

JUDICIAL INTEGRITY AND INDEPENDENCE: THE SOUTH AFRICAN OMAR AL BASHIR MATTER

Angela Mudukuti¹

Introduction

In South Africa, the Constitution is the supreme law of the land and it forms an integral part of the foundational building blocks of the constitutional democracy that exists today.² In terms of the Constitution, judicial independence is protected. Section 165 states in part that:

- “(2)The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”

This provision binds all organs of State, preventing them from interfering with the independence and effectiveness of the courts. This strengthens the separation of powers which is vital for the effective protection of the rule of law. It is upon this firm foundation set by the Constitution that South African courts have operated since 1996.

Whilst it cannot be said that the South African judicial system is flawless, this paper is based on a case that it is a commendable example of judicial independence. Cited as the *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others*,³ this case and its two judgments highlight the importance of ensuring judicial independence and protecting the rule of law. This case was politically charged because it involved a head of State as well the South African government authorities. Despite the political dimension, the judges of the High Court and the Supreme Court of Appeal were able to make just and legally sound rulings.

Sudanese President Omar al Bashir is wanted by the International Criminal Court (ICC) for five counts of crimes against humanity, two counts of war crimes and three counts of genocide. He was initially charged in 2009, followed swiftly by more charges in 2010.⁴

1 International Criminal Justice Programme Lawyer, Southern Africa Litigation Centre; LL.B (University of Pretoria), LL.M (University of the Western Cape in conjunction with Humboldt University).

2 “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” Constitution of South Africa (No. 108 of 1996), section 2.

3 All available court documents are located at: <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/> (last accessed: 26 October 2016) Cited as *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17 in the Supreme Court of Appeal and *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402 in the North Gauteng High Court.

4 The first arrest warrant was issued 4 March 2009 for five counts of crimes against humanity and two counts of war crimes. The second arrest warrant was issued 12 July 2010 for three counts of genocide. *The Prosecutor v President Omar al Bashir* ICC-

President Bashir's alleged crimes took place in the context of a state led suppression of an insurgency carried out by the Justice and Equality Movement (JEM) and the Sudanese Liberation Army (SLA) in Darfur Sudan in 2003. The groups revolted in protest of their treatment under Bashir's rule. The rebels and the communities they represent felt marginalised and discriminated against by the Khartoum government and decided to take action igniting a conflict that continues today.⁵ The United Nations estimates that at least 300,000 people have died and an additional 4.7 million have been severely affected by the conflict through internal displacement and other grave human rights violations.⁶

Seeking to bring justice to the victims, the ICC indicted suspected perpetrators from both sides of the conflict.⁷

As the ICC has no police force, it relies on signatory States to assist with its mandate by fully cooperating with the ICC. Article 86 of the Rome Statute⁸ obliges all State Parties to "co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". In addition, article 87(1) entitles the Court to request co-operation from State Parties. The Court may request state parties to arrest and surrender a suspect or, in urgent cases, to arrest the suspect provisionally pending further proceedings.⁹ South Africa signed, ratified,¹⁰ and domesticated the Rome Statute.¹¹

South Africa had both a domestic and international law duty to arrest President Bashir when he arrived in South Africa for the 25th African Union Summit in June 2015. Previously South Africa had acted in accordance with this duty; for example in 2009, a chief magistrate domesticated the ICC arrest warrant making it a South African arrest warrant. Also in 2009, President Bashir was invited to attend President Zuma's inauguration but was informed publically that he would be arrested should he set foot on South African soil.¹²

In January 2015 it became public knowledge that South Africa would host the 25th African Union Summit. Aware of the potential of President Bashir's visit, the Southern Africa Litigation Centre (SALC) wrote to six branches of the South African government in May 2015, a month before the Summit. The purpose of the letter was to remind them of their obligations in terms of the Rome Statute and the Implementation Act.¹³ SALC received one response from the government's Chief

02/05-01/09, available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/pages/icc02050109.aspx (last accessed: 26 October 2016).

- 5 "Q and A: Sudan's Darfur Conflict" BBC (23 February 2010) available at <http://news.bbc.co.uk/2/hi/africa/3496731.stm> (last accessed 28 October 2016).
- 6 UNICEF "Darfur - overview" (2008) available at: http://www.unicef.org/infobycountry/sudan_darfuroverview.html (last accessed: 28 October 2016).
- 7 ICC "Situation in Darfur, Sudan" (2005) ICC-02/05 available at <https://www.icc-cpi.int/darfur?ln=en> (last accessed: 28 October 2016).
- 8 A/CONE.183/9 of 17 July 1998.
- 9 *Id* articles 58(5), 89(1) and 92.
- 10 South Africa signed the Rome Statute on 17 July 1998 and deposited its instrument of ratification of the Rome Statute on 27 November 2000. ICC Assembly of State Parties (ASP) website, available at https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/south%20africa.aspx (last accessed: 28 October 2016).
- 11 Implementation of the Rome Statute of the International Criminal Court Act (27 of 2002).
- 12 "SA is obliged to arrest Al-Bashir, says Ntsaluba" SA News (31 July 2009) available at <http://www.sanews.gov.za/south-africa/sa-obliged-arrest-al-bashir-says-ntsaluba> (last accessed: 28 October 2016).
- 13 K Ramjathan-Keogh "SALC Reminds SA Government: President Bashir Must be Arrested" *Southern Africa Litigation Centre*

State Law Adviser who indicated:

“I am aware that the Government is mindful of its international obligations which it takes seriously... You should not though, expect to receive a further communication on the matter, unless I am specifically instructed to engage you on the contents of your letter.”¹⁴

SALC wrote to the government again, informing them that legal action would be taken should President Bashir be found in South Africa. Despite all the correspondence, President Bashir arrived and was not arrested. SALC was forced to approach the High Court on an urgent basis seeking the implementation of the arrest warrants.

High Court Proceedings and Judgment

Upon receiving confirmation of President Bashir’s arrival, SALC approached the North Gauteng High Court on a Saturday evening seeking the implementation of the ICC arrest warrant. The matter was heard the following morning on an urgent basis.

The government of South Africa opposed the court application and requested that the matter be postponed. The matter was postponed until later that afternoon but having learnt lessons from previous experience in Kenya and Nigeria,¹⁵ SALC requested that the Court issue an interim order mandating the government of South Africa to ensure that every port of entry and exit is aware that President Bashir should not be allowed to leave the country. It stated that, “President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the respondents are directed to take all necessary steps to prevent him from doing so”.¹⁶

When the matter resumed in Court the following day, the judges ruled that President Bashir should be arrested and detained for subsequent transfer to the Hague.¹⁷ It was at that point that the State informed the Court that they believed that President Bashir had already left the country. This was despite the fact that the Court had repeatedly asked state counsel, prior to handing down

(21 May 2015) <http://www.southernafricalitigationcentre.org/2015/05/21/salc-reminds-sa-government-president-bashir-must-be-arrested/> (last accessed: 28 October 2016).

14 Letter received from the Chief State Law Advisor, Enver Daniels (21 May 2015) para. 2-3.

15 The Nigerian Coalition of the ICC (NCICC) litigated in Nigeria’s domestic courts in an attempt to arrest Sudanese president Omar Al Bashir. On 14 July 2013 Bashir arrived unannounced in Nigeria, and the NCICC promptly filed their court documents on 15 July 2013 requesting that the courts issue a domestic arrest warrant for Bashir in the case of *NCICC and Others v Federal Republic of Nigeria*. However, during the court proceedings the news that Bashir had unexpectedly left Nigeria reached the court and the proceedings were abandoned. The NCICC quickly brought a second action to the court to secure a standing provisional arrest warrant that would be executed at any time should Bashir return to Nigeria. This case was filed as *NCICC and Others v Federal Republic of Nigeria No. 2*; see SALC *International Criminal Justice Regional Advocacy Conference Report - Civil Society in Action: Pursuing Domestic Accountability for International Crimes* (2014) 16-20; The Kenyan section of the International Commission of Jurists has also been involved in efforts to arrest Bashir. In 2011 the organisation filed an application before the High Court seeking an arrest warrant for Bashir should he be found in Kenya. The Kenyan High Court issued a provisional arrest warrant. After the arrest warrant was issued, ICJ Kenya managed to ensure that should the Kenyan Attorney General and the Minister of Internal Security hear of Bashir’s travelling to Kenya, they are under a legal obligation to prepare to arrest him and surrender him to the ICC.

16 “Interim Court Order” Case No. 27740/15 (14 June 2015) para. 1, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Interim-interdict.pdf> (last accessed: 30 October 2016).

17 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others ZAGPPHC 402*, Case No. 27740/2015 (2015) para. 2, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Judgement-2.pdf> (last accessed: 30 October 2016).

judgment, if President Bashir was still in South Africa.

During legal arguments, SALC raised the importance of adhering to domestic and international law and the importance of promoting justice and accountability in Africa. SALC relied on provisions of the Rome Statute, the Implementation Act, United Nations Security Council Resolution 1593,¹⁸ customary international law and foreign and comparative law to indicate that there can be no immunity with respect to President Bashir. Relying on the South African Diplomatic Immunities and Privileges Act, the Host Agreement with the African Union, and customary international law, the State attempted to convince the Court that arresting President Bashir would have been in violation of head of State immunity.

The High Court found itself reviewing the legal obligations under domestic and international criminal law whilst under immense political pressure. Despite this, the High Court maintained its judicial integrity by promoting and protecting the rule of law. The Court ruled against the State in this very high profile matter, indicating that:

“A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.”¹⁹

The Court also reaffirmed the need for South Africa to adhere to its domestic and international law obligations:

“It must be stated at this juncture that the Implementation Act as mentioned earlier is such national legislation, and the State is bound to implement it. By way of its enactment, the legislature complied with its obligations as a state party to the Rome Statute to take measures at national level and to ensure national criminal jurisdiction over the crimes set out in the Rome Statute. This is clear from the long title of the [Implementation] Act and the preamble also gives good insight into its motivation. Note should also be taken of ss. 3 (a) and (b) which define the objects of the Act, which mainly are, in the present context, to ensure that anything that is done in terms of this Act conforms with the obligation of the Republic in terms of the Statute.”²⁰

The Court also requested that the State produce an explanatory affidavit detailing how President Bashir was allowed to leave the country despite a court order explicitly calling for such to be prevented. This call for transparency is another example of the independence of the judiciary. The Court correctly requested that the government put their explanation on record.

According to the Department of Home Affairs, “the passport of President Bashir was not part of the passports that were handed to immigration for processing of the persons that were on board the flight.”²¹ Although the entire Sudanese delegation was on board the flight, the State proposed

18 UNSC Resolution 1593 referred the situation in Darfur to the ICC and called for cooperation from Member States.

19 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* ZAGPPHC 402, Case No. 27740/2015 (2015) para. 37.2.

20 *Id* para. 25.

21 “Respondents’ Explanatory Affidavit” Case No. 27740/15 (25 June 2015) para. 7, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/State-Explanatory-Affidavit-including-Lubisi->

that President Bashir was not. At best, this is a tenuous explanation for a direct breach of a court order. The High Court agreed and invited the National Prosecuting Authority to consider whether “criminal proceedings are appropriate”.²²

Nonetheless, the State proceeded to seek leave to appeal to the Supreme Court of Appeal (SCA) from the High Court. Citing that there were no prospects of success on appeal,²³ the High Court denied leave to appeal. The state directly petitioned the SCA and the appeal was heard on 12 February 2016.

Supreme Court of Appeal Proceedings and Judgment

The arguments presented before the Supreme Court of Appeal were similar to those raised before the High Court. The State continued to insist that President Bashir was protected by head of State immunity whilst SALC indicated that in accordance with the Implementation Act, South Africa had a duty to arrest President Bashir and that any immunities that could possibly apply had been trumped.

The SCA also ruled against the State indicating that, the State:

“in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa’s obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.”²⁴

The SCA addressed the State’s conduct throughout the High Court proceedings and began by addressing the explanatory affidavit:

“The affidavit failed to explain how a head of state, using a military air base reserved for the use of dignitaries, could possibly have left the country unobserved. The Director-General said that President Al Bashir’s passport was not among those shown to officials of his department, but as an explanation that is simply risible.”²⁵

Wallis JA proceeded to raise the possibility that:

“Senior officials representing Government must have been aware of President Al Bashir’s movements and his departure, the possibility of which had been mooted in the press. In those circumstances the assurances that he was still in the country given to the Court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the Court or misled

supplementary.pdf (last accessed: 30 October 2016).

22 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* ZAGPPHC 402, Case No. 27740/2015 (2015) para. 39.

23 “Leave to Appeal Judgment” Case No. 27740/15 (15 September 2015) para. 9, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Bashir-leave-to-appeal-judgment.pdf> (last accessed: 30 October 2016).

24 *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17 at “Order” available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/03/Bashir-SCA-judgment.pdf> (last accessed: 30 October 2016).

25 *Id* para.7.

counsel in giving instructions, or the representatives and counsel misled the Court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct.”²⁶

The SCA judges did not mince their words, calling the State’s conduct “disgraceful”. South Africa’s constitutional democracy requires its office bearers to protect and uphold the rule of law. When such office bearers fail to act in compliance with their constitutionally enshrined duties, it falls to other stakeholders to ensure accountability. In this instance, South Africa’s independent judiciary acted without fear or favour and held the government accountable in terms of the law.

Conclusion

Goal 16 of the Sustainable Development Goals recognises that “[p]eace, stability, human rights and effective governance based on the rule of law are important conduits for sustainable development”.²⁷ Independent judiciaries are key to the development and protection of the rule of law. Judicial officers are the gatekeepers who should also conduct themselves ethically, and act independently.²⁸ This case not only sets the correct precedent, but it also gives victims of egregious crimes hope that justice can be done.

26 *Id.*

27 United Nations General Assembly *Transforming Our World: The 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1.

28 As “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.” Secretary General KA Annan, S/2004/616 (23 August 2004).