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THE SUPREME COURT OF APPEAL

SCA CASE NO: 867/2015

CASE NO: 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	1st Applicant
DIRECTOR GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2nd Applicant
MINISTER OF POLICE	3rd Applicant
COMMISSIONER OF POLICE	4th Applicant
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	5th Applicant
DIRECTOR GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	6th Applicant
MINISTER OF HOME AFFAIRS	7th Applicant
DIRECTOR GENERAL OF HOME AFFAIRS	8th Applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	9th Applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	10th Applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	11th Applicant
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	12th Applicant
and	
SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

FILING SHEET

DOCUMENT: APPLICANTS' REPLYING AFFIDAVIT

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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case no.
HC case no. 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second applicant
MINISTER OF POLICE	Third applicant
COMMISSIONER OF POLICE	Fourth applicant
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fifth applicant
DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	Sixth applicant
MINISTER OF HOME AFFAIRS	Seventh applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Tenth applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	Eleventh applicant
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	Twelfth applicant
and	
SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

REPLYING AFFIDAVIT

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I, the undersigned,

TERRESA NONKULULEKO SINDANE

do hereby make oath and state that:

1. I am the deponent to the applicants' founding affidavit. I remain authorised to depose to this affidavit on behalf of all the applicants.[1]

2. The facts contained herein are, save where otherwise indicated or so appears from the context, within my personal knowledge, and are true and correct. Where I make legal submissions I do so on the advice of the applicants' legal representatives.

3. In this affidavit I respond, within the narrow confines I am advised Rule 19(4) permits, to SALC's answering affidavit. Rule 19(4) permits a replying affidavit of a maximum length of ten pages, dealing "strictly only with new matters raised in the answer[ing] [affidavit]". It is thus necessary to record that allegations and arguments advanced in SALC's 30-page answering affidavit not specifically addressed in what follows are denied.[2]

4. The answering affidavit deals with mootness, the merits and procedural defects. Significantly, it does so in reverse order. Had the *in limine* issue of mootness even in the estimation of SALC genuinely been viewed as meritorious SALC would hardly have

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[1] Their citation is explained in paragraph 3 of my founding affidavit: the current applicants are the former respondents cited by SALC itself in its notice of motion before the High Court. It follows that para 3 of SALC's answering affidavit (and the spurious conclusion sought to be drawn) is wrong.

[2] As regards procedural issues, none of SALC's five arguments is sustainable. First, urgency is not appealable (the suggestion in para 11.1 is accordingly legally incompetent). Second, the question is not (contrary to the suggestion in para 11.2) whether the High Court *recorded* that it had insufficient time to consider properly the relevant issues and authorities, but whether it afforded a fair hearing and properly applied its mind. Third, a hearing on leave to appeal does not purge the main hearing (contrary to the suggestion in para 11.3): even if it could do so the judgment on leave to appeal does not deal with the applicants' heads of argument (para 6 of the founding affidavit, not traversed in the answering affidavit). The fourth (para 11.3) is a repeat of the third (para 11.3), and is not salvaged by resorting to mootness (*inter alia* because the merits were indeed applied as backstop for the untenable finding on mootness). Fifth (contrary to the suggestion in para 13), the judgment clearly reflects that the High Court was influenced by media reports of which judicial notice was taken before delivering its order.

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relegated it to the penultimate two pages. I shall deal in what follows with the issues in the sequence in which they properly arise.

A. Mootness

5. SALC contests Government's submissions on mootness on five bases. None is tenable.

6. The first is that "the order under appeal directed the applicants to arrest and surrender President Bashir to the ICC", and because "President Bashir left South Africa" therefore "[t]he facts that gave rise [sic] the application no longer pertain", ergo "[t]he application is ... moot" (para 77). This argument misstates the order. The order comprises a declarator and a mandamus.

7. The declarator is not erased when facts no longer "pertain". It remains, and the legal, political and practical consequences flowing from it continue. That is patently why SALC wanted a declarator in addition to the mandamus. This is also why the ICC itself has suspended proceedings before it based on President Bashir's departure from South Africa pending the appeal process in South Africa. The ICC itself considers these proceedings far from moot.

8. The mandamus, too, is not deleted by President Bashir's departure. SALC itself declared that the consequences of the mandamus are that it continues to operate, and that Government would be obliged to arrest President Bashir if he returns to South Africa. SALC's purported bald categorical denial in paragraph 8 is ineffective.

9. SALC's second argument on mootness is that the High Court "confirmed" that the matter was moot, and that SALC "respectfully endorse[s] that view" (para 78). This, too, is not legally competent. In an appeal the question is precisely whether the court *a quo* was correct. Invoking the court below to "endorse" SALC'S "view" is circular.

10. SALC's third argument on mootness is that while President Bashir was indeed invited to return to South Africa, some news reports "suggest" that he has been asked not to attend the December 2015 forum at which he is otherwise expected (para 79). The reasoning is both circular and self-destructive. If media speculation is borne out and President Bashir does not attend, this is patently because the orders are *not* moot.

11. Moreover, the orders do not expire in December 2015. SALC itself expressly asserts that the High Court's order obliges President Bashir's arrest.[3] It is accordingly common cause that the order prevents President Bashir's presence in South Africa without being arrested. Thus the order places an impediment on his travelling to South Africa. For as long as the order stands, President Bashir cannot enter South Africa without the risk of being arrested. Accordingly the order is not moot. Thus, SALC's third argument is self-defeating.

12. SALC's fourth argument is that the appeal would not raise questions of public importance, because "[t]here are currently no other serving heads of State against whom the ICC has pending arrest warrants" (para 80, emphasis added). This argument, again, elides the first order declaring the applicants to be in breach of the Constitution. The argument is also undermined by its qualification: currently. Extensive ICC investigations which could imminently lead to arrest warrants are a matter of public record. That there are "currently" no such warrants is meaningless (President Kenyatta's has only recently been lifted). Moreover, the unprecedented High Court judgment (now reported)[4] is of continued world-wide public importance, because it might either be construed as new State practice (*usus*) by South Africa, or found a cause

[3] Fn 3 of the founding affidavit; not traversed in the answering affidavit.
[4] S.v. *SA Litigation Centre v Minister of Justice* 2015 (5) SA 1 (GP).

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of action under international law (as it did in the *Arrest Warrant* case) against South Africa.

13. The argument is also misconceived for repeating the notion that there is no reason to believe that South Africa would invite or receive a serving head of State subject to an arrest warrant. (That the argument is advanced at all is an implied acceptance by SALC of the vulnerability of the resort to the "current" absence of other arrest warrants affecting other heads of State.) The impugned orders are not moot unless there is a guaranteed presence of a head of State in South Africa. They are moot if they cannot have the effect of restricting a head of State's coming and going to and from and through South Africa. On SALC's own argument the orders do have this effect. Accordingly SALC has in effect conceded that the mootness argument to which it was driven to defend the orders in its favour is bad.

14. SALC's final argument on mootness repeats its second argument. It is that the High Court so found, and that SALC again simply "endorse[s]" the finding. This is untenable. It is conceptually flawed to bolster a finding on mootness or public interest with reference to prospects of success. It is also inconsistent to seek to deny public interest or importance when the High Court itself invoked this in delivering its far-reaching judgment despite President Bashir's departure from South Africa.

15. Accordingly none of SALC's arguments is sustainable. But what SALC has not disclosed to this Court in advancing them is that SALC itself accepts this. SALC has, as a matter of record, given a procedural prognosis to the ICC Prosecutor of the matter being appealed until the end of 2016 up to the Constitutional Court. The full terms of this procedural prediction are not clear from the ICC Prosecutor's recent request to the ICC's Pre-Trial Chamber II, but footnote 5 of the request refers to SALC's attorney's

advice that a hearing date is likely to be provided by this Court only during next year, and that "if the matter reaches the … Constitutional Court … the proceedings could stretch to the end of 2016." As the *Daily Maverick* reports (in an article dated 27 October 2015, annexed marked "A"), what this means is that SALC itself "indicated that the matter was also likely to come before the Constitutional Court". For her part, the ICC prosecutor herself acknowledges "the need for the resolution of the domestic proceedings", and she too expressly contemplates "that [President Bashir] may travel to South Africa again" (*ibid*).

16. Accordingly the mootness argument is not only without merit, but not even *bona fide*.

B. Merits: Prospects of success

17. SALC advances extensive legal arguments with reference to four topics: (i) the constitutional significance of international law; (ii) the ICC Act; (iii) South Africa's obligations under the Rome Statute; and (iv) the Immunities Act. SALC does *not* deny that the Full Bench told counsel *only* to address the mootness issue, thus depriving the applicants of any opportunity at all to address in oral argument matters on which, it is now apparent, the Full Bench was to refuse leave.

18. As regards the first topic, this is a zero-sum argument. This is because the constitutional significance of international law simultaneously supports the applicants' position. The applicants' position is that immunity *ratione personae* is a fundamental principle of international law (to which national legislation gives effect), and that it was incorrectly applied by the High Court. The pejorative suggestion that Government "misunderstand[s] the role that customary international law plays in our legal regime" (para 16) is accordingly mistaken.

19. As regards the second and third topics, these have been addressed in Government's heads of argument on leave to appeal filed in the High Court (which SALC attached to its answering affidavit) and in Government's founding affidavit filed in this Court. SALC's answering affidavit does not properly address any of Government's submissions. Indeed, SALC avoided traversing Government's founding affidavit on the pretext of prolixity. SALC simply repeats, for instance, its reliance on Article 27 of the Rome Statute and sections 4(2)(a) and 10(9) of the ICC Act. In doing so, SALC

- fails to appreciate that Article 27 deals only with proceedings before the ICC itself. It does not deal with immunities before a domestic court.
- misconstrues section 4(2)(a). It provides that being a head of State is not "a defence to a crime" or "a ground for any possible reduction of sentence". SALC submits that section 4(2)(a) "provides that serving heads of State ... have no immunity domestically from criminal prosecution" (para 36, emphasis added). But even were SALC's misconstruction to be followed to its own logical conclusion, it still does not address the correct issue: immunity against arrest.
- misrepresents section 10(9) as providing for "arrest and surrender" (para 42). Arrests are not the subject-matter of this provision, as Government has already pointed out.
- perpetuates conflating jurisdiction of a South African court with the absence of immunity of a foreign head of State (e.g. para 36). Jurisdiction does not presuppose the absence of immunity; to the contrary, it is only when jurisdiction exists that immunity can ever arise. Indeed, throughout the answering affidavit SALC confuses and conflates also other issues which are conceptually, legally and statutorily apart (e.g. "prosecution" and "arrest"; and proceedings before a national court and proceedings before the ICC: see e.g. paras 37 and 65).

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20. The fourth topic is premised on many of the preceding errors (see e.g. para 47, repeating the reliance on section 4(2) of the ICC Act which SALC contends "expressly excludes immunity for serving heads of State; see similarly para 56.1). It also circles back to SALC's construction of what the Rome Statute (and, in turn, the ICC Act) provides (para 47). Government has shown that the Rome Statute and the ICC Act (which gives effect to the Rome Statute) in truth respects immunity *ratione personae* and does not purport to infringe the consensual principle of treaty law or the sovereignty principle of international law. SALC did not deal with this. Instead, SALC misconstrues section 4 of the Immunities Act as granting only such immunities as paragraphs (a) to (c) of subsection (1) lists (para 52). But it is only "privileges" which are thus qualified. In respect of immunities section 4(1) provides that a heads of State is categorically immune from the criminal and civil jurisdiction of the courts of the Republic. This reflects international law, which only recognises an exception in respect of immunity *ratione materiae*.

21. SALC's argument on the alleged development of customary international law is flawed in a number of respects. Most importantly, it fails to distinguish between immunity *ratione personae* and immunity *ratione materiae*. And it, regrettably, misstates authority in this respect, suggesting that the *Arrest Warrant* case is "severely criticised" by "leading international criminal law academics and practitioners" (para 59). Only two academics are cited: Prof Dugard and Prof Cassese. Prof Dugard does not suggest that the majority judgment in the *Arrest Warrant* case does not express the correct principle of international law.[5] The majority judgment has indeed subsequently been confirmed

[5] It is true only that Prof Dugard refers to some aspects of the judgment as "surprising", "premised on a rule of customary international law with little practice to support it" and as "strongly criticised as a setback for the movement against impunity for the commission of international crimes". What is important to note is that Prof Dugard in fact confirms that "[a]t the outset a distinction must be drawn between international and national

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and applied by the ICJ itself. Unsurprisingly SALC must therefore strive to distinguish the *Arrest Warrant* case (para 58). But there is no valid basis for distinction in circumstances where the ICC itself has confirmed the application of the principle articulated in that judgment.

22. Furthermore, it is significant that while SALC cites up to five judgments in support for certain legal contentions advanced in its answering affidavit, it can cite none for the assertions advanced in paragraph 56. The assertion is that "customary law has developed and does not preclude the arrest … of a serving head of State". What this reveals is that SALC is in fact mistakenly seeking to invoke the rule lifting functional immunities (immunities *ratione materiae*) in cases of international crimes. The rule does not apply to personal immunities (immunities *ratione personae*). The distinction is explained by Prof Cassese, the only other academic commentator cited by SALC. Prof Cassese is quite clear: "as long as a foreign minister [or head of State] is in office, he enjoys full immunity from foreign jurisdiction and inviolability, for whatever act he may perform" – even for crimes against humanity. Thus the correct legal position is, with respect, precisely as stated in Government's founding affidavit.

23. Once the legal position is correctly understood, none of the instruments invoked in paragraph 60 of SALC's answering affidavit supports it. This is because each of these instruments deals with functional immunities. Their text makes it clear that official capacity is not a defence against criminal "responsibility" or a basis to "mitigate

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courts for the purposes of immunity". It is this distinction which SALC disregards. Prof Dugard also confirms that

> "[i]n considering the approach of national courts to immunity of senior state officials of international crimes, regard must be had to the distinction between immunity *ratione personae* and immunity *ratione materiae*. …. [The former] immunity applies even to international crimes, as held by national courts in cases involving Ghaddafi, Castro, Sharon, Mofaz and Mugabe."

Dugard further quotes with approval Dapo Akande, stating that

> "Judicial opinion and State practice on this point are unanimous and no case can be found in which it was held that a State official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign State when it is alleged that he or she has committed an international crime."

punishment". Accordingly, official capacity is not a substantive defence (or basis for the reduction of a sentence). Personal immunities do not relate to substantive defences; instead, they "relate to procedural law" and "render the State official immune from civil or criminal jurisdiction (it is a procedural defence)".[6]

24. Prof Cassese's article also explains why SALC's reliance (in para 61) on examples from the Special Court for Sierra Leone and the ICTY is misplaced: "whereas the statutes of international criminal tribunals and courts … may perhaps be construed as removing, at treaty level, even personal immunities", this does not apply to "the ICC, where the text is clear". Article 98 (which Prof Cassese cites) expressly provides for the retention of immunity of a third State. Prof Cassese concludes "[c]learly, the relevant provisions of the Court's Statute removing any immunity only apply to contracting states." Sudan is not a contracting State. Accordingly its President's immunity *ratione personae* is retained by the Rome Statute. Therefore, because "[t]he question is … what obligations the Rome Statute itself imposes" (as SALC correctly identifies it at para 24), the answer is that the obligation is to respect Sudan's President's immunity.

25. It follows that SALC has misconstrued the correct legal position and the authorities it cites. Prof Cassese's article does not "severely criticise" the *Arrest Warrant* case. He instead confirms that "not only the arrest and prosecution …, but also the mere issuance of an arrest warrant may seriously hamper or jeopardise the conduct of international affairs" and that "[b]y and large this conclusion [by the ICJ in the *Arrest Warrant* case] is convincing, despite the powerful objections raised by Judge Al-Khawawneh in his important dissenting opinion. The Court must be commended for elucidating and spelling out an obscure issue of existing law."

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[6] Cassese *op cit* at 863-864.

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26. Finally, also SALC's contention that the *Arrest Warrant* case allows an exception in respect of prosecutions before the ICC (para 62) is flawed in its own terms. What it overlooks is that this case concerns immunity *ratione personae* in respect of jurisdiction exercised by a national court. Accordingly SALC's conclusion (in para 65) departs from a wrong premise: the question is not whether "President Bashir enjoys ... immunity from prosecution before the ICC". It is whether President Bashir enjoys immunity *ratione personae* before the South African courts. Because President Bashir does enjoy immunity in a South African court, the High Court could not issue the mandamus to arrest him.

C. Conclusion

27. It follows that the High Court's order directing President Bashir's arrest departs from (and indeed violates) international law, as the *Arrest Warrant* case (to which the High Court judgment does not refer) held. This requires urgent correction by this Court. The violation continues "to seriously hamper or jeopardise the conduct of international affairs", and is accordingly not moot. Nor is the order declaring that any failure to take steps to arrest President Bashir is unconstitutional. Both orders are contrary to international law and, in turn, to national law giving effect to international law. Therefore leave should be granted. The urgency and both national and international repercussions are patent, and further demonstrated each week SALC seeks to prevent a determination by a higher court (while conceding to the ICC itself that this must happen).

TERRESA NONKULULEKO SINDANE

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I certify that the deponent acknowledged to me that she knows and understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on her conscience; that the deponent thereafter uttered the words, I swear that the contents of this declaration are true, so help me God; and signed this declaration in my presence at Pretoria on this 09 day of November 2015.

SOUTH AFRICAN POLICE SERVICE
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SOUTH AFRICAN POLICE SERVICE

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