even address in its judgment, the applicant's arguments concerning the probability of the twelfth respondent's complicity in the war crimes detailed in the 1998 United Nations report, was inconsistent with its duty to give appropriate and considered attention to the serious charges of multiple war crimes and other violations of international humanitarian law against the twelfth respondent.

48. For this reason alone leave to appeal ought to be granted.

The government respondents failed to properly consider the applicable law and the allegations against the twelfth respondent

49. At paragraph 20 of the judgment, the court a quo recorded that the deponent to the answering affidavit deposed to by the government respondents had "*deposed to the fact that when the twelfth respondent's application was considered, they were aware of the serious allegations as mentioned by the applicant and as required had considered them in assessing whether the twelfth respondent and his family should be granted refugee status*".

50. The court a quo's findings in this regard are flawed, with respect. Aside from this bald assertion, there was no supporting evidence by the government and no Rule

53 record documentation to confirm the say-so of the deponent. The government respondent's answering affidavits in the court a quo were replete with vague and unsubstantiated denials, generalities and a failure to fully explain what specific allegations against the twelfth respondent were taken into account, the weight, if any, accorded to these allegations and how the decision to grant the twelfth respondent refugee status was arrived at.

51. The court a quo's failure is all the more material when it is recalled that the respondents refused to comply with the provisions of Rule 53 and chose to oppose the review application without filing a single document relating to the process by which the decision to grant the twelfth respondent's refugee status was arrived at.

52. It is wholly insufficient for a respondent in a review application to be permitted to justify the rationality of his decision by simply asserting, without anything more, that he applied his mind and considered all relevant factors. Were that to be so, the powers of the court to review the exercise of administrative decision-making would be defeated and rendered effectively redundant. As the applicant highlighted in its argument, a decision maker whose decision is being challenged on review may not justify his decision by mere assertion.

53. In these circumstances, the court a quo's finding, based as it was on the mere say so of the government respondents that they had properly considered the allegations against the twelfth respondent when assessing his application for asylum, simply cannot be sustained.

54. Had the respondents correctly applied section 4(1) of the Refugees Act, and considered the allegations made against the twelfth respondent, then the twelfth respondent would not have been awarded refugee status. The respondent's airy statements to the contrary, without any primary or contemporaneous evidence to support their decision-making, ought to have been rejected by the court a quo.

55. Furthermore, as the applicant will now show, had the court a quo properly applied the legal test and scrutinised the evidence, then it would have found that the twelfth respondent's refugee status was unlawfully granted.

56. Proper consideration of the allegations made against the twelfth respondent would involve consideration of the Refugees Act which requires only that there be "reason to believe"[9] that the excludable offence has been committed.

57. Furthermore, proper consideration would involve the application of section 6 of the Refugees Act which deals with the interpretation, application and administration of the Act and requires that due regard be had to the Refugees Convention, the Additional Protocol, the OAU Convention, the Universal Declaration of Human Rights and any other relevant convention or international agreement to which South Africa is or becomes party to. [10]

[9] The applicable standard for ascertaining whether there is "reason to believe" was set out in detail in the applicant's High Court heads of arguments para 188-197.
[10] See the applicant's High Court heads of argument: paras 98.1.

58. Proper consideration would also involve the application of constitutional provisions relating to the application of international law. Specifically:

    a. Section 232 of the Constitution which incorporates customary international law into South African law, including the recognition of certain core international crimes, such as war crimes, crimes against humanity and genocide and the concomitant duty to combat impunity for their commission.[11]

    b. Section 39 of the Constitution which mandates consideration of international law and permits the use of foreign case law, the consideration of which is germane to this application.[12]

59. These provisions provide the parameters in which all refugee applications must be assessed and they must inform all decisions to grant or deny refugee status. In this case it is clear that the respondents did not properly consider the allegations made against the twelfth respondent or the applicable law. Had they performed their functions properly and constitutionally, they would have come to the only conclusion open on the facts: that the twelfth respondent is not a refugee for the purposes of South African refugee law; and that whatever the other merits

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[11] See in this regard *S v Basson* 2005 (1) SA 171 (CC) where the Constitutional Court noted:

> *"[I]nternational law obliges the state to punish crimes against humanity and war crimes. It is… clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes. We do not have all the details before us but it does appear that the crimes for which the accused was charged may well fall within the terms of this international law obligation. In the circumstances, it may constitute an added obligation upon the state."* At para 37.

The Court went on to say that:

> *"[G]iven the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges."* At para 184.

[12] There is extensive comparative law on the issues raised in this application and the applicant accordingly attempted to assist the court a quo by collating and referring to that jurisprudence in its submissions in the applicant's High Court heads of argument.

might have been of his application, he could not and should not have been recognised as a refugee under the law.

60. The court a quo accordingly erred in not finding that the decision to grant the twelfth respondent refugee status is irrational arbitrary and unreasonable and hence reviewable under a multitude of provisions under PAJA.

The lack of indictments issued against the twelfth respondent by the International Criminal Tribunal for Rwanda is irrelevant

61. The court a quo at paragraph 20 stated that the twelfth respondent was not cited in indictments issued by the "*International Criminal Court for Rwanda*". The correct name of the entity referred to by the learned judge is the United Nations International Criminal Tribunal for Rwanda ('the ICTR'). Whilst no indictments have been issued against the twelfth respondent by the ICTR, the jurisdiction of the ICTR was limited to crimes committed on the territory of Rwanda between 1 January 1994 and 31 December 1994.[13] The Tribunal "*may"* also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period. A number[14] of the allegations made against the twelfth respondent fall outside the jurisdiction of the ICTR both as a matter of *ratione temporis* and *ratione loci.* Thus, it is unsurprising that the twelfth respondent is not cited by the ICTR.

[13] As stated on the official website of the ICTR.
[14] Including the crimes documented in the United Nations Report of the Secretary-General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo - S/1998/581 (the UN Report), referred to in para 39 of the applicant's High Court heads of argument.

62. What is germane – and which was not considered by the court a quo – is that two indictments have been issued against the twelfth respondent and his extradition is sought by two sovereign states: France and Spain. The questions before the court a quo were inter-alia whether the respondents had demonstrated that the two indictments issued against the twelfth respondent, do not show that there is "reason to believe" that the twelfth respondent has been involved in the commission of excludable offences.[15]

63. The court a quo failed to find – which was the only conclusion that could be reached on the evidence,[16] and having regard to the correct legal test[17] – that the respondents had failed to do so.

Confidentiality of the twelfth respondent's asylum application was incorrectly addressed

64. The court a quo at paragraphs 24 to 26 of the judgment, concluded that there was no basis for the information disclosed in the twelfth respondent's asylum application to be disclosed to either the applicant or the court. The respondents in the court a quo justified their submissions, and their lack of substantiation, on the basis that refugee applications are confidential. The court a quo incorrectly accepted the respondents' reliance on the confidentiality provisions of the Refugees Act.

[15] Detailed in the applicant's High Court heads of argument: paras 208-213.
[16] Detailed in the applicant's High Court heads of argument where the relevant evidence was dealt with: paras 180-187.
[17] Set out in the applicant's High Court heads of argument where the correct legal test is described: paras 198-211

65. Section 21(5) of the Refugees Act provides that "*The confidentiality of asylum applications and the information contained therein must be maintained at all times.*"

66. The respondents interpreted this provision as providing for blanket confidentiality – thereby denying the opportunity for a proper ventilation of their impugned decision, and without any consideration for the established means by which that confidentiality might be maintained before the court a quo through appropriate safeguards.

67. The court a quo's sole explanation for its findings (based on the respondent's misguided reliance on the alleged blanket confidentiality of asylum applications) is the reference in paragraph 26 of the judgment – without referencing any supporting authority – that "*public interest does not demand that openness and accountability should surpass the safety of a vulnerable person*".

68. The application before the court a quo concerned matters of compelling public interest, including just administrative action and accountable public administration in relation to the Government's grant of asylum and the application of the international and domestic law rules around exclusion of suspected international criminals from the grant of refugee status. The court a quo erred by accepting an evasive, and vague answer from the respondents, without interrogating whether their purported reliance on confidentiality of asylum applications was legally sustainable.

69. What the court a quo ought to have found is that the rule of law and the public interest in a transparent and open government demanded that the applicant and the court a quo should have been afforded proper access to the relevant documentation and reasoning behind the respondents' decision to grant the twelfth respondent refugee status.[18] The public interest and the rule of law demand openness and accountability from the government and the respondents' bland refusal to comply with those constitutional prescripts resulted in them electing not to put a version before the court a quo. The court a quo was in these circumstances wrong to find that the respondents' decision to grant the twelfth respondent refugee status was rationally justifiable and that the confidentiality of asylum applications was peremptory and a proper justification for the conduct of the government respondents.

70. The court a quo's findings were against the weight of authority referenced in the applicant's heads of arguments in the High Court. The court a quo's findings in this regard are also inconsistent with the approach of the Constitutional Court in *Mail and Guardian Media Limited and others v Chipu NO and others* where the Constitutional Court ruled that section 21(5) of the Refugees Act is unconstitutional.

70. Even if the documents could be construed as confidential, the respondents furthermore by their absolutist position on confidentiality failed to consider or propose alternatives that would have allowed a balance to be struck between the

[18] See the applicant's heads of argument: paras 15-17;65-68;121.

asserted confidentiality rights of the twelfth respondent and the requirements of openness, transparency and accountability on the other. The court a quo was shown that it is now well accepted in our law that a Court might be asked to fashion such a balancing order – for instance, by limiting access to the Court and the parties' legal representatives, subject to the conclusion of applicable confidentiality agreements.[19]

71. The applicant refers in this regard to the orders made in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W),[20] *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W)[21] and *Competition Commission v Unilever plc and others* 2004 3 SA 23 (CAC)[22] – all drawn to the court a quo's attention.

72. The important point is that "*[i]t does not follow … that, because the respondents require protection [in regard to purportedly confidential documentation], the applicant is to be denied relief.*"[23]

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[19] See the applicant's High Court heads of argument at paras 133-134

[20] Per Schutz AJ (as he then was) at 1103: "*… although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access*".

[21] Per Botha J (as he then was) at 465: "*It seems to me that the position is as reflected in [Horner Lambert Co v Elaxo Laboratories 1975 RPC 354], that the Court should endeavour to impose suitable conditions relative to the inspection of documents and machinery in the possession of the respondents, so as to protect the respondents as far as may be practicable, whilst at the same time affording the applicant a reasonable opportunity of achieving its purpose*".

[22] The order of the Competition Appeal Court may be found at 26H-27C.

[23] See *Moulded Components* at 466E.

73. As this Court explained in *Tetra Mobile Radio (Pty) Ltd. v Member of the Executive Council of the Department of Works and Others* 2008 (1) SA 438 (SCA),

> *"[14] The appellant contended that the respondents had not made out a case for reliance on confidentiality: if there was any apprehension on the part of the respondent regarding any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd, where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the applicant's attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent expert. In that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other".*[24]

74. By proposing such an order of limited access the respondents could have protected the confidentiality of the twelfth respondent whilst allowing the applicant's legal representatives to interrogate the relevant documents. It would have avoided a situation where the applicant's legal representatives are required to argue the application and this Court is required to decide the case behind a "*veil of ignorance*" by virtue of being denied access to important documents that were before the decisions makers and which reflect the reasoning behind the decision to grant the twelfth respondent asylum.[25]

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[24] At para 14.
[25] *Competition Commission v Unilever plc* 2004 3 SA 23 (CAC) at 30H

75. The court a quo failed to appreciate that the respondents had chosen not to adopt such an ameliorative approach in this matter. The court a quo thus failed to find that the respondents' approach amounts to an effective ouster of this Court's power to properly investigate the decision impugned in this application – and it failed to impose a confidentiality regime if indeed it thought that the matter raised questions of confidentiality.

International laws and principles governing confidentiality

76. As the applicant highlighted for the court a quo, in considering the question of confidentiality in this matter due regard must also be had for the Refugees Convention and the complementary obligations found under other international instruments.[26] The applicant drew the court a quo's attention to obligations assumed by states (including South Africa) in terms of international instruments such as the Rome Statute of the International Criminal Court, the Genocide Convention, the Convention Against Torture and the Geneva Conventions, which seek to ensure that international criminals do not escape justice.[27]

77. The court a quo failed to have regard to the fact that proper administration and enforcement of the Refugees Act is a vitally important exercise of public power. Decisions made pursuant to the Act not only directly affect the lives of thousands of refugees that turn to South Africa for protection; these decisions also have the potential to ensure that undesirable persons (such as those that have committed international crimes) do not benefit from these protections.[28]

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[26] Set out in the applicant's High Court heads of argument: paras 81-86.
[27] Set out in the applicant's High Court heads of argument: para 141.
[28] Set out in the applicant's High Court heads of argument: paras 142.

78. The court a quo also failed to have regard to the principles established in other common law jurisdictions such as New Zealand, Canada, Australia and the United Kingdom – all drawn to the court a quo's attention – which explicitly prescribe exceptions to the absolute maintenance of confidentiality. These exceptions recognise that refugee law does not cloak refugee claims with absolute confidentiality. Rather they demonstrate the need to strike a balance between competing interests and recognise that in certain circumstances a state must, within circumscribed limits, be permitted to disclose details of the refugee or protection claims. As to when 'certain circumstances' arise, there is no closed list, and each claim must be dealt with on a case-by-case basis.

79. The court a quo further failed to appreciate that the United Nations High Commissioner for Refugees ("UNHCR") recognises that while the maintenance of confidentiality is important it:[29]

> *"also recognizes that the appropriate sharing of some personal data in line with data protection principles can assist States to combat fraud, to address irregular movements of refugees and asylum-seekers, and to identify those not entitled to international protection under the 1951 Convention and/or 1967 Protocol."*[30]

80. As the applicant highlighted for the court a quo, generally the government may disclose confidential information to facilitate investigations into criminal conduct, to

[29] Set out in the applicant's High Court heads of argument: para 144.
[30] UNHCR *Application of the Exclusion Clauses* (2003) (*Exclusion Guidelines*) at para 8 – referenced in applicant's heads of argument at para 144.

protect national security, to determine refugee claims (including related extradition/prosecution requests), and for similar activities of national importance.

81. Aside from being inconsistent with South African domestic law, the court a quo's findings are furthermore contrary to the established limits of confidentiality under regional and international law.

Costs order against the applicant

82. The court a quo ordered the applicant to pay the costs of the proceedings including the costs of two counsel.

83. The court a quo clearly erred in doing so. In accordance with the principles enunciated in the Constitutional Court decision in *Biowatch,*[31] costs should be determined with regard to the "way in which a costs order would hinder or promote the advancement of constitutional justice".[32] The application instituted by the applicant raised an important constitutional issue relating to the obligations of the state when considering an application for refugee status from an individual who is alleged to be complicit in the commission of international crimes. There can be no suggestion that the applicant acted in bad faith or vexatiously, or brought the application wantonly.

[31] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC).
[32] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC para 16.

84. The court a quo materially misdirected itself in ordering costs against the applicant, not least of all since the application raised novel questions of law pertaining to the maintenance of the integrity of refugee status in South Africa. In addition, the applicant turned to litigation as last resort, having engaged in correspondence with the respondents to no avail. This hardly represents inappropriate behaviour that warrants an adverse cost order.

85. In *Biowatch* the Constitutional Court held that if a court decides to make a cost order that could hinder the advancement of constitutional justice (as did the court a quo) then, "a court should set out reasons that are carefully articulated and convincing."[33] The court a quo clearly failed to do so: it gave no explanation whatsoever for the costs order and referenced no conduct on the part of the applicant that might justify a departure from the Constitutional Court's clear precedent on costs.[34]

86. The court a quo's decision on costs is particularly startling in light of the fact that it accepted at paragraph 14 of the judgment that the determination of the issues in the application were in the public interest and that the applicant had *locus standi* to bring the application in the public interest.

CONCLUSION AND REQUESTED ORDER

87. For reasons given above the application for leave to appeal should be granted.

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[33] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC) para 25.
[34] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC Para 29.

88. The applicant requests that costs should be costs in the appeal.

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ROSHANARA DADOO

I certify that:

I. the Deponent acknowledged to me that :
A. She knows and understands the contents of this declaration;
B. She has no objection to taking the prescribed oath;
C. She considers the prescribed oath to be binding on her conscience.
II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
III. the Deponent signed this declaration in my presence at the address and on the date set out hereunder.

COMMISSIONER OF OATHS