

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

Case Number: 27740/2015

(1)	REPORTABLE: YES/NO	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(3)	REVISED.		
SIGNATURE		DATE	
		15/9/15	

In the matter between:

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

1ST APPLICANT

THE DIRECTOR-GENERAL OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT

2ND APPLICANT

THE MINISTER OF POLICE

3RD APPLICANT

THE COMMISSIONER OF POLICE

4TH APPLICANT

THE MINISTER OF INTERNATIONAL

RELATIONS AND COOPERATION	5 TH APPLICANT
THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION	6 TH APPLICANT
THE MINISTER OF HOME AFFAIRS THE DIRECTOR-GENERAL OF HOME AFFAIRS	7 TH APPLICANT 8 TH APPLICANT
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	9 TH APPLICANT
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	10 TH APPLICANT
THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	11 TH APPLICANT
THE DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	12 TH APPLICANT (RESPONDENTS A QUO)

And

THE SOUTHERN AFRICA LITIGATION CENTRE	RESPONDENT (APPLICANT A QUO)
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JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

The Court

1.

The Applicants herein filed an application for leave to appeal identifying 16 respects in which our judgment of 24 June 2015 was reasonably liable to a different conclusion by another Court, as it was put. Before the hearing we were provided with detailed Heads of Argument, which we gratefully received and considered.

2.

It is clear from Applicants' written argument that the grounds of appeal overlap in a number of instances. In other respects they deal with our reasoning and contend that it was erroneous in certain instances. The essence of this reasoning is that we erred by finding that a Cabinet Resolution coupled with a notice issued by the 7th Respondent did not trump the provisions of the *Implementation of the Rome Statute*

of the *International Criminal Court Act 2002*¹ (*the Implementation Act*). It will be recalled that the notice was issued in terms of the *Diplomatic Immunities and Privileges Act*² (*the Immunities Act*) and it was sought thereby to immunise any delegate attending the African Union summit in this country from arrest. The reasoning advanced by the applicants boils down to a conclusion that this country was under no obligation to effect the warrant of arrest against President Bashir during his visit to this country.

3.

We do not intend to traverse these grounds again, inasmuch as all relevant issues were fully dealt with in our judgment. There is no point in merely repeating or confirming them again. It must however also be remembered that an appeal is solely aimed at an order of a Court, and not its reasoning.

4.

With those remarks as background, we deem it prudent to first discuss the legal

¹ Act 27 of 2002

² Act 37 of 2001

framework within which we should consider the application before us. Our view is that the issues raised in the application at hand, are best decided with reference to *s. 16 and 17 of the Superior Courts Act*³ (the Act). Section 17 deals specifically with applications for leave to appeal and of relevance to us is subsection (1) which provides –

“(a) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard,

including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

In turn Section 16 (2) (a) provides –

“(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed

³ Act 10 of 2013

on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

5.

Section 16 (2) (a) has to do with matters where the practical effect of the appeal sought to be pursued features. This is an issue raised squarely by the respondent. Mr Trengrove SC for the respondent, whose Heads of Argument we also gratefully received and studied, submitted that because President Bashir had left South Africa, the issues between the parties had become academic and that any order by the Supreme Court of Appeal, the court to which leave to appeal is sought, would have no practical effect or result. It is prudent to dispose of this issue at the outset.

6.

Section 17 (1) (b) is clear that we should not grant leave to appeal should we be of the opinion that the appeal will have no practical effect (See section 16 (2) (a)).

The argument made by the respondent is that "*The order under appeal directed the applicants to arrest and surrender President Bashir to the International Criminal Court, for*

prosecution for various alleged international crimes. It was sought and granted on the basis that President Bashir was in South Africa, and consequently subject to the jurisdiction of the South African courts and capable of arrest by South African authorities." The argument is further that the order was not given effect to as President Bashir had left the country and that the appeal will have no practical effect whether it succeeds or fails. Mr Gauntlett SC, for the applicants, argues that section 16 (2) (a) does not apply *in casu*. The argument is that the appeal will indeed have practical effect as it will deal with the issue whether a sitting head of state enjoys immunity under international law and South African law or is subject to arrest in this country, which will affect future international events in this country. The second basis advanced by Mr Gauntlett SC is that this court retains the discretion in the same manner as the court of appeal to which leave is sought, to entertain an appeal even though the appeal will have no practical effect between the parties. The argument in this regard is that the matter at hand raises important questions of public international law arising from the interpretation of the Implementation and Immunities Acts. On this basis Mr Gauntlett SC urged us to exercise the discretion and grant leave.

7.

Our courts have on numerous occasions stated that a matter is moot "if it no longer presents an existing or live controversy requiring resolution, which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law"⁴. In *Janse van Rensburg NO & Another v Minister of Trade & Industry & another NNO*⁵ the Constitutional Court stated – "This Court has held that an issue is moot if it does not present an existing or live controversy; such an issue is not justiciable." The facts before us are clear that there is no longer any live controversy between the parties. We are further of the opinion that the appeal will therefore have no practical effect between the parties. For this reason this application must fail on the basis of section 17 (1) (b) of the Act. As we show in the following paragraph we can find no merit in Mr Gauntlett SC's argument that section 16 (2) (a) is not applicable to this matter.

8.

Mr Gauntlett SC has argued as stated earlier that the matter raises important questions of public law. This argument is based on a reading of section 17 (1) (a)

⁴ National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at footnote 18

⁵ 2001 (1) SA 29 (CC) par 9; See also *JT Publishing (Pty) Ltd v Minister of Safety & Security* 1997 (3) SA 514 (CC) par 15

referred to above. In the first place we do not hold the opinion that the appeal has reasonable prospects of success at all. The traditional approach which our courts have followed in the past when confronted with applications of this nature is to determine whether there is a reasonable prospect that another court may come to a different conclusion⁶. This approach has been altered by the Act as we show hereunder.

Section 17 (1) (a) (i) provides that leave to appeal may only (our emphasis) be given where the Court concerned is of the opinion that the appeal would have a reasonable prospect of success. We are not of that opinion and for the reasons stated in our judgment President Bashir enjoyed no immunity from arrest or from prosecution under customary international law as a serving Head of State. The essence of the case made out by the applicants is that South Africa's duty to arrest President Bashir in terms of the Implementation Act simply takes a back seat even when a known fugitive Head of State, of the International Criminal Court is in the

⁶ See *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B

country. The high water mark of this argument boils down to the following - that when domesticating the Rome Statute through the *Implementation Act*, this country's legislature deliberately created a situation relegating South Africa's obligations in terms thereof in favour of the *Immunities Act*. We have not been directed to such provision. In our view, had this been the intention it would have been expressly provided as the *Immunities Act* was already in operation when the *Implementation Act* was promulgated. Our view is that it is clear that the provisions of the *Implementation Act* prevail over the rules of customary international law imported by the *Immunities Act*, and are subservient to it. Article 27 of the *Implementation Act* applies and is clear in its terms. It expressly excludes head of State immunity from jurisdiction and from prosecution. Article 27 provides -

"Irrelevance of official capacity

- (1) This statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official, shall in no case exempt a person from criminal responsibility under this statute, nor shall it in, and of itself, constitute a

ground for reduction of sentence.

- (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.”

10.

Also, the Constitutional Court has conclusively decided in *National Commissioner of the South African Police Service vs South African Human Rights Litigation Centre*⁷ that the South African Government is bound by the provisions of the *Implementation Act*, and must implement its provisions. It has enacted this domestic legislation and is obviously bound by it.

11.

One further aspect deserves mention herein. Mr Gauntlett SC submitted that even if we were of the view that the matter was moot, and also doubted that there were prospects of success on appeal, we were entitled, by the exercise of our discretion,

⁷ 2015 (1) SA 315 CC

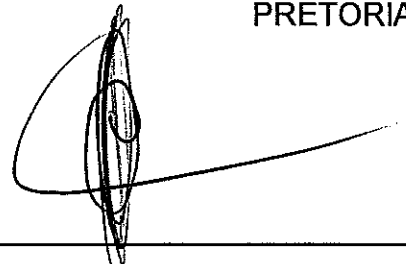
to nevertheless grant leave, having regard to the importance of the matter and its precedent-setting effect. We do not agree. Nothing contained in the provisions of s. 16 and 17 of the Act grants us such discretion as contended by Mr Gauntlett SC. To the contrary: section 17 (1) specifically prohibits the exercise of any discretion in this context and clearly states when, and only when, leave to appeal may be granted.

12.

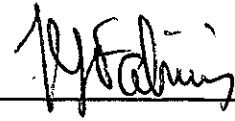
Accordingly the application for leave to appeal is dismissed with costs, including costs of two Counsel.



JUDGE D MLAMBO
JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA



JUDGE A P. LEDWABA
DEPUTY JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH
COURT, PRETORIA

A handwritten signature in black ink, appearing to read 'H. J. Fabricius', written over a horizontal line.

JUDGE H. J. FABRICIUS
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA