

SUMMARY OF JUDGMENT

National Commissioner of the South African Police Service and Another v Southern Africa Litigation Centre and Another

Supreme Court of Appeal, Bloemfontein South Africa, 27 November 2013

Judge Navsa, writing for a unanimous Court, penned the judgment in this, the first case brought before South African courts to determine the competence of South Africa authorities to investigate crimes against humanity.

This case came before the Supreme Court of Appeal (SCA) after the South African Police Service (SAPS) and the National Prosecuting Authority (NPA) petitioned the SCA following the refusal by the North Gauteng High Court to grant leave to appeal. The Judges sitting in chambers referred the petition to oral argument on the basis of a peremption argument that SALC and ZEF had made in their written submissions. However, as SALC and ZEF abandoned this argument the SCA immediately granted leave to appeal.

Judge Navsa characterised the central issue of this case as being “the investigative powers and obligations of the NPA and the South African Police Service in relation to alleged crimes against humanity perpetrated by Zimbabweans in Zimbabwe.” What is significant about this question is that the relevant crimes have no direct connection to South Africa – and so traditional jurisdictional links for investigation and prosecution are absent. The Court was required to interpret The Implementation of the Rome Statute of the International Criminal Court Act (the ICC Act) – South Africa’s legislation domesticating the Rome Statute.

The judgment set out a concise and thorough background to the case. Following a raid on the Movement of Democratic Change (MDC) headquarters SALC prepared a memorandum, which was presented to the NPA unit responsible for international crimes, detailing allegations of torture against MDC members on a widespread and systematic basis. The memorandum explained how this form of torture constitutes a crime against humanity, and set out the international and domestic law relating to South Africa’s obligations to investigate and prosecute crimes against humanity. Judge Navsa identified the graphic nature of the torture described in the memorandum including waterboarding, physical assaults with baseball bats, and electrical shocks.

As in the hearing itself, the judgment deals with the NPA position rather cursorily. The National Director of Public Prosecutions was the second applicant in the appeal – and had been joined by the Head of the Priority Crimes Litigation Unit (PCLU), the NPA unit responsible for international crimes, in the High Court. The NPA position before the SCA was that it simply was “not the correct first port of call when a complaint of the kind in question is to be made and that the SAPS is the responsible authority in that regard.”

Since the initiation of this litigation the structures of the NPA and SAPS have changed as the NPA unit, the Directorate of Special Operations (commonly known as the Scorpions), has been disbanded and replaced by a similar unit (the Hawks) located within the SAPS. Judge Navsa explained that these changes mean that the Hawks are now the most appropriate unit to direct a complaint relating to crimes against humanity to, and have, rightly, resulted in the Head of the PCLU falling out of the picture as a litigant in this matter. In the SCA, counsel for the NDPP had accepted that the legislative structure meant that “the assistance of a special division within the NPA could be sought by the police in the event of an investigation being launched by the latter.”

The judgment focused more heavily on the arguments put forward by SAPS. The position of the SAPS in both courts was that it was not legally permitted to investigate the crimes alleged in SALC’s memorandum. This was based on the fact that the SAPS believed it was territorially limited to conducting investigations within South Africa, and that section 205 of the Constitution (which confers the obligation on the police to investigate crime) is not extra-territorial. The NPA also maintained that neither the ICC Act nor international law enjoined the SAPS to investigate extra-territorially. Judge Navsa also highlighted difficulties that various members of SAPS had raised with the NDPP including the inadequacy of the evidence contained in the SALC memorandum, and the fact that the suspects seldom, if ever, visited South Africa.

Having established the background of the case, and the arguments of the two applicants, Judge Navsa undertook a thorough analysis of the applicable law. The Judge was careful to ensure that the issues in the case were contextualised “within the broader parameters and principles of Public International Law.” He explained the three different types of jurisdiction: prescription, which is the jurisdiction to proscribe conduct; enforcement, which is the jurisdiction to “enforce those prescriptions, including through investigations and prosecutions”; and adjudicative, the jurisdiction to “determine the outcome of a matter pursued through the exercise of enforcement jurisdiction by way of, *inter alia*, adjudicating what has been proscribed.” International law requires that the enforcement and adjudicative jurisdiction of any country be “severely restricted to its own territory”, but enables prescriptive jurisdiction to more flexible - including being exercised extra-territorially.

The extension of prescriptive jurisdiction is partly as the result of an increased awareness after the Second World War of the need to end impunity for “[c]rimes that struck at the whole of humankind and impinged on the international conscience”. There was a new sense that states should be empowered to proscribe these crimes as their commission affects the international community as a whole. The court succinctly captured this by saying that “this basis for jurisdiction is not tied to the state’s territory or some other traditional connecting factor, but is rather grounded in the universal nature of the offence committed.” It was this trend towards universal interest in the commission of certain crimes that led to the establishment of the International Criminal Court.

South Africa complied with its obligations as a signatory to the Rome Statute of the International Criminal Court by enacting the ICC Act. The judgment highlighted that this legislation gives effect to the Rome Statute’s principle of complementarity which holds that the primary responsibility for the prosecution of international crimes rests on individual states, and not the ICC. It is only when a state is unwilling or unable to prosecute that the ICC would step in.

The crux of the case, as mentioned by Judge Navsa, is the interpretation of the provisions of the ICC Act – specifically section 4. Before providing the Court’s interpretation of the provisions he set out the SAPS interpretation, which he described as difficult to follow. SAPS argued that “the ICC Act has no extra-territorial application and that conduct committed in another country is not a crime in South Africa,” but also that “an insufficient basis has been laid for a proper investigation and that further investigation would be impractical if not impossible.” Counsel for SAPS argued that sections 4(1), (2) and (3) precluded the police from initiating an investigation.

Section 4(1) gives effect to the prescriptive jurisdiction of South Africa and criminalises the commission of international crimes irrespective of where they were committed. It is clear from this that the South African legislature has followed the international trend of extending the scope of prescriptive jurisdiction extraterritorially. Section 4(3) deals with adjudicative jurisdiction and requires the presence in South Africa of any suspect for the prosecution of any international crime.

SAPS argued that all elements of section 4 are restricted by the territorial conditions in section 4(3). This meant that the conduct was only deemed to be a crime under section 4(1) when a suspect was present in South Africa, and that investigations could not commence without the suspect’s presence. Judge Navsa characterised the SAPS interpretation of the provisions as “patently fallacious”. He said that in light of the development of prescriptive jurisdiction and the principle of *nullum crimen, nulla poena sine praevia lege poenali* which requires that conduct can only be punished if it was a crime at the time of its commission, section 4(1) must be read as a provision that “criminalises such conduct at the time of its commission, regardless of where and by whom it was committed.”

In determining the investigative competence of SAPS the Court examined various provisions of the Constitution and domestic legislation. Section 205(3) of the Constitution provides that “[t]he objects of the police service are to prevent, combat and investigate crime”; section 13(1) of the SAPS Act enables police officials to “exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official”; and section 16 of the SAPS Act classifies international crimes as “national priority offences” which are to be investigated by the Hawks. The Court concluded that because these provisions confer power on the police to investigate international crimes “it is clear that the SAPS, in the form of the Hawks, has the competence to initiate an investigation into conduct criminalised in terms of the Act which had been committed extra-territorially.” Notably, the Court stated that “[w]hilst it is true that s 4(3) of the ICC Act does not expressly authorise an investigation prior to the presence of an alleged perpetrator within South African territory, it also does not prohibit such an investigation.”

Judge Navsa was clear in the judgment that the competence to investigate these crimes (committed out of the country) is limited to South African territory and so SAPS is neither empowered nor allowed to engage in investigation in Zimbabwe in this matter – unless Zimbabwe consents. He also pointed out that SALC and ZEF never requested extraterritorial investigation and offered to make witnesses available to the police in South Africa.

Having determined that SAPS has the competence to investigate international crimes committed outside South Africa, Judge Navsa moved on to determining whether an investigation is warranted in this case. He accepted the merit in the SAPS argument that any investigation is useless unless there is a likelihood of prosecution – which would require

presence in the country. As there is no international law rule relating to presence for investigations the Judge looked at the approach of various other states who are party to the Rome Statute for guidance. This led him to conclude that “there is no universal rule or practice against the initiation of investigations in the absence of alleged perpetrators”

The Judge held that “[a]dopting a strict presence requirement defeats the wide manner in which our legislation is framed, and does violence to the fight against impunity.” However, he acknowledged that there is no point in initiating an investigation if there is no possibility of the perpetrator ever being present in South Africa. He concluded that “if there is a prospect of a perpetrator’s presence, I can see no reason, particularly having regard to the executive and legislature’s earnest assumption of South Africa’s obligations in terms of the Rome Statute *and* for the reasons set out in the paragraph that follows, why an investigation should not be initiated.”

The SCA set aside the decision by the authorities to not initiate an investigation for the following reasons. First, the Judge explained that they had misconstrued the obligations assumed by South Africa, and the authorities’ powers, under the ICC Act. Second, the SAPS experts, while identifying concerns with the SALC memorandum, did themselves acknowledge that the allegations were deserving of further investigation. Third, the assistance offered by SALC in the investigation was “too readily dismissed.” Finally, both SAPS and the NPA “were fundamentally mistaken as to their competence to investigate crimes against humanity committed extra-territorially.”

In conclusion the Court held that although it is clear that an investigation is warranted it cannot dictate to SAPS how to conduct that investigation.

The SCA set aside the order of the High Court and substituted it, ordering that the decision taken by SAPS to not investigate the complaints submitted by SALC was reviewed and set aside. It declared that “SAPS are empowered to investigate the alleged offences irrespective of whether or not the alleged perpetrators are present in South Africa” and that “the SAPS are required to initiate an investigation under the [ICC Act]”. The NDPP and the National Commissioner of SAPS were ordered jointly and severally to pay the costs, including the costs of two senior counsel and one junior counsel.