

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case number:

In the matter between:

<b>JUSTICE ALLIANCE OF SOUTH AFRICA</b>	First Applicant
<b>ANDRE WILLIAMS</b>	Second Applicant

and

<b>THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA</b>	First Respondent
<b>THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT</b>	Second Respondent
<b>THE MINISTER OF CORRECTIONAL SERVICES</b>	Third Respondent
<b>THE MINISTER OF POLICE</b>	Fourth Respondent
<b>THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE</b>	Fifth Respondent
<b>JOHANNES LOMBARD N.O.</b>	Sixth Respondent
<b>THE LEGAL AID BOARD OF SOUTH AFRICA</b>	Seventh Respondent
<b>THE SOUTH AFRICAN POLICE SERVICE</b>	Eighth Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned

## **JOHN JACKSON SMYTH**

do hereby make oath and say that:

### **INTRODUCTION**

1. I am an adult male and a retired member of the Bar of England and Wales. I was appointed Queen's Counsel in 1979.
2. I am the Honorary Director of the First Applicant and am duly authorised to make this affidavit on its behalf.
3. The facts contained within this affidavit are within my personal knowledge and are true, save where the context indicates otherwise.
4. This application is brought as a result of the collective failure of the Respondents to protect the Second Applicant, Andre Williams, when he was arrested as a child of fourteen years of age and held for almost three years awaiting trial in Pollsmoor Prison, only to have his case eventually struck from the roll.

5. The Respondents are all important role-players in the South African criminal justice system, which system is based upon the values contained in the Constitution of the Republic of South Africa, 1996 (“the Constitution”).
6. Two of the most important values contained in the Constitution are the right to liberty of every person, and the right of a child to special protection.
7. What happened to the Second Applicant was a gross violation of these values, and was therefore a breach of the constitutional duties of the Respondents and an infringement of the Constitution itself.
8. This application is brought with two aims.
9. First, to seek a declaration that the Second Applicant is entitled to restitution from the Respondents for what he has suffered. Secondly, to seek declarations that the Respondents are collectively responsible for the protection of children in the criminal justice system. This second form of relief is sought as a forward-looking remedy to put the Respondents on notice that they are required, under the Constitution, to treat the cases of children with special attention.
10. In support of these aims, this affidavit deals with:

- 10.1. The parties;
- 10.2. The standing of the Applicants;
- 10.3. The facts;
- 10.4. The responsibility of the Respondents;
- 10.5. The applicable law; and
- 10.6. The remedies sought.

11. As the Constitutional Court held in *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC), every interference with physical liberty is *prima facie* unlawful and unconstitutional. Once it is demonstrated that the Second Applicant was arrested and detained, it is for the Respondents to justify the imprisonment of the Second Applicant under the Constitution.

## **THE PARTIES**

12. The First Applicant is the Justice Alliance of South Africa, a non-profit voluntary association constituted as a juristic person capable of suing and

being sued in its own name. A copy of the Constitution of the Applicant is annexed hereto marked **JJS1**. The First Applicant's office is at 1 Ruskin Road, Bergvliet, Cape Town, 7945, and its NPO status registration number is 069-600-NPO.

13. The Second Applicant is the abovementioned Andre Williams, a currently unemployed adult male, born on 17 January 1992.

14. The First Respondent is the Government of the Republic of South Africa, as represented by members of the Cabinet and of the national executive.

15. The Second Respondent is the Minister of Justice and Constitutional Development, cited in his official capacity as the Minister overseeing the courts and the prosecution services which were seeking to prosecute the Second Applicant.

16. The Third Respondent is the Minister of Correctional Services, cited in her official capacity as the Minister in charge of prisons where the Second Applicant was unlawfully detained.

17. The Fourth Respondent is the Minister of Police, cited in his official capacity as the Minister in charge of the South African Police Service which was responsible for expeditiously investigating the case of the Second Applicant.

18. The Fifth Respondent is the Director of Public Prosecutions: Western Cape (“the DPP”), the regional head of the body responsible for bringing the abortive prosecution against the Second Applicant.
19. The Sixth Respondent, Johannes Lombard, is a Magistrate sitting at the relevant time in the Bellville Regional Magistrate’s Court, before whom the Second Applicant appeared some 30 times on remand between 18 November 2006 and 24 October 2008. On each occasion the Sixth Respondent remanded the Second Applicant in custody. Similar action was taken by a few other magistrates before whom the Second Applicant appeared. This application is brought against the Sixth Respondent in his official capacity.
20. The Seventh Respondent is the Legal Aid Board of South Africa, whose offices are on the 5<sup>th</sup> and 6<sup>th</sup> floors of the Nedbank Building, 85 St George’s Mall, Cape Town. The Seventh Respondent is the employer of the attorneys who acted for the Second Applicant and who were acting at all material times within the course and scope of their employment with the Seventh Respondent. The Legal Aid attorneys did little to oppose the repeated applications for postponement of the Second Applicant’s case until he had spent three years in prison, as a child, without trial.

21. The Eighth Respondent is the South African Police Service, which is obligated under the Constitution to investigate criminal cases expeditiously, so that charges against accused persons can be either proven or dropped.

## **THE STANDING OF THE APPLICANTS**

22. Section 38 of the Constitution provides:

**“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.**

**The persons who may approach a court are:**

- (a) anyone acting in their own interest;**
- (b) anyone acting on behalf of another person who cannot act in their own name;**
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;**
- (d) anyone acting in the public interest; and**
- (e) an association acting in the interest of its members.”**

23. The First Applicant brings this application in the public interest, in terms of section 38(d) of the Constitution, and in the interests of its members under section 38(e) of the Constitution:

23.1. This application is in the public interest as it seeks declarations that will ultimately clarify the roles and duties of the Respondents under the Constitution concerning the protection of children in the criminal justice system. Such declarations will help to ensure that no child is ever again detained without justification without trial for three years, as happened to the Second Applicant.

23.2. The First Applicant acts in the interests of its members, as reflected in the annexed constitution of the First Applicant, who seek to “uphold the Constitution and laws of the Republic of South Africa”, *inter alia*, “by means of litigation in the courts”.

23.3. The First Applicant has previous experience of constitutional litigation in furtherance of the interests of its members and the public interest. Most recently, on 31 August 2009 under case number 11206/08, Traverso DJP ruled in favour of the First Applicant against, *inter alia*, the Fourth Respondent in a matter concerning the legality of regulations issued by the Fourth Respondent.

24. The Second Applicant acts in his own interest, in terms of section 38(a) of the Constitution, but also acts in the public interest on the same basis as the First Applicant.

## THE FACTS

25. In setting out the facts, I shall make use of various documents obtained by the Applicants' attorneys from the clerk at the Blue Downs Magistrate's Court. These documents were in a state of disarray and are in many cases difficult to decipher. I am of the view that this Court can rely exclusively on the facts set out in this affidavit, which are verified by the personal experience of the Second Applicant, but I attach hereto a number of the documents in order to provide this Court with as full a picture as possible.

26. The Second Applicant was arrested on 10 July 2006, and charged with armed robbery together with four other persons. The four other accused were aged 20, 26, 26, and 27 years. The Second Applicant was then fourteen years old.

27. I attach hereto as annexures **JJS2** and **JJS3** the J15 charge sheet and the J47 supplementary information form, listing the date of arrest and the crime with which the Second Applicant was charged. Note that his age is erroneously recorded as being fifteen years.

28. On 12 July 2006, the Second Applicant appeared before the Bellville District Magistrate's Court. The matter was postponed for two weeks for further investigations. The Second Applicant was remanded into custody by the

Court. After a short period in a place of safety, he was held in the Youth Centre at Pollsmoor Correctional Facility (“the Centre”) where he remained until discharged by the Court on 3 June 2009, almost three years later.

29. The Centre houses awaiting trial juvenile males (aged 14 – 18 years) separately from adult inmates. It is a secure facility and as such is surrounded by multiple electrical fences with a single metal door. It contains both single and communal cells. The Second Applicant was, at various stages of his detention, held in both types of cells.

30. The communal cells hold approximately 30 inmates at any given time. They contain rows of bunk beds, and have one toilet and one sink between all the inmates. In winter the cells become extremely cold, as there is little protection from the wind coming through broken windows.

31. Single cells are about 1.5 metres wide and have one bunk bed, a sink and a toilet.

32. When an inmate is visited by family, he will be placed in a locked single cell and only be allowed to speak to them through the metal grill in the door. A Department of Correctional Services official will be present at all times.

33. The inmates are locked in the cells for most of the day, with a one hour outdoor period to stretch their legs. If it is raining they remain inside their cells all day. The routine in the Centre is very structured and disciplined. The discipline meted out by Correctional Officers can be harsh or at times violent.
34. There is very little in the way of schooling or educational programmes available in the Centre for children awaiting trial.
35. On 24 July 2006, the Second Applicant again appeared before the Bellville District Court. He requested and was assigned a lawyer by the Seventh Respondent. I attach hereto as **JJS4** certain of the Magistrates' notes from 12 and 24 July 2006.
36. Thereafter remands continued at weekly or fortnightly intervals until the case was transferred to the Bellville Regional Court in November 2006. I attach hereto as **JJS5** all the Magistrates' notes from the period July to November 2006.
37. On 28 November 2006 the Second Applicant appeared before the Sixth Respondent for the first time and was remanded in custody again. Thereafter the Second Applicant appeared before the Sixth Respondent approximately thirty times, and other Magistrates on occasions, until the case was transferred to the Blue Downs Court on 24 October 2008.

38. I attach hereto as **JJS6** the Magistrates' notes from the period November 2006 to October 2008, including those notes from Magistrates other than the Sixth Respondent.

39. On each occasion the Second Applicant was remanded in custody notwithstanding the fact that all of his four co-accused in the case had been granted bail. I attach hereto as **JJS7** copies of the four bail receipts.

40. On the 3 June 2009 Mr D van der Spuy, presiding at the Blue Downs Court, refused the State a further postponement and struck the case from the roll.

41. The Second Applicant was released, aged seventeen.

42. The Second Applicant had spent two years, ten months, and twenty-four days in prison.

43. He was denied access to proper education and subject to the harsh life of a youth in a badly overcrowded prison.

44. The formative years of his life had been stolen from him, without justification.

## **THE RESPONSIBILITY OF THE RESPONDENTS**

**45. The First Respondent:** The First Respondent is the primary bearer of duties under the Constitution, including the duty to protect children detained by the criminal justice system. The Constitutional Court held in *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at paragraph 42 that the First Respondent is responsible for the conduct of the national executive or members of the Cabinet.

**46. The Second and Third Respondents:** The Applicants contend that these Ministers bear the supreme responsibility to ensure that the administration of the criminal justice and detention system is carried out with due regard to the Constitution, and in particular that no person, especially not a child, is denied his or her liberty without due cause.

47. The Second Applicant could have, and should have, been granted bail. He could have completed his education and avoided the abuse which he suffered in a prison environment. Furthermore, at the very least, even if he had been denied bail, his case should not have been allowed to drag on for almost three years.

**48. The Fourth and Eighth Respondents:** The Fourth and Eighth Respondents are responsible for the diligent investigation of cases such as that of the Second Applicant.

49. By failing to place expeditiously the required evidenced – whether it be incriminating or exculpatory evidence – before the prosecutors, the Fourth and Eighth Respondents created a situation where the Second Applicant's case had to be postponed time and time again.

50. Furthermore, the Second Applicant was not charged with a particularly complicated crime. The lengthy delay after the arrest of the Second Applicant probably did more to hinder than help the chances of a successful prosecution.

51. **The Fifth Respondent:** The Fifth Respondent is responsible for the State prosecutors, based in the Western Cape, who acted against the Second Applicant in this matter.

52. The Applicants contend that, in failing to bring the matter to trial over a period of nearly three years, the prosecutors acted in total disregard of the duties contained in the Constitution.

53. Further, the National Prosecuting Authority Prosecution Policy states in its Preface that:

**“Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.”**

(Emphasis added.)

54. The Prosecution Policy goes on to state, under section 7, that:

**“The Prosecuting Authority should give special attention to the effective and speedy disposal of cases identified as priority matters.”**

55. Thus the Fifth Respondent’s own policy on prosecutions recognises the importance of efficiency and speed in prosecutions. This paraphrases a right possessed by all accused persons under section 35(3)(d) of the Constitution – that their trials begin and conclude without unreasonable delay.

56. Furthermore, the Fifth Respondent undermined the Second Applicant’s constitutional rights by not ensuring that he was granted bail. Particularly when the accused person is a child, it is incumbent on State prosecutors to ensure that the accused is treated in a fair and humane fashion. It must have been apparent to any prosecutor handling the Second Applicant’s case that he had been detained for a very lengthy period of time and that, as his trial would not begin soon, it would be best for him to be released from detention.

57. **The Sixth Respondent:** As the presiding officer in the majority of the Second Applicant’s appearances, it was the Sixth Respondent’s duty to ensure that the constitutional rights of the Second Applicant were upheld. With respect, he failed in this duty. Instead of allowing the State one postponement after

another for approximately two years, the Sixth Respondent was obliged to take the initiative to ensure that the Second Applicant was detained only for the shortest appropriate period of time, if he was to be detained at all.

**58. The Seventh Respondent:** The Legal Aid Board has a duty to ensure that those attorneys they assign to represent accused persons under the Legal Aid provisions are competent, and know and protect the rights of accused persons represented by them under the Constitution. It is the duty of the Legal Aid attorneys to diligently defend the interests of their clients. In this case, the record does not reveal a single occasion in nearly three years when the attorney representing the Second Applicant asked for bail or resisted a postponement, until 3 June 2009.

## **THE APPLICABLE LAW**

59. The actions – or inactions – of the Respondents must be seen in light of the clear provisions of the Constitution.

60. Section 2 of the Constitution provides:

**“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”**

61. Section 12(1) of the Constitution provides in the relevant part:

**“Everyone has the right to freedom and security of the person, which includes the right—**

- (a) not to be deprived of freedom arbitrarily or without just cause;**
- (b) not to be detained without trial;**
- (c) to be free from all sources of violence from either public or private sources.”**

62. Section 28 states in part:

**“(1) Every child has the right—**

**...**

- (d) to be protected from maltreatment, neglect, abuse or degradation;**

**...**

- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 36, the child may be detained only for the shortest appropriate period of time, and has the right to be—**

- (i) kept separately from detained persons over the age of 18 years; and**
- (ii) treated in a manner, and kept in conditions, that take account of the child’s age.”**

**...**

- (2) **A child’s best interests are of paramount importance in every matter concerning the child.”**

(Emphasis added.)

63. Section 35(3)(d) of the Constitution states:

**“Every accused person has the right to a fair trial, which includes the right—**

**. . .**

- (d) to have their trial begin and conclude without unreasonable delay.”**

64. It is the Applicants’ contention that each and every one of these rights has been violated by the collective conduct of the Respondents.

65. Section 172(1) of the Constitution sets out the powers of a court when dealing with constitutional matters. It provides:

**“When deciding a constitutional matter within its power, a court—**

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and**

- (b) may make any order that is just and equitable, including—**

- (i) an order limiting the retrospective effect of the declaration of invalidity; and**

**(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”**

66. If the conduct of the Respondents is found to be unconstitutional, this Honourable Court has no discretion but to make a declaration to that effect.

67. It is the contention of the Applicants that, in the circumstances of this case, a damages order would be just and equitable in terms of section 172(1)(b) of the Constitution.

## **CONCLUSION AND REMEDIES**

68. The submission of the Applicants is that what happened to the Second Applicant is unacceptable and unconstitutional. This is even more so:

68.1. when the case is eventually struck from the roll;

68.2. where the accused is not granted bail; and

68.3. where the accused is a child.

69. It is clear that the Respondents, being enmeshed in their bureaucracy, simply reacted automatically and unthinkingly allowed the Second Applicant's case to be postponed time and time again, without question or opposition.

70. Such a mechanical response is not permitted under the Constitution, particularly where the person suffering is a child who should only be detained "for the shortest appropriate period of time" and whose best interests are "paramount".

71. Accordingly, the first to eighth of the orders sought by the Applicants declare that the Respondents, collectively and individually, failed in their constitutional duties to the Second Applicant.

72. The ninth order would entitle the Second Applicant to damages in terms of section 172(1)(b) of the Constitution for the failure of the Respondents to comply with their constitutional obligations, to his great and irrevocable detriment. It goes without saying that no amount of money can truly compensate one for impressionable teenage years spent incarcerated for a crime with which one is eventually not charged.

73. The tenth declaratory order is forward-looking and is of general application, to put the Respondents on collective notice that they must genuinely engage with the cases before them, and use some initiative to ensure that injustice is

not unthinkingly perpetuated. Never again should a child be detained for three years only to see his or her case dropped.

74. Applicants further seek costs against the Respondents, jointly and severally, such costs to include the cost of three counsel.

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**JOHN JACKSON SMYTH**

I certify that:

The Deponent signed this affidavit and swore and acknowledged that s/he:

- a) Knew and understood the contents thereof;
- b) Had no objection to taking the oath; and
- c) Considered the oath to be binding on his/her conscience.

The Deponent then uttered the words "*I swear that the contents of this declaration are true, so help me God*".

**DATED AT CAPE TOWN THIS                      DAY OF APRIL 2010.**

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**COMMISSIONER OF OATHS**