IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO 77150/09

In the matter between:

SOUTHERN AFRICA LITIGATION CENTRE	First Applicant
ZIMBABWE EXILES FORUM	Second Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE HEAD OF THE PRIORITY CRIMES LITIGATION UNIT	Second Respondent
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	Fourth Respondent

---

SUPPLEMENTARY FOUNDING AFFIDAVIT

INTRODUCTION 3

Furnishing of the record in terms of Rule 53 4

Supplementation 5

CONFIRMATION AND SUPPLEMENTATION OF THE ORIGINAL REVIEW GROUNDS 5

Introduction 5

The respondents' inexplicable and unjustified delays 6

The reasons and record confirm and supplement the applicants' review grounds 9

The respondents' contention that it is impossible or impractical to investigate the crimes committed in Zimbabwe 10

The fourth respondent failed properly to consider the contents of the torture docket or the first applicant's offer of assistance 19

The respondents' contentions about the negative impact on "South Africa's diplomatic initiatives in Zimbabwe" and the "international relations of the country" 23

The fourth respondent's further material errors of law 24

The first respondent abrogated his duties and misconstrued his power under section 5 of the ICC Act ... 29

Anticipated presence 31

CONCLUSION 33

I, the undersigned,

NICOLE FRITZ

do hereby make oath and say that:

INTRODUCTION

1. I am duly authorised to depose to this supplementary affidavit on behalf of the applicants, and I deposed to the founding affidavit filed by the applicants in this matter.

2. The averments made herein are to the best of my knowledge true and correct and are, unless otherwise stated or indicated by the context, within my personal knowledge. Where I make legal submissions, I do so on the basis of advice that the applicants have received from their legal representatives.

3. In this supplementary affidavit I shall use the same abbreviations as those used in my founding affidavit. I have again included a contents page in this supplementary affidavit in the hope that it will be of assistance to this Honourable Court.

Furnishing of the record in terms of Rule 53

4. In the notice of motion in this matter, the applicants exercised their right in terms of Rule 53 of the Uniform Rules of Court and called upon the first, second and fourth respondents to dispatch to the Registrar of this Honourable Court the record and the reasons why the impugned decision(s) should not be reviewed and corrected or set aside.

5. After filing notices of intention to oppose, on 6 April 2010 the first and fourth respondents respectively took the opportunity afforded them by Rule 53 to furnish reasons for the impugned decision. That election has now been made.

6. I attach the first respondent's reasons hereto as annexure **NFsupp1**. I attach the fourth respondent's reasons hereto as annexure **NFsupp2**.

7. Furthermore, on the same date the first and fourth respondents respectively took the opportunity to file their records of proceedings in terms of Rule 53(1)(b) of the Uniform Rules of Court. I attach the two records filed as one bundle, and refer to it herein as annexure **NFsupp3**.

8. In this affidavit I shall for ease of reference refer to the first and fourth respondents as "*the respondents*", except where the context requires otherwise.

9. This supplementary affidavit is prepared on the basis that the respondents have no other documents in their possession that are relevant to the issues with which this review application is concerned.

Supplementation

10. In light of the reasons and the record, the applicants now wish to supplement their founding affidavit in relation to the relief sought in their notice of motion (as they are entitled to do in terms of Uniform Rule 53(4)). The applicants will also amend their notice of motion. The amended notice of motion will be filed together with this affidavit.

11. For the avoidance of doubt, I emphasise at the outset that the applicants stand by all of the review grounds in their founding affidavit. What is set out below is intended to supplement the contents of the applicants' founding affidavit.

CONFIRMATION AND SUPPLEMENTATION OF THE ORIGINAL REVIEW GROUNDS

Introduction

12. I respectfully submit that the reasons and record filed by the respondents support the grounds of review contained in the applicants' founding affidavit. In some respects the reasons and record provide further, supplementary, bases on which the impugned decision falls to be reviewed and set aside.

13. I will come to my reasons for saying so in due course. Before I do so, I point out that the record and reasons filed by the respondents confirm that the applicants were correct to complain about the dilatory response they had received from the respondents.

The respondents' inexplicable and unjustified delays

14. It will be recalled that the applicants in their founding affidavit set out in detail the inordinate amount of time that was allowed to transpire between the time the first applicant made its initial request for an investigation and the respondents' final response.

15. A reading of the reasons and the record filed by the first respondent shows the following:

    15.1. The first respondent was informed on 18 March 2008 that the first applicant had submitted the torture docket (see para 1.1, first respondent's reasons, NFsupp1).

    15.2. Shortly after 14 July 2008, the first applicant received a report from the second respondent "*recommending that the matter be referred to the South African Police Service for investigation, but advising that the Minister should first be briefed*" (see para 1.10, first respondent's reasons, NFsupp1).

15.3. It was only more than five months later, on 17 December 2008 ("*after having met the Minister and Deputy Minister and briefed them*"), that the first respondent wrote to the Acting National Commissioner of Police, "*requesting him to give attention to having the allegations made by the First Applicant investigated*" (see para 1.12, first respondent's reasons, NFsupp1).

15.4. A staggering 6 months later (and without any apparent steps by the first respondent to elicit an earlier answer), on 12 June 2009 the first respondent received a written response from the Acting National Commissioner (see para 1.13, first respondent's reasons, NFsupp1).

15.5. On 19 June 2009, the first respondent wrote to inform the first applicant that the Acting National Commissioner had declined to conduct an investigation (see para 1.14, first respondent's reasons, NFsupp1).

16. This dilatory approach, it must be remembered, is in respect of properly motivated allegations that crimes against humanity of torture have been committed (crimes which fall within the category of crimes that are of the most serious concern to humanity, and which the ICC Act describes as "*atrocities*"). Such inordinate delays are furthermore attributable to the first respondent, the senior functionary in charge of a unit described purposely as a "***Priority*** *Crimes Litigation Unit*" (emphasis added).

17. The first respondent's dilatory conduct is matched by that of the fourth respondent. The reasons and record filed by the fourth respondent demonstrate the following:

17.1. The fourth respondent received on 5 January 2009 a letter from the first respondent recording that the allegations in the torture docket "*require further investigation*" (see para 1, fourth respondent's reasons, NFsupp2).

17.2. After an initial meeting with the head of the PCLU on 14 January 2009, the fourth respondent thereafter inexplicably took more than four months to decide "*not to initiate an investigation*", a decision eventually conveyed to the first respondent by way of letter dated 29 May 2009 (see para 5, fourth respondent's reasons, NFsupp2).

18. Accordingly, the record and reasons now filed by the respondents make it clear beyond any doubt that the prolonged refusal and/or failure by the respondents to act in conformity with their obligations under the ICC Act, as well as their obligations under Section 179 of the Constitution read with the requirements of the National Prosecution Authority Act, violates the constitutional principle of legality. It is also now patently clear that the delays by the respondents violate Section 237 of the Constitution, since those delays are inexcusable and confirmed by the record. In the circumstances, the applicants have amended their notice of motion to seek declaratory relief that the delays in question constitute a breach of Sections 179 and 237 of the Constitution.

The reasons and record confirm and supplement the applicants' review grounds

19. In my founding affidavit I contended that the impugned decision(s) fell to be reviewed on the basis that:

19.1. by virtue of section 6(2)(e)(ii) of PAJA "*the action was taken … for an ulterior purpose or motive*";

19.2. by virtue of section 6(2)(d) of PAJA "*the action was materially influenced by an error of law*";

19.3. by virtue of section 6(2)(e)(iii) of PAJA "*irrelevant considerations were taken into account or relevant considerations were not considered*";

19.4. by virtue of section 6(2)(e)(vi) of PAJA the decision was taken "*arbitrarily or capriciously*";

19.5. by virtue of section 6(2)(f)(ii) of PAJA the decision is "*not rationally connected to (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator*";

19.6. by virtue of section 6(2)(h) of PAJA the decision is "*so unreasonable that no reasonable person could have so exercised the power or performed the function*".

20. I respectfully submit that the reasons filed by the respondents confirm and in some cases provide further grounds for arguing that the respondents have failed to apply their minds seriously to their obligations under the ICC Act, and/or have wholly misunderstood the nature of the ICC Act and their duties thereunder; and/or have failed to apply their minds seriously to the comprehensive and substantiated basis set out in the torture docket for initiating an investigation into torture as a crime against humanity.

21. I say so for the following reasons:

<u>The respondents' contention that it is impossible or impractical to investigate the crimes committed in Zimbabwe</u>

22. Both the first and fourth respondents contend that investigations would have to be conducted in Zimbabwe, which "*could not be done through existing legal channels*" (see para 1.13, first respondent's reasons, NFsupp1); and that "*[i]n terms of existing international obligations, very specific channels of communication and modalities of investigations by the SAPS in Zimbabwe are provided, which exclude the exercising of any police powers by members of the SAPS in Zimbabwe*" (see para 7, fourth respondent's reasons, NFsupp2).

23. Moreover, the first respondent separately voiced concerns about "*[t]he practicalities of conducting a prosecution in the Republic of South Africa relating to an offence committed wholly outside its borders*" (see para 1.8.4, first respondent's reasons, NFsupp1). The fourth respondent also argues that "*[i]n*

view of the SAPS's territorially limited investigative powers, [investigations to verify any version put forward by the suspect but also to garner corroborative material] will not be possible" (para 10.2, fourth respondent's reasons, NFsupp2).

24. These averments suggest that it is impossible or impractical to conduct investigations in respect of crimes committed outside of South Africa, they ignore the fact that the torture docket itself provided a prosecutable case, and they fly in the face of the numerous existing domestic and international instruments for mutual legal assistance in criminal matters, and indeed the very objects of the ICC Act.

25. At the hearing the applicants' legal representatives will advance further argument in this regard. Suffice it to say the following:

25.1. The respondents simply make the assertion that further investigations were required whereas they were presented with a docket that is prosecutable in its present form and they have never contended otherwise.

25.2. There is also no reason provided to explain why investigations would have to be conducted in Zimbabwe by the SAPS. The possibility exists that the witnesses may come to South Africa: yet the applicants were never approached to discuss the possibility of witnesses coming to South Africa; the applicants were never approached to discuss other forms of cooperation; and the respondents do not give the slightest indication at all what further

investigations were required. In short, there is a whole range of practical measures that have never been explored.

25.3. The respondents without reason focus on the fact that the only possible source for evidence is Zimbabwe. That is not an accurate assumption. Most obviously the torture docket presented a substantial source of evidence already in the hands of the South African authorities. Futhermore, there might be evidence available from witnesses who are now in South Africa or in other countries. The International Criminal Court itself might have compiled witness statements related to Zimbabwe based on a complaint even though Zimbabwe is not a party. While it is discretionary, a request to the International Criminal Court under article 93(10) of the Rome Statute would be possible. In short, the torture docket itself constitutes a sufficient basis for prosecution, and to the extent that further investigations were required, there are a number of mechanisms for investigation open to the respondents. Had they chosen to act in good faith and consistent with their legal obligations, investigations may well have borne fruit by now.

25.4. Furthermore, as the fourth respondent appears to accept, it is perfectly possible (from a practical perspective) and permissible (from a legal perspective) to conduct such an investigation in South Africa through "*the use of mutual legal assistance in terms of South African and Zimbabwean legislation on mutual cooperation in criminal matters and the cooperation*

of the Zimbabwean police authorities" (see para 7, fourth respondent's reasons, NFsupp2).

25.5. In 1996 Parliament enacted the International Co-operation in Criminal Matters Act No 75 of 1996 (the MLA Act). The MLA Act was enacted to give effect to South Africa's desire to co-operate internationally in the suppression of crimes on a wider scale. Requests for assistance from a foreign state in criminal matters fall squarely under the MLA Act; and the Act (in section 2 in particular) sets out the conditions under which South Africa may ask a foreign state to cooperate, and which in practice – as confirmed by a number of cases – the NDPP has previously utilised.

25.6. The first respondent has also clearly failed to appreciate that the MLA Act permits the prosecuting arm of government to play a decisive role in the investigation of serious crime. That is because section 2(2) of the MLA Act permits – and previous practice confirms – that the NDPP may approach a judge in chambers or a magistrate on application to request "*him or her [to] issue a letter of request in which assistance from a foreign State is sought to obtain such information as is stated in the letter of request for use in an investigation related to an alleged offence…*".

25.7. Aside from section 2, other sections of the MLA Act evince our government's desire to co-operate internationally in the suppression of crimes on a wider scale. For example, section 31 of the MLA Act

empowers the NDPP to seek mutual legal assistance in exceptional circumstances; and section 27 of the MLA Act provides that "*[t]he President may on such conditions as he or she may deem fit enter into any agreement with any foreign State for the provision of mutual assistance in criminal matters and may agree to any amendment of such agreement*".

25.8. South Africa is moreover a founding member of the SADC *Protocol on Extradition and Mutual Legal Assistance (MLA) in Criminal Matters* (*SADC MLA Protocol*). Both South Africa and Zimbabwe have signed the *SADC MLA Protocol*, and South Africa has taken the further step of ratifying.

26. Despite the obvious implications of these instruments in respect of investigations arising from the torture docket, the reasons and record of the respondents show that little or no meaningful thought was given by them to the MLA Act or the SADC Protocol. Certainly no rational explanation is provided for failing to consider these instruments in the context of cooperation in the investigation of crimes under the ICC Act.

27. The respondents essentially conclude that the extensive provisions on mutual legal assistance will not work without even trying. At the very least, given the existence of these cooperation instruments, it was incumbent on them to make a request. If the request is not answered or is declined that is a different matter but to simply

presume non cooperation as a reason for not investigating constitutes a lack of good faith.

28. What is more, the position advanced by the respondents (that it is impossible or practically difficult to investigate crimes committed abroad) is one that flies in the face of Parliament's intention as reflected in the ICC Act:

28.1. *First*, section 4 of the ICC Act makes it plain that the crimes within the Court's jurisdiction *ratione materiae* are crimes within the Republic. Thus, while they may be committed abroad, for the purposes of the ICC Act they must be "*deemed*" by the respondents to be crimes "*committed ... in the territory of the Republic*"

28.2. *Second*, the respondents' reasons (such as they are) render the ICC Act meaningless inasmuch as it evinces Parliament's intention for crimes against humanity committed abroad to be prosecuted domestically before the courts of South Africa.

29. In disclosing their reasons and record the respondents have accordingly confirmed that they failed to apply their minds, took into account irrelevant considerations and ignored relevant factors, and generally laboured under a material error of law both in respect of the ICC Act and also in their understanding of the applicable legal instruments on mutual legal assistance.

30. Such material defects in the respondents' decision-making have perpetuated other difficulties for the respondents.

30.1. In the *first* place: the first respondent's suggestion that an investigation would "*terminate cooperation from the Zimbabwean Police in connection with ongoing and future criminal investigations…*" (see para 1.13, first respondent's reasons, NFsupp1) is a bald exaggeration without any supporting evidence.

30.2. In any event, the suggestion is patently without substance. In light of the MLA Act such requests are not irregular; and indeed the SADC MLA Protocol makes it clear that within SADC, member states may be assumed to do the opposite to that suggested by the respondents: namely, instead of terminating cooperation, Zimbabwe may be expected to extend its assistance in connection with ongoing and future criminal investigations.

30.3. *Secondly*: this supposition presumes that all cooperation from the Zimbabwean Police will automatically be withheld as a result of the investigation of the torture docket by the SAPS.

30.4. There is no evidence to that effect whatsoever, including no supporting affidavit filed by the Minister of International Relations and Cooperation. In fact, the supposition is an insult to Zimbabwe, which should be presumed to

comply with the legal obligations under its own domestic law, and those voluntarily assumed by virtue of its membership of SADC.

30.5. *Thirdly*: the concerns raised by the respondents regarding the statements (affidavits) provided in the first applicant's torture docket falling short of "*a thorough court-directed investigation*" (first respondent's reasons, para 1.13; fourth respondent's reasons, para 10.1), are manifestly without substance and overblown.

30.6. A perusal of the affidavits in the torture docket makes it plain that the statements are corroborative, detailed, and substantial. Nowhere is it stated in what respect they are deficient or in what respect further investigation was required and no approaches whatsoever have ever been made to the applicants in this regard.

30.7. Certainly there was nothing in the torture docket which prevented the respondents from taking the requisite steps to perform their own "*court-directed*" investigation. The torture docket itself provided a prosecutable case, or if the respondents believed further investigations were required, then they could utilise the cooperation instruments described above. To the extent that the respondents (including the first respondent) were minded to pursue such a court-directed investigation, section 2(2) of the MLA Act allows for an application to a judge in chambers or a magistrate to request "*him or her [to] issue a letter of request in which assistance from a foreign*

State is sought to obtain such information as is stated in the letter of request for use in an investigation related to an alleged offence…".

30.8. *Fourthly*: it is similarly irrational and inexplicable for the first respondent to assert that in his view "*it would have been inappropriate for the evidence to be gathered in an inadmissible manner*…." (para 1.13, first respondent's reasons, NFsupp1). I submit that the first respondent has patently misconstrued the nature of mutual legal assistance – which is a legal process by which two states agree to cooperate in gathering evidence which will be admissible at trial.

30.9. *Fifthly*: the respondents' assertion that the first applicant "*could not be used as an agent of the South African Police Service to gather evidence on its behalf*" (para 1.13, first respondent's reasons, NFsupp1; para 10.4, second respondent's reasons, NFsupp2) is, with respect, an obvious misdirection. For one thing, the first applicant offered this assistance in addition to the evidence already contained in the torture docket. Even if the respondents were of the view that the first applicant could not be used as "*an agent*" to gather *further* evidence on their behalf, the torture docket had already provided a basis for a prosecution, or if considered inadequate, for an investigation which, by reliance on the relevant MLA instruments and the ICC Act, the respondents were empowered and obliged to initiate. That is to say that if the respondents were disinclined to accept the first applicant's

offer of further assistance, that did not provide an excuse for the respondents to ignore the evidence already contained in the docket and their legal obligations arising therefrom.

31. In the circumstances the respondents' failure properly to consider the MLA Act and the SADC MLA Protocol, as read with the ICC Act, means that the impugned decision is vitiated by a material error of law and is reviewable in terms of section 6(2)(d) of PAJA, alternatively constitutes a failure to consider relevant factors such that the impugned decision is reviewable under section 6(2)(e)(iii) of PAJA, or is otherwise irrational, unconstitutional and unlawful.

<u>The fourth respondent failed properly to consider the contents of the torture docket or the first applicant's offer of assistance</u>

32. The fourth respondent states that the torture docket "*contains nothing more than mere allegations*" (para 10.1, fourth respondent's reasons, NFsupp2). I submit that this is a fundamental misdirection.

33. I respectfully submit that a perusal of the docket indicates plainly that the docket is a comprehensive collection of evidence on oath and supporting medical reports. It is certainly more than a collection of "mere allegations", as stated by the fourth respondent. It presents a prosecutable case.

34. I am constrained to submit that the fourth respondent cannot have properly considered the contents of the torture docket, alternatively, did not appreciate the evidential value of the contents of the torture docket.

35. In any event, and assuming only for purposes of argument that the torture docket contained "*mere allegations*", it is a common feature of our criminal justice system that police investigations are initiated on the basis of allegations by a complainant. The fourth respondent's unwillingness to treat the torture docket in the same vein is explicable only on the basis that he wished to avoid undertaking the requested investigation. This is especially so in light of the fact that he nowhere indicates what further investigation was required, neither did he approach the applicants at any time in this regard.

36. I am further startled by the fourth respondent's suggestion that the undertaking by the first applicant to make witnesses available and assist in obtaining evidence was "*not clear*", and "*[t]he value of such undertaking by the First Applicant is not clear and is doubted*" (para 10.3, fourth respondent's reasons, NFsupp2). I also note the fourth respondent's statement that "*[i]t is also clear that neither the SAPS nor the First Applicant have the power or the ability to provide the required protection in Zimbabwe to protect potential witnesses, especially in the investigative phase*" (para 10.3, fourth respondent's reasons, NFsupp20).

37. I stress that this is the first time that the first applicant has learnt that the fourth respondent was unclear about the offer of assistance. Naturally, had any of the

respondents wished for clarity, all they had to do was ask. I point out that in its letter dated 15 December 2008 in which the first applicant offered its assistance in conducting the investigation, the writer thereof concluded her letter by recommending a meeting "*between members of the PCLU, SALC and counsel assisting SALC (Wim Trengove SC, Gilbert Marcus SC and Max du Plessis) in order to expedite the investigation of the officials referred to in the dossier*" (record: 282). No such meeting was called by the respondents.

38. I also stress that the first applicant's offer to assist in the collection of further evidence and testimony was not made unsolicited but was prompted by an inquiry from the NPA following on discussions between SALC and the second respondent's office (see record: 277 to 282). It is ironic that the fourth respondent would now choose to be "*unclear*" about the offer of assistance.

39. The fourth respondent also states that "*the probative value of the reports of non-governmental organizations as presented by the First Applicant is highly questionable. The all-encompassing unsubstantiated allegations made in those reports would obviously have to be verified and will lead to an investigative process, the magnitude of which is not determinable at this stage*" (para 10.3, fourth respondent's reasons, NFsupp2).

40. In this respect the fourth respondent is clearly mistaken. The Constitutional Court has sanctioned the use of such reports by respected human rights organisations without the need for the allegations therein to be verified; and such reports are

routinely relied on by international (criminal) tribunals to demonstrate the contextual nature of international crimes (for instance, that they are widespread and systematic).

41. Accordingly, the reports were relevant material whose probative value in proving the context of crimes against humanity in Zimbabwe was not "*highly questionable*".

42. In any event, as a general proposition the fourth respondent's statement that the magnitude of the evidence is "*not determinable at this stage*" can never be a basis for not beginning an investigation. I submit that it is patently irrational to refuse to investigate on the apprehension of future difficulties that may or may not materialise and which may only become relevant upon further investigations.

43. For these reasons I submit that the impugned decision is vitiated by a material error of law and is reviewable in terms of section 6(2)(d) of PAJA, alternatively constitutes a failure to consider relevant factors such that the impugned decision is reviewable under section 6(2)(e)(iii) of PAJA, by virtue of section 6(2)(e)(ii) of PAJA "*the action was taken … for an ulterior purpose or motive*", or under section 6(2)(e)(v) was taken "*in bad faith*", or was by virtue of section 6(2)(e)(vi) of PAJA taken "*arbitrarily or capriciously*; or is otherwise irrational, unconstitutional and unlawful.

The respondents' contentions about the negative impact on "South Africa's diplomatic initiatives in Zimbabwe" and the "international relations of the country"

44. The fourth respondent suggests that it "*was also foreseen that international relations of the country could have been negatively affected by the initiation of an investigation*" (para 9, fourth respondent's reasons, NFsupp2). The first respondent says that a valid consideration relating to national interest and policy is that "*the proposed investigation would impact negatively on South Africa's diplomatic initiatives in Zimbabwe*" (para 1.13, first respondent's reasons, NFsupp1).

45. I stress that these foreign policy assertions are bland and irredeemably speculative and that foreign relations is a matter for the relevant ministry and not the fourth respondent. What is more, they are made by two officials – one a former Head of the Prosecuting Services; the other a senior policeman – who are neither skilled nor experienced in the field of foreign relations, nor do they have any authority to speak on South Africa's foreign relations. There is absolutely no supporting evidence advanced by the respondents to verify the apparently negative impact on foreign relations. And there is no evidence in corroboration by the relevant officials – the Minister, or Director General, of International Relations and Cooperation, or indeed anybody qualified to deal with the topic.

46. There is a statement only by the first respondent that he "*intended to discuss the issue of an investigation personally with ... the Director-General of the then*

Department of Foreign Affairs" (para 1.7, first respondent's reasons, NFsupp1). However, there is no further mention of such a discussion, or confirmation that his intention was given effect to. This is scarcely surprising. It is inconceivable that the Director General would compromise South Africa's obligations under the Rome Statute and the ICC Act.

47. Moreover, what these submissions demonstrate is a complete failure by the fourth respondent to appreciate the nature and ambit of his statutory duty under the ICC Act and international law to investigate and prosecute persons responsible for the most serious crimes of concern to the international community.

48. Accordingly, the respondents' reliance on these speculative considerations as ostensible justification for the decision not to investigate constitutes the taking into account of irrelevant considerations and the failure to consider relevant ones, amounts to unreasonable administrative action, and is otherwise irrational, unconstitutional and unlawful.

The fourth respondent's further material errors of law

49. For the reasons set out above, the respondents' failure to consider the applicable mutual legal assistance instruments as read with the ICC Act means that the impugned decision is vitiated on the basis of a material error of law.

50. A number of other assertions by the fourth respondent further confirm his very material misunderstanding of the relevant legal provisions applicable in this case.

51. *First*: is the fourth respondent's assertion that the first applicant's request for an investigation would expose the South African Police Service "*to conduct which is tantamount to espionage, or impinging on the sovereignty of another country*"; and that there is "*no obligation under the Rome Statute of the International Criminal Court ... to conduct covert investigations, nor to interfere in the domestic affairs of another country*" (para 10, fourth respondent's reasons, NFsupp2).

52. I stress that at no point in the torture docket or in subsequent correspondence did the applicants call for clandestine investigations. Instead, they expected nothing more (and nothing less) than the proper use of conventional investigative methods and cooperation mechanisms and the investigation and prosecution of the individuals concerned with due regard for the Government's obligations under the ICC Act.

53. *Second*: the fourth respondent has a peculiar yet manifestly erroneous view of the relationship between the Rome Statute and the ICC Act in respect of jurisdiction.

54. The fourth respondent says in terms that "*[a] further consideration that played a role [in the impugned decision] is whether under the circumstances the International Criminal Court (the ICC) would have jurisdiction to adjudicate upon the matter*." In this respect the high-water mark of the argument is the fourth respondent's view that because "*Zimbabwe is not a State Party, hence ... the ICC will not exercise jurisdiction over that country*", such that "*[t]he*

corollary to this proposition is that South African Courts cannot exercise jurisdiction broader than that which the ICC does not have" (para 15, fourth respondents reasons, NFsupp2).

55. It is thus clear that the fourth respondent places much store on the fact that Zimbabwe is not a state party to the Rome Statute to assert that there is no *rationae jurisdictionis* in respect of the crimes in question.

56. This assertion is based on a fundamental misunderstanding of the Rome Statute, the ICC Act and international criminal law. Further legal argument will be advanced in this respect at the hearing of this matter. For present purposes, it suffices for me to submit as follows:

56.1. *First*: the jurisdiction of South African courts to try international crimes – such as those alleged in the torture docket – comes from the ICC Act, not the Rome Statute.

56.2. The ICC Act has made it plain that the crimes alleged in the torture docket are deemed to have been committed within the territory of South Africa. Under the ICC Act, national prosecution is based on the exercise of jurisdiction according to the principles of territoriality or nationality; and is also legitimately grounded in universal jurisdiction, allowing South Africa the competence (and imposing the obligation) to investigate and prosecute crimes committed outside our territory by and against foreigners.

56.3. Thus many states, including South Africa, have introduced specific national legislation prohibiting international crimes. Although the crimes defined in these Acts are international, the jurisdiction exercised under the relevant Statute is domestic. Similarly, many of these acts allow for more extensive jurisdiction than that provided under the Rome Statute. Therefore, under domestic law the power to investigate and prosecute comes from the ICC Act, not the Rome Statute. The jurisdictional provisions of the Rome Statute are therefore irrelevant insofar as the prosecution of a crime under 4(3)(c) is concerned. And there is nothing in section 4 of the ICC Act or elsewhere to suggest that South Africa may not investigate crimes committed abroad in the territories of non-state parties. The very opposite is true.

56.4. *Secondly*, in any event the authority under international law for domestic courts to prosecute international crimes does not come from the Rome Statute, but from (customary) international law. South African courts have jurisdiction over crimes against humanity under the principle of universal jurisdiction. The suggestion by the fourth respondent that South Africa, by ratifying the Rome Statute, circumscribed its jurisdiction under international law not only fundamentally misrepresents and misunderstands the principles of international law (treaty interpretation) but runs contrary to the very purpose of the ICC Act which proclaims Parliament's commitment that South Africa will prosecute "*the most serious crimes of concern to the*

international community". It also undermines the obligation upon South Africa under international law to investigate and prosecute international crimes.

56.5. *Thirdly*, the Rome Statute primarily encourages prosecutions at the national level through the principle of *positive complementarity*, and only acts in the event of the failure of national courts to do so. Paragraph 6 of the preamble to the Rome Statute, for example, declares that "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*". There is no indication in the Rome Statute that such duty is limited to nationals of states parties.

57. I respectfully submit that the fourth respondent's confusion continues (in paragraphs 16, 17 and 18, fourth respondent's reasons), where it is suggested that South Africa cannot "*unilaterally establish international obligations for another sovereign state, without the intervention of the United Nations and specifically the UN Security Council*".

58. Of course, nothing of the sort is done by way of the ICC Act. Whatever international obligations are established for Zimbabwe are established under international law – and these obligations would include the by now widely accepted customary international law prohibition on torture as a crime against humanity. The ICC Act establishes domestic obligations upon South Africa to act

against offenders – no matter where the crime is committed – who violate this customary international law norm.

59. This assertion too reveals a fundamental misunderstanding of how the ICC, the Rome Statute, and the ICC Act, function.

60. In the circumstances, I submit that the impugned decision was vitiated by the fourth respondent's material errors of law, and it falls to be reviewed and set aside in terms of section 6(2)(d) of PAJA.

The first respondent abrogated his duties and misconstrued his power under section 5 of the ICC Act

61. Under section 179 of the Constitution, it is the first respondent who is the head of the NPA, and the NPA has the power and duty to institute criminal proceedings on behalf of the State.

62. Furthermore, section 5(1) of the ICC Act stipulates that "*[n]o prosecution may be instituted against a person accused of having committed [an international crime] without the consent of the National Director [of Public Prosecutions]*". And section 5(3) of the ICC Act provides that when reaching a decision about a prosecution, the National Director must recognise South Africa's obligation under the principle of complementarity in the Rome Statute, to exercise jurisdiction over and to prosecute persons accused of having committed an ICC crime. Finally,

section 5(5) of the ICC Act obliges the first respondent to report any decision, together with the reasons for such decision, to the Registrar of the ICC.

63. In effect the ICC Act's provisions not only empower but also oblige the first respondent to initiate or veto any prosecution under the ICC Act, and section 24(7) of the National Prosecuting Authority Act 32 of 1998 provides the NPA with the power to request the police service to investigate matters in respect of which the NPA is considering the institution or conducting of a prosecution for an offence; or is of the opinion that a matter connected with or arising out of the offence requires further investigation.

64. The first respondent nevertheless contends that "*[f]or the purposes of this review…the decision not to institute an investigation was therefore not taken by myself…but by the Fourth Respondent*".

65. I submit that in reaching the decision not to respond positively to the first applicant's request the first respondent construed his authority as being contingent on and thus subservient to the initiation of an investigation by the South Africa Police Services.

66. In so doing, and by subordinating his duty to the response of the fourth respondent, the National Director misconceived his authority under section 5(3) of the ICC Act.

67. In the circumstances, he abdicated his responsibility to direct the investigation of international crimes contained in the torture docket. For these reasons I submit that the impugned decision is vitiated by a material error of law and is reviewable in terms of section 6(2)(d) of PAJA, alternatively constitutes a failure to consider relevant factors such that the impugned decision is reviewable under section 6(2)(e)(iii) of PAJA, by virtue of section 6(2)(e)(ii) of PAJA "*the action was taken … for an ulterior purpose or motive*" or was by virtue of section 6(2)(e)(vi) of PAJA taken "*arbitrarily or capriciously*; or is otherwise irrational, unconstitutional and unlawful.

Anticipated presence

68. The fourth respondent contends that it is of the "*firm view that it is not legally entitled to initiate an investigation into the allegations contained in the docket merely on the 'anticipated presence' of persons in South Africa, as suggested by the First Applicant*" (para 7, fourth respondent's answer, NFsupp2).

69. This is a matter for legal argument. I contend however that the fourth respondent is incorrect.

70. I stress that the fourth respondent's contention is apparently not shared by the second respondent – an experienced senior state advocate and head of the PCLU. In this regard I refer to a letter written by the second respondent to the Prosecutor of the International Criminal Court dated 22 April 2008 (record 242) in which the

second respondent states: "*A further possible requirement of the 'anticipated presence'* ***should not be an obstacle in the matter***" (at record 243, emphasis added).

71. It is furthermore not mentioned as a basis by the first respondent in his reasons filed under rule 53.

72. I stress that the first applicant prepared its request in the knowledge that several of the perpetrators named in the torture docket travel to South Africa on official business, in some instances for co-operative endeavours such as the South Africa/Zimbabwe Joint Permanent Commission on Defence and Security. Moreover, given Zimbabwe's economic collapse, many of those named travel to South Africa to obtain desired commodities and services, including healthcare.

73. It is thus clear that the ICC Act's requirement of "presence" can be satisfied.

74. I accordingly submit that on this basis too the impugned decision is vitiated by a material error of law and is reviewable in terms of section 6(2)(d) of PAJA, alternatively constitutes a failure to consider relevant factors or a consideration of irrelevant ones, such that the impugned decision is reviewable under section 6(2)(e)(iii) of PAJA; or is otherwise irrational, unconstitutional and unlawful.

CONCLUSION

75. For the reasons set out in my founding affidavit as supplemented by this affidavit, I respectfully submit that the impugned decision falls to be reviewed and set aside on the basis that it does not meet the principle of legality and/or amounts to unlawful and unreasonable administrative action.

76. The legal grounds of review will be addressed fully at the hearing of this matter.

_____

DEPONENT

The Deponent has acknowledged that he knows and understands the contents of this affidavit/declaration, which was signed and sworn to/declared before me at …… on this the …. day of APRIL 2010, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.

_____

COMMISSIONER OF OATHS