

ZIMBABWE TORTURE CASE



National Commissioner of the South African Police Service v Southern Africa Litigation Centre and Zimbabwe Exiles Forum

Q and A

What is this case about?

The case concerns South Africa's duty and obligation in terms of domestic law (The Implementation of the Rome Statute Act, the Constitution of the Republic of South Africa, and the South African Police Services Act) and international criminal law (Rome Statute of the International Criminal Court and customary international law) to investigate crimes against humanity.

The Rome Statute came about as a pledge by the international community to fight crimes against humanity. South Africa ratified the Rome Statute in 2000 and domesticated the Statute through the Implementation of the Rome Statute Act (ICC Act). The ICC Act gives the South African authorities power to investigate and prosecute crimes of persons who were present in South Africa after committing those crimes (even if they weren't SA nationals and the crimes had been committed outside SA).

What are the events that led to the case?

The events leading to this case relate to the 2007 Zimbabwe elections where the state police raided the opposition party's (MDC) headquarters, and detained and tortured suspected and actual MDC members and activists. As a result of South Africa's obligations under the Rome Statute, the Southern Africa Litigation Centre (SALC) and the Zimbabwe Exiles Forum (ZEF) delivered a dossier to the National Prosecuting Authority (NPA) and the South African Police Service (SAPS) containing comprehensive evidence of the involvement of a

number of Zimbabwean officials in the perpetration of widespread and systematic torture, constituting a crime against humanity. SALC maintained that the Zimbabwean officials named as perpetrators in the dossier travelled to South Africa on a regular basis and so could be subject to the ICC Act. SALC requested the NPA and SAPS to initiate an investigation in terms of their legal obligations as stipulated by the ICC Act. SAPS stated that they are of the opinion that their duties do not apply extraterritorially and refused to initiate an investigation, SALC and the ZEF took this refusal on review to the North Gauteng High Court.

Who are the suspected perpetrators and victims?

The names of the perpetrators and victims have been removed from the documents for their security and to protect the investigation process from being hampered.

The victims of the torture were members (or perceived to be members) of the opposition political party in Zimbabwe, the MDC, and the perpetrators were officials of the ZANU-PF government – is this case politically motivated and are SALC and ZEF aligned to a particular party?

The case involves incidents of state-sponsored violence, and crimes of this nature inevitably have a political component as they are generally committed against political opponents by organs of state in an attempt to suppress opposition.

However, SALC and ZEF are not aligned to any political party and their support for the victims of this state-sponsored torture is not based on political allegiances, but rather on a desire to see South Africa's international legal obligations upheld. The political alignment of either the perpetrators or victims is unrelated to SALC and ZEF's decision to support the victims. SALC and ZEF's intention in bringing the evidence to the attention of the NPA was solely to ensure justice for victims of human rights violations.

SALC is not a Zimbabwean organisation. What are its interests in the case?

SALC is a non-governmental organisation that is committed to promoting human rights and the rule of law in southern Africa. It is involved in research and litigation of matters relating to human rights in the whole of southern Africa and not limited to South Africa. The events leading to this case were a gross violation of human rights as they were aimed at suppressing freedom of association and the dignity of persons.

Why is this case so important?

If the Court upholds SALC and ZEF's arguments the Court would underline the importance of South Africa's international obligations vis-à-vis the International Criminal Court (ICC), the high principles at stake and the care and importance South Africa must accord charges of crimes against humanity, war crimes, genocide. It will be the first time the South African Constitutional Court is asked to make a determination regarding South Africa's ICC Act and globally would serve to affirm the ongoing importance of universal jurisdiction laws. It will also point to the fact that international criminal justice is not only secured in the international realm but, perhaps more importantly, within domestic jurisdictions.

Who were the parties to this case in the High Court?

The applicants were SALC and ZEF, whilst SAPS and the NPA were the respondents.

What happened in the High Court proceedings?

The High Court set aside the decision of the NPA and SAPS not to initiate an investigation into state-sanctioned torture in Zimbabwe. The High Court held that the South African authorities had not acted in accordance with their obligations under the

domestic legislation and ruled that the decision had been taken unlawfully and unconstitutionally.

What happened in the Supreme Court of Appeal (SCA)?

After the High Court judgment the SAPS and NPA took the matter on appeal to the SCA. The SCA ruled that the SAPS are both empowered and obliged to investigate the crimes against humanity detailed in the dossier. SAPS alone have appealed the judgment with the NPA falling out of the matter.



Zimbabweans show support outside High Court

After the SCA case Zimbabwe's Minister of Justice Patrick Chinamasa is reported to have dismissed the ruling saying that South Africa had no right to investigate crimes committed in Zimbabwe - is he correct?

Mr Chinamasa may have misunderstood the case. This case relates to South Africa's duty in terms of its own domestic law, supplemented by international criminal law obligations. The crimes in question took place in Zimbabwe, but SALC and ZEF are not suggesting that SAPS investigate on

Zimbabwean soil. SALC and ZEF submit that sufficient investigation can be conducted solely within the confines of South Africa.

What happens now?

The matter will be heard by the Constitutional Court on 19 May 2014, at 10 am.

Who is representing SALC and ZEF?

SALC and ZEF are represented by international and constitutional law experts Wim Trengrove (SC), Gilbert Marcus (SC) and Max du Plessis. Lawyers for Human Rights are the attorneys in the matter.

What outcomes are SALC and ZEF hoping for?

Relief relating to the NPA's/SAPS' decision not to investigate

In the initial application to the High Court, the relief that SALC and ZEF sought was to have the decision of the NPA and SAPS not to investigate the crimes set aside and an order compelling them to do so. That relief was granted by the High Court. The SCA, with its own order required SAPS to investigate and deemed them empowered to do so. SALC and ZEF hope for a similar outcome at the Constitutional Court.

Interpreting South Africa's obligations to investigate and prosecute international crimes

In a nutshell SALC and ZEF hope that the Court will provide practical content to South Africa's international and domestic obligations to prosecute serious international crimes not only committed in Zimbabwe but in any country in which these crimes occur.

Deterrent against future acts of state sponsored torture

A positive decision may not only be the first step in securing justice for the victims of the raid on the MDC headquarters, it may also serve to deter future perpetrators from engaging in acts of torture. This decision will send out a clear message that perpetrators of international crimes will not be accommodated in South Africa.

Through this case, SALC and ZEF seek to send a message that South Africa is not a safe haven for perpetrators of international crimes and to strengthen South Africa's position in the fight against international crimes. The case will open the

door by providing recourse for the victims of international crimes where there is decay of the rule of law in their home countries.

The case has been going on for a long time, is this the final stage of court proceedings?

The Constitutional Court is the highest court in South Africa and therefore the final stage of court proceedings.

Why has it taken so long to have this matter concluded?

It took a long time for the NPA and SAPS to respond to the dossier that had been submitted by SALC and ZEF - to be precise it was about eight months before the NPA communicated its decision, and a further five months before SAPS relayed its decision. The litigation has also been slow due to the technicalities involved in litigation.

Does this case have implications for the current state of affairs in Zimbabwe?

The case does not have direct implications for the current state of affairs in Zimbabwe, however, should the perpetrators of state sponsored acts of violence be investigated it will send a message to would-be perpetrators that they will not be immune to prosecution outside Zimbabwe.