**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: 25061/2011

DATE: 14 DECEMBER 2012

In the matter between:

**C M KATABANA** Applicant

and

**CHAIRPERSON OF STANDING COMMITTEE FOR REFUGEE AFFAIRS** 1st Respondent

**THE REFUGEES STATUS DETERMINATION OFFICER, SOBANE MCITEKA N.O** 2nd Respondent

**THE MINISTER OF HOME AFFAIRS** 3rd Respondent

**THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS** 4th Respondent

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**J U D G M E N T**

**DAVIS, J**:

This is an application to review a decision taken by the first and second respondents in refusing to grant refugee status and asylum to the applicant. The applicant fled Uvira in the

South Kivu District of the Eastern Democratic Republic of the Congo in 2009 when he was aged 21, after his mother had been accused of being a witch and was then burned alive. Applicant was, in terms of the papers, pursued by his mother's killers and finally found refuge in a police station.

Attached to the founding papers, applicant annexes maps and official reports which show that Uvira, on the Eastern DRC border with Burundi, is a politically unstable area which are occupied by a number of rebel armies. According to these annexures, this area is characterised by rampant violence and ongoing human rights violations. The papers make clear that in this area there is a governmental inability to control the territory which has resulted in a breakdown of law and order.

The applicant arrived in South Africa in November 2009. On 23 November he applied for refugee status and asylum at the Maitland Refugee Reception Office. He could not speak English, but he avers that he was not offered the necessary interpretation support. He claims that he did not understand questions which were asked of him or their meaning. He did not know or understand his rights or the criteria in terms of which the application would be done. He avers in his founding affidavit, that a stranger filled in his asylum application form and he was instructed to return to the reception office in the

following week. When he returned to the office on 30 November 2009, after a long wait, in which he claims he was not personally interviewed by the Refugee Status Determination Office ("RSDO"), he was notified that his application had been rejected.

On 16 March 2011 he received a letter from the Standing Committee on Refugee Affairs ("SCRA"), which recorded that it had upheld the decision of the RSDO and rejected his application. His temporary asylum seeker permit was withdrawn and he was instructed to report to the immigration officer for deportation. Applicant has now approached this court for a review of these decisions. He avers that the first and second respondents' decisions are unlawful, unreasonable and were taken in a manner which was procedurally unfair. In his view, the conduct of first and second respondents had not promoted South Africa's international law obligations, nor did it uphold the spirit of the Constitution (Republic of South Africa Constitution Act 108 of 1996) and Chapter 2 thereof.

In considering the application for asylum, Ms Harvey, who appears on behalf of the applicant, submitted that the RSDO had unlawfully failed to comply with the express provisions of the Refugees Act 130 of 1998 ("the Act") and regulations promulgated in terms thereof. In her view, the RSDO had done

nothing to ensure that the applicant understood his rights or the procedures which were required to process such an application, nor did it consider any evidence which was presented, did not arrange for a competent interpretation in circumstances that was clear that it was necessary insofar as this applicant was concerned. She also submitted that it failed to conduct a proper hearing, had not applied its mind to the fact of the circumstances of the case and provided no coherent reason for its decision.

Ms Harvey contended further that the first and second respondents had failed to apply their mind to the relevant facts and circumstances or to furnish proper reasons for their decision. Further, Ms Harvey contended the decisions taken were clearly unreasonable, certainly in terms of section 6(2)(h) of the Promotion of Administration of the Justice Act (PAJA) 3 of 2000. In her view, the facts and circumstances of the case showed that the applicant was compelled to leave the country owing to events seriously disturbing or disrupting of public order and fled his country of origin as a result of a well-founded belief of being persecuted by reason of his religion or membership of a particular social group. He qualified, in her view, as a refugee under the Act, read together with certain international conventions, to which I shall make reference later.

Furthermore, Ms Harvey submitted, on the basis of a decision of this court in Katshingu v Standing Committee for Refugee Affairs and Others (unreported decision of the WCC: case number 197264/2010: 2 November 2011 per Bozalek, J), that failure on the part of the RSDO to provide an interpreter, was "an egregious shortcoming rendering the entire process to be unfair". In order to assess these grounds of review, it is necessary to traverse the relevant law to which I have already made reference.

The Statutory Framework:

South Africa is a party to a range of international human rights instruments, which are relevant to these proceedings. They include the United Nations 1951 Convention relating to the status of refugees, the United Nations 1967 Protocol relating to the status of refugees and the 1969 Organisation of African Unity Convention in governing specific aspects of refugee problems. To a considerable extent, these international commitments are given effect to in the Act, which stands to be interpreted in the light of these particular conventions to which South Africa is a signatory.

Section 3(a) of the Act provides that refugee status is

accorded to those who, outside of their country of origin, owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or a membership of a particular social group or are compelled to leave their country, owing to events seriously disturbing or disrupting public order in either a part or the whole of his or her country (section 3(b) of the Act).

In terms of section 5(2) of the Act even where the relevant circumstances justifying refugee status have ceased to exist, a person remains a refugee, if he or she can invoke compelling reasons arising from previous persecution for refusing to avail himself or herself of the protection of the country of nationality.

Section 2 of the Act entrenches an international principle of non-refoulement, so that South Africa may not return a refugee to a country where that refugee faces a genuine risk of serious harm. In terms of the Act, an asylum seeker, such as the applicant, must present himself to a refugee reception centre where a refugee reception officer must assist him to apply for asylum. In terms of the regulation, the officer is required to ensure that the asylum seeker is provided with a competent interpreter. See regulations in terms of section 38 of the Act GG 21075 GNR 366 of 6 April 2000. The application is then

evaluated by the RSDO, which must:

> "... conduct a non-adversarial hearing to elicit information bearing on the applicant's eligibility for refugee status and ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented."

In terms of section 24(2) of the Act, the RSDO is obliged to have due regard for the rights set out in section 33 of the Constitution, particularly to ensure that the applicant fully understands the relevant procedures, his or her rights and responsibilities and the evidence so presented.

It is understandable, given that many asylum seekers speak different languages, that the regulations made provision for the RSDO to ensure that applicant fully understands by providing in Regulation 5, a competent interpreter for the applicant at all stages of the asylum process. The RSDO is then obliged to make a decision to whether to grant or refuse refugee status and asylum. (Section 24 of the Act). An application may be rejected as unfounded or as manifestly unfounded (defined in section 1(xii) of Act).

Where the RSDO rejects an application as manifestly

unfounded, it has to submit a record of proceedings and a copy of its reasons to the Standing Committee for Refugee Affairs ('SCRA') for review within 10 days. Asylum seekers have a right to adequate notice of the right to review, as well as the right to make presentations to the Review Body. In terms of section 25 of the Act, read together with Regulation 13, the SCRA is required to review the decision. It has wide powers to obtain relevant information. It may, before reaching a decision, invite the UNHCR representative to make oral written representations, request the attendance of any person, who is in the position to provide it with information relevant to the matter, on its own accord, make a further inquiry and investigation into the matter as it may seem appropriate and request the applicant to appear before it to provide such other information as it may deem necessary. The SCRA must inform the RSDO of its decision "in the prescribed manner and within the prescribed time", (section 25(4) of the Act) which, in terms of Regulation 13(4), is within five days.

When a case is made out in terms of section 3(a) of the Act for refugee status, consideration must be given to an internal flight alternative. This alternative does not apply when a claim is made in terms of section 3(b) of the Act, which in compliance of Article 1(2) of the OAU Convention, affords status to those who have crossed an international border,

owing to events disturbing to the public order in either a part or the whole of their country of origin.

The 2003 UNHCR guidelines issued in this connection in July 2003, make this qualification clear. Applicant, however, contends that, as he comes from Uvira in the Eastern DRC, his primary claim is brought under section 3(b). However, for reasons that are to be sourced in respondents' attitude, this court is required to say a little more about the internal flight alternative. The 1992 UNHCR handbook provides that for claims based on the well-founded fear of persecution, the fear need not extend to the whole territory of the asylum seeker's country of origin. A person:

> "... will not be excluded from refugee status merely because he could have sought refugee in another part of the same country if, under all the circumstances, it would not have been reasonable to expect him to do so".

See paragraph 91 of the handbook. If the persecutor is a state, it is presumed that the state will exercise authority in every part of the country of origin. Even if, as in this case, the agent of persecution is a non-state agent, the question is whether or not, in all the circumstances, the particular

claimant could reasonably be expected to move to the proposed area to overcome his or her well-founded fear of being persecuted. It should be both practical and safe to access the alternative place.

To the extent that the applicant in this case relies on the additional claim under section 3(b) of the Act, he could not reasonably be expected, so Ms Harvey contended, to move to another part of the DRC. As she noted, the applicant was a young man, he was recently orphaned and without the physical means, for example, to purchase an air ticket to Kinshasa. He was situated in a geographically remote eastern border of the DRC, surrounded by a jungle, which was occupied by rebel armies. When he was dropped on the border under cover of night by persons aware that his persecutors had sought him for several days, it was reasonable for him to have crossed the border.

So much for the law and the submissions of the applicant pursuant thereto.

Respondents' case:

I turn now to deal with the respondents' submissions. Respondents' position is set out in an answering affidavit

deposed to by Mr Vuyani Shwane, the refugee status determination manager, who, in answer to applicant's case, says the following:

> "The applicant's assertions as to why he remain (sic) unable to avail himself of the protection of his government are not sound. He simply attempts to tie an ephemeral instant whereby his mother was necklaced by a mop (sic) of people (if so) with the political instability in the country. Based thereupon, it, therefore, rates the current government unable to protect him in general terms, notwithstanding the fact that he was already protected by the police at the local police station for five days. He elected to leave the police station of his own accord with the assistance of the security workers, but without the knowledge of the police. Furthermore, it is a basic rule of refugee law that a person must first exhaust all his domestic remedies before fleeing from his own country of origin to seek refugee in another country. *In casu* the applicant could have, and should have, used the internal flight alternative and seek for refugee elsewhere in his own country before fleeing to South Africa (sic) ... The applicant's earnest believe (sic) that he will face

> persecution if he is to return home because of his ties with is mother, does not make sense. The fact that he fears those who necklaced his mother and would, therefore, not avail himself of police protection due to the instability, does not make sense. In fact he does not pose a political threat to the authorities nor has he had a well-founded fear of being persecuted by reason of his race, tribe, religion, nationality, legal opinion or membership of a particular social group. There was, therefore, no legitimate reason for the applicant to leave his country."

Turning to the question of the assistance which was provided to the applicant, Mr Shwane says:

> "The applicant was properly assisted by a interpreter. The applicant never expressed his dissatisfaction of the interpreter. Furthermore, the interpreter simply wrote down the facts as it was stated by the applicant. The fact that applicant did not know the interpreter, did not (adversely) impact on his application. However, it is denied that the interpreter rushed through the application and that the applicant was only given 10 minutes to give his

information to the interpreter. The interpreter wrote down all the facts as it was stated by the applicant without time constraints. In fact time was not of the essence."

Mr Shwane, therefore, concludes as follows:

"The refugee status determination officer rejected the applicant's claim, given the fact that the latter did not qualify refugee status in terms of section 3(b) of the Act. The standing committee which reviewed the refugee status determination officer's decision, accordingly upheld same, based on the fact that applicant's application was manifestly unfounded."

The reasons given for these decisions are also set out in the papers and deserve to be reproduced in order that a proper analysis thereof can be undertaken. The RSDO decision, insofar as it is relevant, reads thus:

"You claim your mother was burned to death because of witchcraft and you fled. Section 3 of the Act provides the grounds under with an application may be made and states that a person qualifies as a

refugee if that person ... "

Thereafter follows a reproduction of the sections to which I have already made reference. The decision continues:

> "The UNHCR handbook of Procedures and Criteria for Determining Refugee Status, at paragraph 196, page 47, affirms the decision that it is quite a general legal principle that the burden of proof lies on the person submitting a claim. The standard of proof is a real risk and must be considered in the light of all the circumstances, i.e. past persecution and forward looking appraisal of risk (real risk). Your application for asylum is made on the grounds other than those on which an application may be made under the Act ... You, therefore, must return to the Asylum Determination Centre upon the expiry of the section 22 permit to ascertain the status of your application for refugee status in South Africa."

That report is then signed by a Sobane Mciteka on 30 November 2009.

On 16 March 2011, a further letter was sent to applicant, which was self-explanatory. It reads thus:

"On 30 November 2010 the refugee status determination officer found your application to be manifestly unfounded in terms of section 24(3)(b) of the Refugees Act 130 of 1998. In terms of the section 25(1) of the Refugees Act 130 of 1998, the Standing Committee for Refugee Affairs must review any decision by the refugee status determination officer in terms of section 24(3)(b) of the Refugees Act. The Standing Committee for the Refugee Affairs has reviewed the decision of the refugee status determination officer and upheld the decision of 15 February 2011. The Standing Committee has upheld the decision of the refugee status determination officer. Your application has been finally rejected as manifestly unsound. As a foreigner, you cannot stay in the country on a temporary basis indefinitely. You will have to make the necessary arrangements to leave the country in 30 days after receipt of this letter. You will now be handed over to the immigration inspector to be dealt with in terms of the Immigration Act 13 of 2002 as amended in 2004."

This was then signed by P Stemele.

In his replying affidavit, applicant notes that Mr Shwane, who had deposed to the version which I have set out, was not present at these proceedings and had no personal knowledge of what had transpired on the day. When respondent alleges that applicant was assisted by an interpreter, the applicant submits that Mr Shwane has no knowledge thereof. Indeed, the allegation is made by the applicant (and not contested) that Mr Shwane had no personal knowledge of the entire process. As a consequence, respondent caused a further affidavit to be generated. In this case, Mr Carl Sloth-Nielsen, who is the chairperson of the Standing Committee for Refugee Affairs, he deposed to an affidavit, seemingly an attempt to deal with the question of direct knowledge of applicant's case. He avers in his affidavit as follows:

> "I have assumed the office as the chairperson of the Standing Committee for Refugee Affairs on 1 September 2011 after I was appointed by the minister on 15 August 2011. I, furthermore, became aware of this matter during the course of 2012, as the documents were never served on our offices by the applicants. The application was based on the review of the second respondent's decision by previous members of the Standing Committee on 15

February 2011, whose term of office expired during February 2011."

Mr Sloth-Nielsen then continues thus:

"Thus, I am currently in possession of all the information relating to this matter dealt with by the previous members of the Standing Committee and I was also assisted by the officials in the department to acquire all relevant information, given the fact that the previous chairperson of the Standing Committee is no longer in the service of the department. In these circumstances I, therefore, confirm that the content deposed in the answering affidavit by Vuyani Shwane to be true and correct. It is further request (sic) that this Honourable court condone the late filing of my affidavit confirming the correctness of the content of the answering affidavit."

In short, Mr Sloth-Nielsen avers that "the version which I have set out as being that of the respondent is true and accurate and accords with all of the documentation". In the light of these averments, it is necessary to examine the source documents which were made available to this court in this

case. In particular there is a source document entitled "eligibility determination form for asylum seekers". It was completed, presumably, on behalf of the applicant. I say presumably on behalf of the applicant, because the applicant avers (in uncontested evidence) that he is not proficient in English. To the extent that this document is relevant to these proceedings, it is instructive to read the section which answers the question "why are you applying for asylum":

> "I have born when my mother was not married. She get married. When I was seven years old, she was the third wife. As I grow up, there were rumours that my mother's family and my family, they were sorceress. So when a person die in the area, even in my stepfather's family, it was my mother who was blamed as a ... Because of that problem, my stepfather was forced to divorce my mother. Then life became very hard. I stopped the school, because the insulting was too much. By chance I get a girlfriend. One day she visited me and when she went back home, she feels sick. After two days she died. His family came to my home. They burned our house and they put into a tyre and petrol, they burned her to death. They were looking for me. So I went to Tanzania. In Tanzania I took a

decision to go far as I can. That is why I am here."

Nowhere in this document nor else in the record, until I read at the founding affidavit, was the issue of the applicant finding a safe harbour in the police station ever mentioned. Reading Mr Sloth-Nielsen's affidavit, I must assume, if he so wholeheartedly supported the version of Mr Shwane, that he had access to documents that were placed before the RSDO or the Standing Committee that were not in the court file, nor were they mentioned by the RSDO or the Standing Committee in its decision. However these documents constituted evidence when these decisions were taken; that is there was documentary evidence, or other evidence, which suggested that the applicant had been held in safety in the police station.

Central to the respondents' decision, as set out in the answering affidavit, is the averment that there was no reason for the applicant to seek refugee outside of South Africa. An explanation of negligence on the part of Mr Sloth-Nielsen, is the only alternative explanation for the averment in his affidavit, but I need not say more. Whatever the case, there is no evidence that this issue was placed before the RSDO and was, therefore, considered by it in determining the veracity of applicant's version.

Mr Simon, who appeared on behalf of the respondents, submitted that, although some instability might exist, or might have existed, in the applicant's own country, the fact remained, notwithstanding his affidavit that the applicant had failed to adduce evidence that suggested that the applicant remained without protection due to the fact that he feared that he might be associated with his mother who was accused of being a witch. In his view, therefore, the applicant had failed to invoke compelling reasons arising from previous persecution for refusing to avail himself of the protection of the country of nationality. In these circumstances, Mr Simon submitted that the applicant ran no risk of persecution if he was returned to his country.

Applicant's case:

So much, therefore, for the documentary evidence placed before this court and the submissions which were made by the parties. The core of the applicant's case can be summarised thus:

1. His mother was killed because of allegations of witchcraft. Allegations of witchcraft are manifest, a cause of great harassment and worse, injury and death to those who are subjected to these allegations. As the

United Nations High Commissioner for Refugee Report (Research Report 169 of January 2009) states at pages 42 and 43:

"An extensive literature review of journal articles, UNHCR internal documents and newspapers have shown, that witchcraft accusations lead to violence and persecution in locations throughout the world. Protection concerns from witchcraft allegations can occur at home and also impact individuals throughout the cycle of displacement. Witchcraft related violence may manifest as domestic violence, child abuse or mob justice. Workers of international organisations and non-governmental organisations must be aware of the tenacity of witchcraft police, the very real threat they can create for individuals and be willing to provide protection through monitoring, relocation and awareness raising campaigns. UNHCR and government need to be prepared to apply refugee law to claims that are based on witchcraft, by being aware that the phenomenon of witchcraft persecution is still very much alive, those in the refugee field may be better prepared to be able to respond to the associated violence and provide protection if needed."

2. Applicant fled for his life and was given protection in a police station.

There is nothing to gainsay this averment nor to gainsay that his mother was not killed, nor that persecutors sought to have him apprehended, nor that they stood outside the police station in an attempt to secure his capture.

3. After five days in the police station, security at the police station, secreted him out of the Congo, through neighbouring territories and he finally arrived in South Africa.

4. Supported by the UNHCR Global Report, applicant avers that violence in the eastern and western parts of the country, characterised by atrocities, committed by various armed groups, including sexual and gender based violence, has resulted in the displacement of more than 1.7 million people. The continued instability hampered UNHCR's programmes by reducing access to certain areas. A United State's State Department report, which was attached to the papers, supports this version. To the extent that it is relevant, it states:

"Internal conflicts, mainly in the east, continue to significantly affect the human rights situation and challenge the government's limited ability to effectively control its territory, which is particularly the case in North and South Kivu provinces. The conflicts permitted armed entities to commit violent abuses against civilians with little chance that the government would be able to hold the perpetrators accountable. These entities include RNG's such as Democratic Forces for the Liberation of Luanda (FDLR), Maimai (community based self-defence groups), as well as dissident elements of the state armed forces, including former members of the National Congress for the Defence of the People (CNDP) and some "regular" units of the armed forces of the DRC (FARDC). During the year RNG's continue to commit numerous serious abuses, some of which may be constituted war crimes, including unlawful killings, disappearances and torture. RNG also recruited and retained child soldiers, compelled force labour and committed widespread crimes of sexual violence."

5. Applicant, therefore, claims that he fled, owing to a well-founded fear of being persecuted by reason of his

religion (witchcraft is inextricably linked to this category), and further that the total breakdown of law meant that he was compelled to leave his place of habitual residence in order to seek refuge.

On these papers, none of this appears to have been considered in the process before the RSDO nor by the Standing Committee. A belated attempt was made to latch on to the applicant's affidavit, where he disclosed that he had obtained refuge in the police station for five days. How that version can be transmogrified into not being at risk, was never properly explained by respondents.

I accept that a body such as the RSDO is not a court and is not required to prepare a judgment. Cognisance must also be taken of the large amount of refugees who seek safety in the country. However, given our history, and the manner in which other African countries supported our struggle for democracy, great care should be taken when people seek the same hospitality that their countries granted this country's refugees during our hour of need.

What this means simply, is that these decisions must be carefully considered and that some reason, however rudimentary, for a decision should be set out. I do not expect

the RSDO, as I have already stated, to provide a lengthy legal set of reasons, but in this case, as is apparent from the document that I have set out, there was no reason so provided. There is no indication that any of key factors which I have outlined were ever taken into account. More disturbing, the Standing Committee seems to have done nothing more in acting as a safeguard for the very demanding processes that must take place before the RSDO. The decision taken, therefore, was clearly unjustifiable in terms of the evidence placed before this court and cannot be rationally related to the facts as presented.

Realising the difficulties attendant on these papers, Mr Simon, correctly sought recourse in the doctrine of substitution. He submitted that, in the event that the court had decided that the decision of the first and second respondent should be set aside, the matter be referred back to the original decision maker, based on the fact that it would not cause any further delay or any waste of time. In his view the respondents were competent to deal with the applicant's application and the applicant would not be prejudiced.

The question of substitution is itself a subject of jurisprudential investigation by our courts. In University of the Western Cape & Others v Member of the Executive Committee for Health &

Social Services & Others 1998 (3) SA 124 (C) at 131, the court set out special circumstances which would support the substitution by a reviewing court to the decision of the regional functionary. These would include, where the end result is a foregoing conclusion and it would be a waste of time to order the original functionary to reconsider the matter, where further delay would cause unjustifiable prejudice, where the original functionary had exhibited incompetence or bad faith and indicated that its mind was made up, making it unfair to require the applicant to submit to the same jurisdiction, or where the court was in as good a position to make the decision itself.

Ms Harvey submitted that the facts which were set before the court, laid a basis for a reasonable person to conclude either that the respondents were incompetent or they had acted in bad faith in refusing to afford applicant his most basic rights. They had failed completely in their duty to understand the political conditions in the country of origin, resulting in the state's inability to protect the applicant. They had not taken steps to find out, or familiarise themselves with the vast body of research exploring the origins and prevalence of witchcraft accusations and indicating that persecution of witchcraft qualifies as a ground linked to religion or membership of a group which justified an application for refugee status.

I am not sure that it is necessary to go so far. The fact is however that applicant has been in South Africa waiting for a decision for more than three years. To return him to the Congo at this point would, in my view, condemn him to an excruciating set of dangers which seems wrong, unjust and unfair. After three years to simply say 'you have to go back' to a country where the conditions are so obviously supportive of his claim for refugee status is not just nor compatible with the Act.

Furthermore, it is difficult to see what other facts respondents can raise against the applicant in this case, particularly since they were not able to produce any facts in their two decisions to which I have made reference. Further, unless there are documents which they have not provided to this court, the only case that they have made out, was one which was predicated upon a founding affidavit of the applicant, which was deposed to on 9 December 2011, long after the events leading to a refusal of refugee status had taken place. I consider that this is a case for exceptional circumstances and that the interests of justice dictate that this court should make the decision.

For these reasons, the following order is made:

1. The decision of the first respondent, confirming the

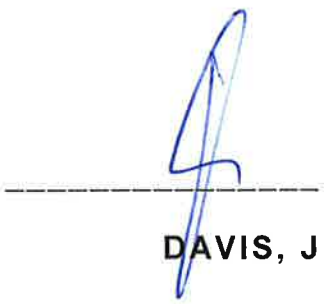
decision of the second respondent to reject the applicant's application for refugee status and asylum is manifestly unsound, is reviewed and set aside.

2. The decision of the second respondent rejecting the applicant's application for refugee status and asylum, is manifestly unfounded and set aside.

3. It is declared that the applicant is a refugee, is entitled to asylum in the Republic of South Africa as contemplated by section 3 of Act 130 of 1998.

4. The third respondent or a delegee is directed to issue to the applicant recognition of refugee status in terms of section 27(a) of the Refugees Act 130 of 1998, read with Regulation 15(1) within 14 days of the date of this order.

5. First and second respondent are ordered to pay the costs of this application.



**DAVIS, J**

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