IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT 02/14
SCA case no: 485/12
NGHC case no: 77150/09

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Applicant
and	
SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE	First Respondent
ZIMBABWE EXILES FORUM	Second Respondent

ANSWERING AFFIDAVIT IN OPPOSITION TO LEAVE TO APPEAL APPLICATION

I, the undersigned,

PRITI PATEL

do hereby make oath and state:

PP

1. I am an adult female and employed as the Deputy Executive Director of the Southern Africa Litigation Centre, the First Respondent in this matter. I am currently the acting Executive Director of the First Respondent.

2. The contents of this affidavit are both true and correct and fall within my personal knowledge, except where the context indicates otherwise. Where I make submissions regarding the law, I do so based on my own professional knowledge as well as the advice of my legal representatives, whose advice I believe to be both true and correct.

3. I am authorised to depose to this affidavit on behalf of the First Respondent.

4. I am further authorised by the Second Respondent to depose to this affidavit on its behalf.

5. I am deposing this affidavit in opposition to the Application for Leave to Appeal filed by the Applicant on 6 January 2014. Before dealing with the Applicant's allegations *ad seriatim*, I wish to make a number of preliminary comments regarding specific aspects of the Applicant's leave to appeal application, namely:

5.1. A brief examination of the facts of the case;

PMP

5.2. The nexus between sections 4(1) and 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("*ICC Act*");

5.3. State sovereignty and Complementarity;

5.4. Prescriptive, adjudicative and enforcement jurisdiction under the ICC Act;

5.5. Improbability of presence and Impossibility of Prosecution;

INTRODUCTION: THE AMBIT OF THIS APPEAL

6. This matter arose from a docket of evidence which was delivered to the South African Police Service ("*SAPS*") and the National Prosecuting Authority ("*NPA*") by the First Respondent in March 2008.

7. The docket contained witness statements and affidavits by medical and other witnesses regarding assaults and injuries committed by agents of the Zimbabwe Police Force against members of the opposition party, the Movement for Democratic Change ("*MDC*"). These assaults took place after victims were arrested at Harvest House in Harare, Zimbabwe which is the headquarters of the MDC.

8. Importantly, the docket contained evidence that the assaults which took place were in fact systematic, widespread, politically motivated and amounted to the crime of torture committed as a crime against humanity as defined in the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("*ICC Act*"). The docket was therefore referred to the state authorities for an investigation under the ICC Act which domesticated South Africa's international obligations to investigate and prosecute crimes against humanity. So extensive was the evidence presented that the NDPP, in its heads of argument in the High Court, made the following concession:

> "***We accept*** *that the NGO reports relating to the situation in Zimbabwe in March 2007 and certain of the witness statements obtained by [SALC]* ***create a reasonable suspicion that crimes against humanity were committed in Zimbabwe during that period***."

9. Counsel for the Commissioner, in argument before the High Court, associated himself with this submission.

10. Throughout this litigation, SALC and ZEF have sought in essence to compel the South African authorities to conduct an investigation. For their part, however, the South African authorities have either misunderstood or mischaracterised the relief sought as being a prosecution. At issue, therefore, is whether or not the South African authorities were under a duty to investigate in circumstances

mp

where they accepted that there was a reasonable suspicion that crimes against humanity had been committed in Zimbabwe and in circumstances where it was common cause that certain of the named perpetrators had visited South Africa.

11. The First Respondent is a South African non-governmental organisation which focuses on issues of human rights and the rule of law in southern African countries. Considering the nature of the crimes and the fact that many of the alleged perpetrators have travelled to South Africa on a regular basis in the past, there was ample reason to believe that such individuals may travel to South Africa in the future and would therefore fall under a South African court's jurisdiction to be prosecuted under the ICC Act, assuming that a competent investigation was timeously launched in response to the docket.

12. The Second Respondent is also a South African based non-governmental organisation which represents the interests of Zimbabwean nationals living in South Africa, particularly those who have fled from persecution and state-sponsored violence in their country of origin. The Second Respondent provided support for the collection of evidence included in the docket and has a direct interest, on behalf of its members, to ensure that a full investigation is done and, where possible, that prosecution of perpetrators takes place under the ICC Act in South Africa.

RMP

13. Before the Supreme Court of Appeal ("*SCA*"), the NPA joined the SAPS in appealing the High Court's decision. We note that only the National Commissioner of the South African Police Services has elected to apply for leave to appeal against the order of the SCA.

14. A further important point of introduction must be made. It is that the SAPS has impermissibly now – for the first time before this Court – sought to impugn various factual findings made by the High Court (I detail each of those challenges in the course of this opposing affidavit). That is despite the fact that the SAPS and the NPA expressly limited their appeals before Fabricius J in the High Court to questions of law – and again, before the SCA, their challenge was only against the legal findings by the High Court. The SAPS and the NPA repeatedly stressed that their attack on appeal would be directed against the interpretation drawn and conclusions made by Fabricius J regarding sections 4(1) and 4(3) of the ICC Act. Before the High Court and the SCA the SAPS' "*central complaint*" (as they styled it) was that the Court got the question of jurisdiction wrong by finding that an investigation may be initiated before the accused are present in South Africa.

15. In their leave to appeal application in this Court the SAPS would thus seek to expand their appeal to evidential findings, requiring this Court to deal with those grounds of appeal without the benefit of the SCA's findings in that regard, and despite the conscious election by the SAPS legal team (the same legal team throughout this litigation) before the High Court and the SCA not to challenge any

PMP

of the factual findings made by Fabricius J. Such an approach, so am I advised, is a further factor that militates against leave to appeal being granted, quite aside from there being no reasonable prospect of success in relation to the various grounds of appeal now pressed before this Court by the SAPS.

CORE QUESTION ON APPEAL

16. The core issue in the appeal to the SCA was whether the SAPS and the NPA had the power to investigate crimes against humanity allegedly committed in Zimbabwe by Zimbabwean nationals who came to South Africa from time to time. SAPS and the NPA contended that it was not competent for them to do so because they derived their power to investigate such crimes from section 4(3) of the ICC Act. They contended – and continue to contend – that their power of investigation only arises if and when suspects are physically present in South Africa.

17. It is submitted that SAPS and the NPA are mistaken in this approach. They do not derive their power to investigate crimes against humanity from section 4(3) of the ICC Act. They have the power of investigation on two grounds: the first is that section 4(1) of the ICC Act makes a crime against humanity a crime under South African domestic law. SAPS and the NPA have constitutional and statutory powers to investigate all crimes alleged to have been committed under South African law. The second is that SAPS and the NPA have a range of

statutory powers which specifically permit and require them to investigate crimes against humanity.

18. Throughout these proceedings, and as carefully observed by the High Court and the SCA, the Applicant has conflated and confused what is legally permissible in respect of the investigation and prosecution of international crimes.

19. The ICC Act is silent on investigation of international crimes. The Applicant argues that the competence to investigate international crimes is derived from section 4(3). But this approach misconceives the Respondents' argument on this issue.

20. The Respondents do not argue that SAPS and the NPA derive their power to investigate such a crime from section 4(3) of the ICC Act.

21. Section 4(1) of the ICC Act provides that anyone who commits a crime against humanity is guilty of an offence and liable on conviction to a fine or imprisonment. It criminalises a crime against humanity under South African domestic law. It is and remains a crime under South African law regardless of where or by whom it is committed. The criminalisation of such a crime under South African law is not dependent on the jurisdiction of the South African courts to try the offender in terms of section 4(3).

PMP

22. SAPS have the power to investigate such a crime under the following provisions:

22.1. In terms of section 205(3) of the Constitution, the objects of SAPS are *inter alia* to "*investigate crime ... and to uphold and enforce the law*". It vests SAPS with the power to investigate all crimes under South African law, including those proscribed under the ICC Act.

22.2. Section 11(1) of the South African Police Services Act 65 of 1998 ("*SAPS Act*") provides that the National Commissioner of SAPS "*may exercise the powers and shall perform the duties and functions necessary to give effect to (section 205(3) of the Constitution)*".[1] SAPS are accordingly endowed with all the powers, duties and functions necessary to give effect to section 205(3) of the Constitution, that is, to investigate all crimes allegedly committed under South African law.

22.3. Further, section 13(1) of the SAPS Act states: "*Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.*"

[1] Section 11(1) refers to s 218(1) of the Interim Constitution but, in terms of s 12(1) of the Interpretation Act 33 of 1957, it must now be read as a reference to s 205(3) of the Constitution.

22.4. Section 17A read with sections 16(1), 16(2)(iA) and item 4 of Schedule 1 of the SAPS Act classifies all offences under the ICC Act as "*national priority offences*".

22.5. Section 17C(1) of the SAPS Act establishes the Directorate for Priority Crime Investigation, that is, the Hawks. Section 17D(1) provides that the functions of the Hawks are to prevent, combat "*and investigate*" national priority offences.

22.6. Section 17D(3) of the SAPS Act provides that, if the head of the Hawks has reason to suspect that a national priority offence has been committed, he or she may request the National Director of Public Prosecutions to designate a Director of Public Prosecutions "*to exercise the powers of section 28*" of the National Prosecuting Authority Act 32 of 1998 ("*the NPA Act*"), that is, to investigate the offence by interrogating witnesses in terms of section 28 of the NPA Act.

22.7. In terms of section 17F of the SAPS Act, all government departments and institutions must, when required to do so, take reasonable steps to assist the Hawks in the achievement of these objectives. Section 17F(4) specifically requires the National Director of Public Prosecutions to ensure that a dedicated component of prosecutors is available to assist and co-operate with the Hawks in conducting its investigations of priority crimes. To that end

AM

Parliament has created a Priority Crimes Litigation Unit ("*PCLU*") dedicated to the combatting, investigation and prosecution of, *inter alia*, the crimes in the ICC Act.

22.8. The PCLU of the NPA has the following powers and duties:

22.8.1. In terms of s 13(1)(c) of the NPA Act, the President may appoint a Special Director of Public Prosecutions to exercise the powers and carry out and perform the duties and functions conferred on him or her by the President.

22.8.2. The President appointed Advocate Ackerman SC as a Special Director of Public Prosecutions by proclamation in the Government Gazette on 24 March 2003. He appointed him as head of the Priority Crimes Litigation Unit of the NPA "*to manage and direct the investigation and prosecution of crimes contemplated in*" the ICC Act.

22.8.3. In terms of s 24(7) of the NPA Act, the head of the PCLU may request the Provincial Commissioner of SAPS for assistance in the investigation of any matter. The Provincial Commissioner is obliged to comply with the request "*so far as practicable*".

PMP

23. SAPS and the PCLU thus have the power to investigate an alleged crime against humanity wherever it might have occurred and whether the suspect is present within South Africa or not. This appeal does not turn on whether they may exercise their powers of investigation outside South Africa. We accept for present purposes that they may only exercise their powers within South Africa. But they may undertake an investigation within South Africa of any crime against humanity regardless of where and by whom it is alleged to have been committed.

24. The matter is thus in fact far less complex than the Applicant persists in believing it to be. In terms of section 4 of the ICC Act:

24.1. Section 4(1) creates the offence of genocide, crimes against humanity and war crimes under South African domestic law;

24.2. Section 4(2) (which is not at issue in this matter) excludes certain defences for the purposes of a conviction and facts from mitigation of sentence; and

24.3. Section 4(3) acts as a deeming provision in order to ground the jurisdiction of a South African court to proceed with a prosecution.

pmf

25. Once the offence was created under our domestic law, the ordinary provisions relating to the authority and, it was argued, obligation to investigate alleged crimes are activated.

26. There is no provision within the ICC Act which limits the constitutional mandate or legislative powers of the SAPS to investigate offences, even if those offences are international in nature. By their incorporation into our domestic law, Parliament enunciated its preference that such crimes, as far as possible, be investigated since by their nature, they are so egregious that all nations – including South Africa – have an interest in their perpetrators being brought to justice.

27. It is submitted that the interpretation proffered by the Applicant is not consistent with international law; fails to give effect to the purpose and objects of the ICC Act, the Rome Statute and South Africa's international law obligations; ignores accepted understandings of international criminal law principles, and is not practicable.

28. For this reason, and based on the reasoning of both the High Court and the SCA, this ground of appeal should be dismissed as it has no prospect of success on appeal.

29. The Applicant has raised a number of other grounds of appeal which will be dealt with below, but, we respectfully submit, they also fail to be dismissed by the Court.

pmf

STATE SOVEREIGNTY AND COMPLEMENTARITY

30. The Applicant has submitted that because Zimbabwe is not a state-party to the Rome Statute of the International Criminal Court ("*the Rome Statute*"), the international agreement which created the ICC, it has therefore not elected to limit its own sovereignty and therefore other state parties to the Rome Statute may not exercise jurisdiction over crimes committed within that state.

31. This understanding of the role of state sovereignty and the principle of complementarity is deeply flawed for two reasons.

32. Firstly, as stated above, Chapter 2 of South Africa's ICC Act domesticated the offences of genocide, crimes against humanity and war crimes. It expressly does not limit the jurisdiction of those crimes over perpetrators from state parties to the Rome Statute. Section 4(1) is clear: "*Any person who commits a crime, is guilty of an offence...*". Section 4(3) is equally clear where it prescribes jurisdiction over "*any person who commits a crime contemplated in subsection (1) outside of the territory of the Republic...*". Neither of these provisions limits the exercise of South Africa's jurisdiction to crimes or perpetrators coming from state parties only.

33. Secondly, the Applicant has used the principle of "*Complementarity*" to limit the jurisdiction of South African officials over ICC Act crimes. This is a flawed understanding of the complementarity principle under both the Rome Statute and the ICC Act.

pmf

33.1. In terms of the Rome Statute, the complementarity principle ensures that the International Criminal Court ("*ICC*") will only exercise its jurisdiction where a state party has not undertaken its own investigation or prosecution or where the state in question is unable or unwilling to undertake a genuine investigation or prosecution.[2]

33.2. The complementarity principle is intended to ensure respect for the sovereignty of state legal systems by placing a limitation on the ICC – as an international criminal court – from exercising its jurisdiction over the offender until it is clear that a state is unwilling or unable to take action. The principle does not stand in the way of a state of its own accord deciding to assert universal jurisdiction over torturers, war criminals and genocidaires. If the Applicant's argument were to be accepted that would create impunity by preventing the exercise of state jurisdiction over international crimes such as torture – an exercise of jurisdiction which the International Court of Justice has confirmed is permissible under international law (see further below).[3]

34. I submit that the Applicant's view of complementarity is misconceived. The principle is not intended to shield domestic courts behind the limited jurisdiction of an international court, but rather to use international institutions only when domestic

[2] Article 17 of the Rome Statute of the International Criminal Court
[3] Paragraph 34.

pmp

courts fail to exercise their jurisdiction. In any event, such an argument is premised on a misunderstanding of section 4(3) of the ICC Act and does not affect the authority and duty of enforcement agencies in South Africa to investigate allegations of crime and this ground also stands to fall and be dismissed by the Court.

PRESCRIPTIVE, ADJUDICATIVE AND ENFORCEMENT JURISDICTION

35. Related to the issue of state sovereignty are issues regarding prescriptive, adjudicative and enforcement jurisdiction. The Applicant has stated that South Africa does not have jurisdiction to investigate offences which took place outside of its borders.

36. But that contention is belied by numerous pieces of criminal legislation already adopted by South Africa's Parliament – of which the Applicant must surely be aware.

37. Indeed, the extraterritorial application of South African criminal legislation is not unique to the ICC Act. A number of South African laws criminalise conduct committed beyond South Africa's borders, which also have the status of "priority offences". These include but are not limited to the following:

37.1. Any offence referred to in paragraph (a) of the definition of "*specified offence*" of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. Section 15(2) thereof provides that "*any act alleged*

pmp

to constitute an offence under this Act and which is committed outside the Republic by a person other than a person contemplated in subsection (1), shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic" if that "*person is found to be in the Republic*". The first prosecution in terms of this Act was against a Nigerian national accused of terrorist activities committed in Nigeria. Issues of investigative power were not raised in this case despite the offences in question being committed in Nigeria.[4]

37.2. Section 9 of the Regulation of Foreign Military Assistance Act 15 of 1998 provides that any court in South Africa may try a person for an offence in terms of this Act, which includes the unauthorized provision of foreign military assistance, regardless of whether the act or omission to which the charge relates was committed outside the Republic.

37.3. Section 35 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 Act, explicitly provides for extraterritorial jurisdiction, and certain offences, even if committed, outside of South Africa, may be tried in a South African court if the person concerned is "*found in South Africa*".

37.4. The Prevention of Organised Crime Act 121 of 1998 defines unlawful activity as "*any conduct which constitutes a crime or which contravenes any law*

[4]See *S v Okah* (SS94/11) [2013] ZAGPJHC 75 (26 March 2013) available at http://www.saflii.org/za/cases/ZAGPJHC/2013/75.html at paras 5 - 3.

whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere."

37.5. Section 7 of the Implementation of the Geneva Conventions Act 8 of 2012 provides that "*any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic.*"

38. The Applicant would have it that not one of these offences could be investigated merely on the basis that the offence was committed abroad. The Applicant's argument is premised on a materially flawed understanding of jurisdiction. Both the High Court and the SCA dealt, correctly in our respectful view, with these issues in the particular context of the ICC Act.

39. Put simply,

39.1. South Africa has *prescriptive jurisdiction* which allows it to create the offences provided for in section 4(1) of the ICC Act;

39.2. South Africa also has *adjudicative jurisdiction* to ensure that a Court may preside over the prosecution of these crimes where the grounding requirements of section 4(3) of the ICC Act have been satisfied;

pmpt

39.3. And South Africa also has a wide range of mechanisms to exercise *enforcement jurisdiction*, which includes the duty of the police, with other state departments such as the NPA, to investigate crimes under the ICC Act.

40. In respect of enforcement jurisdiction, which includes the initiation of an investigation, there is only one limitation under international law, reflected in the judgment of the International Court of Justice (ICJ) in *Democratic Republic of the Congo v Belgium (Arrest Warrant Case):*

> *"The only prohibitive rule (repeated by the Permanent Court in the "Lotus" case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. The Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law. In criminal law, in particular, it is said that evidence-gathering requires territorial presence. But this point goes to any extraterritoriality, including those that are well established and not just to universal jurisdiction. Some jurisdictions provide for trial in absentia; others do not. If it is said that a person must be within the jurisdiction at the time of the trial*

PMP

itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law."[5]

41. The position therefore, and endorsed by this Court in *Kaunda,*[6] is that provided that the exercise of enforcement jurisdiction does not occur in a foreign state without that state's permission, jurisdiction may lawfully be exercised. Per force this means that relevant non-judicial aspects of *enforcement* jurisdiction in South Africa for the purposes of this case, such as the initiation of investigations, do not require the accused to be physically present in South Africa for enforcement steps to be taken.

42. The Respondents have not suggested at any stage of these proceedings that the state must conduct clandestine investigations beyond South Africa's borders. What has been offered is assistance to bring evidence to investigators, such as witnesses, whose statements may be used in the investigation of a crime.

43. The reliance on section 4(3) of the ICC Act to limit the authority to investigate is thus clearly misplaced. In addition, the affidavit by Brigadier Marion has demonstrated – and the SCA has found – that investigations are possible, even if territorially bound.[7]

IMPROBABILITY OF PRESENCE AND IMPOSSIBLITY OF PROSECUTION

[5] ICJ, *Democratic Republic of the Congo v Belgium*, 11 April 2001, Joint Separate Opinion, paras 54-56 available at http://www.icj-cij.org/docket/files/121/8136.pdf.

[6] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) (Kaunda), para. 39: "*It is not necessary to enter this controversy. What seems to be clear is that when the application of a national law would infringe the sovereignty of another state, that would ordinarily be inconsistent with and not sanctioned by international law.*"

[7] SCA Record, Vol. 4, p. 591 – 638.

44. The Applicant has unfortunately sought to suggest that the First Respondent made the identities of the perpetrators public knowledge thereby rendering the presence of a perpetrator in South Africa improbable and negating the need for any investigation, even based on that offender's anticipated presence.

45. The Respondents have consistently denied these allegations.[8] The Harvest House Incident was a notorious incident which attracted international attention. Neither I nor any of the employees of the Respondents or their representatives disclosed the names or identities of the victims or alleged perpetrators. It should be noted that neither the High Court nor the SCA made any finding of fact regarding the disclosure of specific information, although the SCA was critical of the media attention.[9]

46. With respect, however, it was the notoriety of the event, and not an intention to ruin any future investigation or prosecution of perpetrators, which attracted the media attention. The Applicant cannot now opportunistically hide behind that notoriety to insist that the perpetrators will never again visit South Africa.

47. That is particularly so where it is clear that by 2010 the state's own records showed that some of the perpetrators had in fact visited South Africa – despite the docket having been handed to the authorities in 2008 and it being public knowledge that the South African authorities had been asked to initiate an investigation into the acts of torture committed by Zimbabwean officials involved in the raid on Harvest House.

[8] Paragraph 39 – 40, High Court Replying Affidavit, N. Fritz
[9] SCA Judgment, paragraph 10.

The strong economic and cultural links between South Africa and Zimbabwe must furthermore be considered when determining whether perpetrators of the crimes may visit South Africa from time to time (referring to the SCA's "effective connecting factor")[10]. If anything, it has been the insistence by the South African state authorities that no investigation will take place which would encourage perpetrators of international crimes to believe it safe to visit South Africa.

48. The point in any event remains, as confirmed by the SCA: from a practical and logical point of view, if no investigation can take place without the presence of the perpetrator in South Africa, the Applicant's argument will have ensured that the authorities will never be in a position to investigate and ready a docket in time to seize a court and secure a prosecution.

***AD SERIATIM* ALLEGATIONS**

49. I now intend to deal with the allegations made in the founding affidavit *ad seriatim* that call for a response. Any averment not dealt with should be taken to be denied.

Ad paragraph 1

50. I admit the contents of this paragraph. I have no knowledge regarding the authority which the deponent has to bring the application on behalf of the applicant.

Ad paragraph 2

[10] SCA Judgment, paragraph 66.

51. I deny that the facts deposed to are within the personal knowledge of the deponent or that they are in fact true and correct.

Ad paragraph 3

52. I admit the contents of this paragraph. I do not have knowledge of the availability of the applicant to depose to the affidavit in the application.

Ad paragraph 4

53. I admit the contents of this paragraph.

Ad paragraphs 5 – 6

54. While the matter is *res nova* I submit that the interpretation of the ICC Act has been clear from the beginning for the reasons already given above and confirmed by the judgments of the High Court and the SCA. Merely because a matter involves a novel question does not mean that by persistence alone the Applicant is entitled to leave to appeal in respect of its palpably erroneous views of the ICC Act and the jurisdiction to investigate crimes against humanity.[11]

---

[11] See the *dictum* of *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343C-G, referred to by Cloete J (as he then was) in *Janit v Van den Heever and Another N.N.O (No 2)* 2001 (1) SA 1062 (W), who stated:

> "*[3] The primary, if not the sole, question to be considered in this application is whether there is a reasonable prospect of success on appeal: Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343C - G.*
> *[4] The question of law which arose for decision in the main application was whether s 21 of the Insolvency Act 24 of 1936 (the Act) applies to the estate of a surviving solvent spouse where the marriage between the solvent and the insolvent spouse was terminated by death before the deceased insolvent spouse's estate was sequestrated. As the respondents' counsel stressed in argument, the question was res nova. That requires a more than usual degree of judicial*

55. I further deny that the question raised in this matter is accurately described by the Applicant, or that this matter is or has been elevated into "test litigation". The Applicant has recast the "question" in this case in a self-serving attempt to encourage the grant of leave to appeal.

56. In the first place, the Applicant is attempting to place great store in the fact that the matter happens to involve a "non-state party" to the Rome Statute. While I admit that Zimbabwe is not a state-party to the Rome Statute, I deny that this has any influence on the competence of or obligation upon the Applicant to conduct an investigation into allegations of offences committed under the ICC Act. For the reasons given earlier the Applicant's jurisdiction to open an investigation in relation to the crimes in issue in this matter are not beholden to or affected by Zimbabwe's decision whether to become a party to the Rome Statute.

57. I further deny that the "connecting factors" are not present. I presume that the connecting factors referred to are the factors included under section 4(3) of the ICC

---

humility in applying the test to which I have just referred, but is in itself no justification for granting leave to appeal nor is the fact that the issue is one of law: R v Kuzwayo 1949 (3) SA 761 (A) at 765; Attorney-General, Transvaal v Nokwe and Others 1962 (3) SA 803 (T) at 807C-D.

[5] The answer to the question raised in the main proceedings is of great importance generally, as the respondents' counsel also stressed in argument. It is, in addition, important to the parties involved in this litigation as the value of the property belonging to the applicant which has been attached is substantial. A losing party is not, however, entitled to the assurance by a higher Court that the law has been correctly interpreted and applied and that the correct conclusion has been reached simply because of the importance of the matter: Cf S v Sikosana 1980 (4) SA 559 (A) at 562E-H. It may be that if the matter is not important this would be a ground for refusing leave (the question was left open in Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 560J-561A), but the converse is not true: the importance of a matter is, per se, no justification for granting leave to appeal (Attorney-General, Transvaal v Nokwe and Others (supra) at 807 (A))."

PMP R

Act. As stated above, this provision grounds the jurisdiction of a *court* (the presence of the accused being required in order to guard against trials *in absentia*) but have no bearing on the competence or obligation of enforcement agencies, including the Applicant, to undertake an investigation, in terms of the Act, of crimes like torture.

58. I further deny that the particular question in this case could ever be as the Applicant describes it, being one involving anticipated presence of the perpetrators where "*its realisation is in fact unlikely*". That is because on the Applicant's own version, it is not unlikely that such presence will never be realised.

59. Accordingly, while I admit that the matter is of public interest, I submit that the High Court and the SCA have sufficiently dealt with the issue and correctly provided the legal clarity necessary for the SAPS to fulfil its obligations in terms of the ICC Act, the SAPS Act and the Constitution. It is in the public interest that the SAPS stop its efforts at avoiding that duty – an avoidance exercised since 2008 which has ensured that any vindication of the rights of those persons brutalised by the torture in Zimbabwe has remained illusory.

60. I therefore deny that there is a reasonable prospect that this Court will reach a different conclusion from the SCA and I respectfully submit that the application should be dismissed with costs, thereby ensuring that no further delays are occasioned in the investigation of the crimes against humanity implicated in this matter.

pmf

Ad paragraphs 7 – 9

61. I admit the contents of these paragraphs.

Ad paragraph 10 – 11

62. I admit the content of these paragraphs insofar as it accurately reflects the record, however, I deny the correctness of the decision. I also deny that the reasons recorded at paragraph 10(i) through (v) were the only reasons advanced by the SAPS to avoid its duty. A perusal of the High Court judgment makes plain that there were additional reasons advanced by the SAPS for refusing to open an investigation, which were similarly bereft of substance, and which included the adventurous suggestion that in submitting the torture docket the respondents had overlooked the Zimbabwe Human Rights Commission as the requisite forum for the complaints of torture to be dealt with (that Commission is not a criminal court).

63. I further deny that section 4(3) of the ICC Act has any operative function regarding the authority of SAPS to investigate and is strictly limited to the jurisdiction of a court to adjudicate a crime.

Ad paragraph 12

64. I deny the contents of this paragraph and the correctness of the Applicant's arguments.

Ad paragraph 13

65. I deny the contents of this paragraph and the continued conflation by the SAPS between the obligation to investigate and the obligation to prosecute. I respectfully reiterate that the obligation to investigate is founded in South Africa's domestic legislation and the Constitution and is not affected by whatever varying levels of universal jurisdiction may or may not be practised by other states or be accepted under international law.

Ad paragraph 14

66. I deny the contents of this paragraph and note again the Applicant's persistently erroneous interpretation of the principle of complementarity.

67. I further deny that the ICC Act, which reflects South Africa's obligations under the Rome Statute, limits its application to member states of the Rome Statute. I respectfully deny the efforts by the Applicant to limit the Rome Statute to the creation of a "network extending between its members states" only. Parliament has already made it clear that our domestic efforts to combat impunity for international crimes such as torture are aimed, as far as possible, at taking action under the ICC Act against "any person" who is alleged to be responsible for such crimes. In any event, this paragraph again conflates the duty to investigate under our domestic legislation and the duty to prosecute under international law as explained above.

Ad paragraph 15

68. I deny the contents of this paragraph.

69. I am uncertain from where the "three jurisdictional facts" referred to have been derived.

70. I also deny that there is any distinction made between prosecutions against a person from a member-state or non member-state of the Rome Statute accused of a crime under the ICC Act.

71. I note that the first "jurisdictional fact" would require an investigation in order to determine whether a prosecution is possible as with any other "court driven investigation" under South African law.

Ad paragraph 16 – 17

72. I deny the contents of these paragraphs and draw attention to the fact that in its efforts to manufacture a basis for leave to appeal to this Court the SAPS is now purporting to dispute factual findings through "*analysing the High Court's and the Supreme Court of Appeal's judgments*". This is as impermissible as it is unfortunate.

73. In this regard I stress that in their application for leave to appeal in the High Court both the NPA and the SAPS limited their leave to appeal grounds to questions of law did not challenge any of High Court's findings of fact, including its conclusions that:

"*From Fourth and First Respondents version, the following facts are obvious at this stage:*

the docket was examined to ascertain whether it contained sufficient information for a so-called court-directed investigation, i.e. whether it could enable a prosecutor to make a properly informed decision whether or not to prosecute;

the docket was therefore not considered with the view to conduct further investigations into the alleged deficiencies and future evidential and/or legal requirements;

First Respondent did not take the ICC Act or the Rome Statute into account, and therefore did not even apply his mind to the proper context in law;

political considerations were taken into account by institutions, which, according to law, are obligated to act independently in the context of the Constitution and the legislation governing their functions, duties and obligations;

a number of the implicated torturers had in fact visited South Africa during certain periods;

Brigadier Marion stated that a prosecutor would not have prosecuted the facts before him, but would have directed that further investigations be

conducted. The irony is obvious: this is precisely Applicants' point, the crux of their argument is that Respondents were in law obliged to conduct an investigation." (judgment, page 39, my emphasis).

74. Furthermore, neither the NPA nor the SAPS challenged the High Court's conclusion that:

> "*In the present context it was the duty of the First, Second and Fourth Respondents to investigate the docket. It contained sufficient information for purposes of such an investigation, in the context of the Rome Statute*" (judgment page 86, para 29, my emphasis).

75. I do not wish to burden the papers and hence tender to provide a copy of the applications for leave to appeal and the leave to appeal notices filed by the SAPS and the NPA in the High Court and the SCA respectively, should they be required by this Court in its determination of whether to grant leave to appeal.

76. It is not appropriate for or open to the Applicant now to attempt to challenge those factual findings. I, in any event specifically deny that the conditions for enabling a prosecution were established, particularly in light of the fact that no investigation has taken place.

pwp

76.1. I deny that Brigadier Marion's evidence stated that it was not possible to conduct a prosecution, but rather – as the High Court held – *further investigation* would be necessary if the docket (as it was at that time) was taken to a prosecutor.

76.2. I deny that Zimbabwe's status as a non state-member of the Rome Statute affects the application of the ICC Act with regard to the crimes committed beyond South Africa's borders – an argument not pressed by the SAPS before the High Court or the SCA, as indicated by a reading of those courts' judgments, but which is now raised before this Court which is expected, so it seems, to deal with it as a court of first instance.

76.3. I further deny that there is a presence requirement for an investigation or that any anticipated presence is unlikely – as the High Court held on the evidence, ***a number of the implicated torturers had in fact visited South Africa during certain periods.***

77. I also deny that a "speculative investigation" would be irresponsible. An investigation is necessary to establish the facts of the case and whether a prosecution would be necessary. What would be irresponsible is the failure to investigate an international crime despite *prima facie* evidence provided to the police.

Ad paragraph 17

78. I deny the Applicant's interpretation of the ICC Act or the Rome Statute. While the UN Security Council may authorise an investigation and prosecution, and South Africa would be obliged in terms of the Rome Statute to assist such investigation, this fact is legally irrelevant to and does not negate the obligations voluntarily assumed for South Africa by Parliament's domestic adoption of the ICC Act and the offences that have been created in terms of that Act.

Ad paragraph 18

79. I deny the contents of this paragraph.

80. I deny that there is any reasonable prospect of success considering the detailed and reasoned judgments of both the High Court and the SCA.

81. I further deny the Applicant's interpretation of our position. What is important is that the Act does not *prevent* investigations (as contended by the Applicant's reliance on section 4(3) of the ICC Act), but that the offences created under section 4(1) of the ICC Act trigger the SAPS' domestic legislative obligation to investigate evidence of such offences. The myriad of legislation that create statutory offences under South African law do not require a special provision which gives investigatory power to SAPS whereas the SAPS Act makes provision for high priority crimes to be investigated.

pmp K

Ad paragraphs 19 – 21

82. I deny the contents of these paragraphs.

83. The issue at hand is whether the state must conduct an investigation within South Africa with the evidence that has been presented to it, including the interviewing of victims of torture who are willing and able to meet with investigators.

84. For the reasons given earlier I deny that such an investigation will invariably lead to a non-prosecutable case – an assertion which is belied by the High Court's rendering of the evidence and which finding was never contested by the Applicant.

85. I further deny that the basic principles of criminal investigation and prosecutorial discretion do not apply. However, the issue is whether they have been applied correctly in this case. I submit that the refusal to investigate the evidence which has been presented to the SAPS is ample confirmation of the SAPS's incorrect application of the above principles.

86. I deny that the SCA has imposed a duty to institute an ineffectual investigation, and I reiterate that it is inappropriate now for the SAPS to suggest that "on the evidence", there was "no basis to find a reasonable prospect of any investigation leading to a prosecutable case" – when the appeal by the SAPS was limited to a question of law and no factual findings were challenged.

PMP

87. In its judgment, the SCA also found errors in the reasoning of the SAPS in their refusal to initiate an investigation. For example, a territorially bound investigation will in no way interfere with Zimbabwe's sovereignty. The basic premise behind the Rome Statute and South Africa's adoption of the ICC Act has been to avoid impunity for perpetrators of international crimes, a premise which will be undermined if the argument by SAPS were correct.

88. I deny that the order needs correcting.

Ad paragraphs 22 - 24

89. I admit the contents of these paragraphs insofar as they accurately reflect the record.

Ad paragraph 25

90. I admit that the SAPS disputed SALC's and ZEF's standing – an unbecoming objection, with respect, apparently aimed at avoiding the merits by resorting to technical evasion. The Applicant's contentions about standing were rightly dismissed by the High Court, and the argument was not pressed by the Applicant in the SCA.

91. I deny that the proper question has been asked and that the "non member-state" status of Zimbabwe affects the application of the ICC Act.

PMP

92. I note that SAPS and other investigatory organisations often seek the public's assistance with reporting and investigating crime. I submit that the nature of our organisations makes us well placed to report on the specific offences created under the ICC Act, a fact recognised by the High Court and the SCA.

Ad paragraph 26

93. I note the contents of this paragraph.

Ad paragraphs 27 – 28

94. I deny the contents of these paragraphs insofar as they appear to give the impression of an ulterior or improper purpose in the submission of the docket to the NPA and SAPS.

95. It should be noted that the docket was submitted in March 2008 and not in 2007.

96. It should further be noted that extensive correspondence was entered into between the First Respondent and the relevant state officials in order for a decision to be made on the docket. It was this delay in responding to our request which occasioned our having to wait until December 2009 before filing our application.

97. I also deny that the High Court made extensive orders not sought by SALC or ZEF. The parties were asked by Fabricius J, at the end of the hearing, to propose an order to him in the event that he was inclined to grant the application. SALC and

pmf

ZEF prepared such an order, as did the SAPS, and the High Court order reflected in paragraph 33 of the High Court's judgment (page 182, Vol 2) is based on these proposals in material part. It is difficult to understand how the Applicant could make the assertion when regard is had to what Fabricius J expressly records at paragraph 32 of his judgment (page 181, Vol 2).

Ad paragraphs 29 – 32

98. I admit the contents of these paragraphs insofar as they accurately reflect the record of fact in the High Court judgment – and again note the impermissible efforts by the Applicant now, for the first time before this Court, to challenge certain factual findings of the High Court.

99. The danger of attempting now to interrogate the High Court's evidential findings when they were not assailed below is amply demonstrated by the new assertion before this Court (in paragraph 30) that the High Court apparently accepted the evidence that "further investigations into the relevant allegations would be impractical and virtually impossible". That assertion is palpably wrong: since such further investigations were eventually ordered by the Court, on the back of two proposed orders offered by SALC and ZEF and the SAPS respectively.

100. I further deny that the apparent lack of any specific rejection by the High Court of the evidence as stated in paragraph 32 was of relevance to the ultimate finding that an investigation was necessary.

pmf

Ad paragraphs 33 – 35

101. I deny the contents of these paragraphs and the conclusions that the Applicant attempts to drawn from them.

102. In any event, it is impossible, with respect, to know what particular point the Applicant is attempting to advance in these paragraphs – other than to note that again the Applicant purports to challenge now for the first time various factual findings of the High Court. In this regard I reiterate that it is impermissible for the SAPS to assert now for the first time that in respect of the findings in paragraph 11.1 of its judgment, the High Court committed a "*material misconstruction of the evidence*" (para 33), and that the High Court incorrectly construed what it found in paragraph 11.2 (para 35).

Ad paragraph 36

103. I note the content of this paragraph and the statements said above regarding issues of standing.

Ad paragraphs 37 – 38

104. I note the contents of these paragraphs and admit the portions insofar as they accurately reflect the record. I do not understand the relevance of referring to them since the judgment and order against which an appeal lies is that of the SCA. I

PMP 4

reserve the right to deal with any conclusions drawn from the issues contained in these paragraphs in legal argument should the need arise.

Ad paragraphs 39 – 40

105. I deny the contents of these paragraphs. Yet again the Applicant attempts for the first time before this Court to suggest that the High Court erred factually in rejecting or ignoring portions of SAPS' evidence – when that was never a ground for appeal to the SCA.

106. In any event, while I do not deny that SAPS has a duty to investigate objectively, this cannot be used as a shield against interacting with members of the public and organisations which have evidence at their disposal for SAPS to evaluate.

107. I further deny that the entire result of the investigation could be determined on the basis of the docket presented to the SAPS, and particularly their expert witnesses. The docket was evaluated based on the wrong question (whether it was sufficient to proceed with a prosecution) and not on what further investigation would reveal.

108. I further deny that the High Court failed to adequately consider the Commissioner's decision and the defective evidence, materially flawed legal interpretation and defective decision-making process on which it was based. The

pmpt

judgment speaks for itself in this regard, as confirmed by the Supreme Court of Appeal.

Ad paragraphs 41 – 42

109. I note the contents of these paragraphs and refer to the Supreme Court of Appeal's decision in this regard.

110. I deny, however, that no case was made out for extraordinary relief. Considering the importance of the issue, the delay in decision-making and the technical aspects of the investigation as borne out during the hearing, the High Court's relief was a product of its just and equitable remedial powers and the proposed orders handed to it by the parties.

111. I cannot make sense of the averment that the High Court did not make an order substituting the decision-maker's decision by ordering an investigation. It is clear from a perusal of the High Court's order that the Court ordered just that: (see paragraph 5 of its order where the PCLU is ordered to "do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket", and the combined efforts of the SAPS in that investigation are made clear in paragraphs 6, 9, 10 and 11).

Ad paragraphs 43 – 44

PMP

112. I deny the contents of these paragraphs and, for the reasons stated above, agree that the Applicant (and the others cited in the High Court) had misconstrued and continues to misconstrue the interpretation of section 4(3) of the ICC Act and the duty to investigate with the jurisdiction to prosecute.

113. It has been found in both courts *a quo* that the urging of a prosecution does not render the evidence submitted to the police or prosecutors not useful. The duty is on the investigators to remain objective, but members of the public (and most victims of crime) have no obligation to remain objective when handing evidence to the police.

Ad paragraphs 45 – 47

114. I admit the contents of these paragraphs with regard to the peremption principle and the principle in *Patel v Witbank* – but do not understand the relevance of this detail for purposes of leave to appeal to this Court.

Ad paragraph 48

115. I deny the contents of this paragraph and rely on the arguments elsewhere in this affidavit and the record in support thereof.

Ad paragraphs 49 – 51

116. I admit the contents of these paragraphs insofar as they accurately reflect the SCA's judgment.

pvp R

Ad paragraph 52

117. I deny the contents of this paragraph.

118. I deny that the status of Zimbabwe as a non member-state of the Rome Statute is relevant to the question on appeal – and I stress that had it been such a "crucial consideration", then it would have been pressed in argument before the High Court and the Supreme Court of Appeal, but was not. As stated above, the offence created by section 4(1) of the ICC Act is not limited to state members only. The Act refers to "any person" (s. 4(1)) and a crime "contemplated in subsection (1) outside the territory of the Republic" (s. 4(3)).

119. I respectfully submit that the SCA was in any event correct in not considering Zimbabwe's membership of the Rome Statute when determining the duty to investigate.

Ad paragraph 53

120. I deny the contents of this paragraph.

121. The evidence relating to command responsibility and *mens rea* was included in the docket. What was necessary was a proper investigation to take place which would have included interviewing the victims and other witnesses on the *mens rea* element. The mere fact that such an investigation may require effort or be

pmf

difficult is not itself a basis for refusing to open an investigation at all. In other cases, difficulties such as command responsibility or head of state immunity have not been considered insuperable obstacles to opening an investigation.

Ad paragraphs 54 – 55

122. I strongly deny the allegations in these paragraphs.

123. I deny that there was a "devastating effect" arising from any media exposure, particularly considering the amount of attention the incident had attracted in 2007 and afterward.

124. I further deny that any media exposure would have rendered any investigation meaningless. The brief snapshot from Brigadier Marion's investigation into the Movement Control System showed that some of the perpetrators have travelled to South Africa in the past.

125. I further deny that any investigation would be futile even today. It should be noted that there is no "statute of limitations" on crimes against humanity and therefore the prospect of a prosecution in the foreseeable future remains open. It is impossible to predict – until efforts have been attempted – what the response might be to attempts for cooperation from the Zimbabwean authorities regarding investigations in Zimbabwe of the allegations of torture. And even if the Applicant is particularly negative regarding such efforts now, the Applicant cannot know

what the future holds and when the day might arrive when such cooperation becomes possible. With a proper interpretation of section 4(3), it is imperative to gather evidence at present while it is available for future investigations to take place.

126. While the assertions by SAPS deprecating torture are commendable, their failure – now coming up for six years – to investigate the evidence of torture in the docket in this matter deserves to have been set aside as unlawful by the High Court and the SCA, and any further delay in the investigation ought – with respect – to be brought to an end by the refusal of leave to appeal.

Ad paragraphs 56 – 57

127. I note the content of these paragraphs – their relevance to the attempted appeal is not understood.

Ad paragraphs 58 – 59

128. I deny the contents of these paragraphs except insofar as they accurately reflect the wording of the SCA judgment.

129. I deny that Marion disproved that perpetrators visit South Africa regularly. His records show that some had indeed visited South Africa in the past. It also cannot be denied that South Africa and Zimbabwe share economic and cultural ties which link the two countries. As neighbours in the same region, it is not

pmf

inconceivable that alleged perpetrators have visited since then and may visit in the future.

130. Considering the important ties between the countries and the fact that some have visited South Africa in the past, and considering that many of the victims are currently in South Africa, it is denied that there is not a basis for reasonably anticipating the presence of perpetrators. That was the evidence before the High Court and accepted by it – and the evidential finding was not challenged by the SAPS in appealing the High Court's judgment and order.

Ad paragraph 60

131. I deny that the SCA judgment is incoherent.

Ad paragraph 61

132. I deny the contents of this paragraph.

133. I deny that a different court would come to a different conclusion regarding the Applicant's erroneous interpretation of legislative provisions regarding section 4(3) of the ICC Act.

134. While I admit that this case may be novel and of interest to the public, I deny that the reasoning of the SCA requires this court to interfere with its decision.

Ad paragraph 62

135. I deny the contents of this paragraph and the hyperbolic suggestion of "unlimited investigations" being foisted upon the SAPS into allegations of international crimes.

136. Before any such investigation would be required, the SCA judgment refers to an "effective connecting factor" which must be present, the absence of which would prevent "wasting precious time and resources" for other police duties.[12]

137. I further deny that many of the countries listed in paragraph 66 have only tenuous connections with South Africa. In any event, if there were a reasonable basis to assume that an individual from any of those countries had committed genocide, say, and was anticipated to be present in South Africa, then victims would rightly be entitled to applaud if the SAPS were – by dint of the SCA's judgment – "*constrained to institute investigations into allegations of core crimes*". The SCA's judgment merely confirms that which Parliament has already declared in the ICC Act, namely, that South Africa has accepted its role as a member of the international community and has accordingly assumed obligations in terms of the ICC Act and the Rome Statute.

Ad paragraph 63

[12] SCA Judgment, paragraph 66

138. I deny the contents of this paragraph for the reasons stated in the introduction to this affidavit. I particularly deny that only an investigation in Zimbabwe will suffice for a proper decision to be made on whether to prosecute.

Ad paragraphs 64 – 65

139. I deny the contents of this affidavit as they misinterpret the understanding of universal jurisdiction.

140. What the Applicant again misses, with respect, is that in this case the ICC Act creates the offence but matters relating to jurisdiction and enforcement are found in the Constitution and the SAPS Act. In other words, domestic legislation provides for the investigation of criminal offences under South African law. As demonstrated above, that law does not require the presence of a suspect within South African territory in order for an investigation to be lawfully initiated.

Ad paragraphs 66 - 68

141. I deny the contents of these paragraphs.

142. While state sovereignty is a fundamental pillar of international law and international criminal law, the founding principle of universal jurisdiction is that state sovereignty may not be used to shield perpetrators of international crimes from prosecution.

143. In addition, it would be inconsistent with the Purposes of the United Nations to condone such crimes by allowing perpetrators to shield themselves from prosecution through the types of argument advanced by the Applicant.

144. In any event, this does not prevent a state from *investigating* crimes which have been reported to them and for which there are reasonable connecting factors (such as the possibility of future presence) for conducting an investigation.

145. The complementarity principle is intended to ensure that the first responsibility for prosecution falls on state members and that only when states fail to prosecute (under Article 17) then the ICC may prosecute. The principle is not intended to allow states to avoid responsibility for prosecutions under their own domestic legislation.

Ad paragraph 69

146. I deny the contents of this paragraph insofar as it is based on a misconception of the principle of complementarity as stated above, and a misconstrual of the factual findings of the High Court and the SCA thereafter.

Ad paragraphs 70 – 71

147. I deny the contents of these paragraphs. The argument by SAPS has remained inconsistent and incoherent and is materially based on a misinterpretation of law,

PMP

particularly sections 4(1) and 4(3) of the ICC Act and now, belatedly, the complementarity principle.

148. I further deny that the evidence showed that possibility and presence were not satisfied (even if they were jurisdictional facts). International crimes must be given particular attention by the state, as Parliament has made clear through the ICC Act.

149. In addition, our courts – including the Constitutional Court – have often pronounced on the limiting of constitutional rights based on limited resources and have not accepted such reasoning. Section 205 does not permit a lack of investigation due to an unwillingness on the part of the investigator to closely examine the facts which have been presented to him or her.

Ad paragraphs 72 – 73

150. I deny the contents of these paragraphs except insofar as they correctly record what was stated in the SCA judgment. I have already dealt with the Applicant's erroneous understanding of jurisdiction.

151. I deny that an investigation will "inexorably lead to a dead end". While perpetrators may not travel to South Africa often, the evidence shows that some have travelled in the past. Even an entry of less than 24 hours or simply transiting through will be enough to ground the jurisdiction of a South African

pnp R

court for the purposes of a prosecution. Knowing this, the state must be prepared by having exhausted its investigative abilities as far as possible (in terms of section 3(d) of the ICC Act) and be prepared to arrest that perpetrator if the evidence supports such a prosecution.

Ad paragraph 74

152. I deny the contents of this paragraph for the reasons stated above. It should be noted that the travel to South Africa "of years ago" occurred at a time when the docket had already been presented to the SAPS and the NPA and the request for an investigation was public knowledge. There is no evidence at all to support the Applicant's assertion that any travel to South Africa is "unlikely ever to be repeated".

Ad paragraphs 75 – 79

153. I deny the contents of these paragraphs, and note again the suggestion by the Applicant that the evidence of SALC and ZEF was not sustainable, "especially not on motion". If that is so, the Applicant could have and should have challenged the factual findings of the High Court, but instead elected to limit its appeal to questions of law. It is unfortunate – having lost on questions of law – that the Applicant would before this Court, for the first time, seek to challenge factual findings.

pmk

154. Again, and for the same reasons stated above, the Applicant appears to have misconceived the powers to investigate and the fact that an investigation may take place within South African territory.

155. The respondents maintain that they are willing to assist SAPS (and the NPA) with the collection of evidence in this matter.

156. Once a full investigation has been done after collecting statements from witnesses and interrogating the evidence, nothing in law prevents SAPS from inviting the alleged perpetrators to provide exculpatory evidence. As stated above, it may also be that in the future, the Zimbabwe government will be willing to cooperate in an investigation.

Ad paragraph 80

157. I deny the contents of this paragraph. There is nothing in the High Court's judgment – which found that it was possible to open an investigation – which the Applicant took issue with factually or evidentially in seeking leave to appeal.

158. I further deny that the use of the term "possible" under section 3(d) of the ICC Act was intended to limit investigations. Section 3(d) is a restriction on "*prosecutions*", not investigations.

Ad paragraph 81 – 89

pmp

159. I deny the contents of these paragraphs except insofar as they correctly reflect the paraphrasing of the practice in other states by the SCA.

160. Of course, whether other states' legal codes may be silent regarding presence as a requirement of investigation is neither here nor there, since the fact is that in South Africa there are particular constitutional and legislative provisions which provide the Applicant with the authority and the duty to open such investigations.

161. The Applicant has provided a high-level criticism of the Supreme Court of Appeal's reliance on German law and the other comparative law but without any supporting authority and an anecdotal example, and without expressing any expertise in those areas of law. I similarly do not profess to be an expert in German or comparative law, but Professor Gerhard Werle is. I attach (as Annexure PP1) a copy of his article "Torture in Zimbabwe under Scrutiny in South Africa", published in the Journal of International Criminal Justice in 2013, in which he discusses the judgment of the High Court in this matter. At page 667 there (and see the footnotes), Professor Werle arrives at the following conclusions:

> "*Secondly, state practice and opinio juris does not support the assumption of a presence requirement for the exercise of universal jurisdiction at any stage of the trial. While presence is a requirement for the exercise of universal jurisdiction in many national legal systems, the relevant*

pnp R

provisions are by no means uniform, in particular when it comes to the question of presence during the pre-trial stage. On the other hand, quite a few states do not require presence as a precondition for universal jurisdiction. In addition, there are various examples of states investigating crimes under the heading of universal jurisdiction without the suspects being present in their territory."

162. What is clear is that while there may be a debate about the presence requirement in state practice (which debate the SCA was reflecting in its judgment), there certainly is no prohibition under international law which would prevent the Applicant from opening an investigation on the basis of universal jurisdiction, even if only in anticipation of the perpetrator's presence – which is precisely what the ICC Act, as read with the other legislation I referred to at the outset, contemplates.

163. As Professor Werle concludes at page 668:

"*Eventually, a presence requirement as a precondition for a criminal investigation would unnecessarily complicate criminal proceedings. It would bar further investigation once a suspect leaves the country before sufficient evidence could be collected to justify an arrest. This is illustrated by the Court's reasoning in the present case. In addition, a presence requirement would preclude any form of 'anticipated legal assistance'*

pmp

aimed at securing evidence while the suspect is not present. The Court silently acknowledged the importance of anticipated legal assistance when it endorsed the applicants' contention that an investigation was required even without a concrete prospect of a trial. In fact, evidence preserved through anticipated legal assistance has proven instrumental for the prosecution of crimes under international law in the past, for instance, in cases before the International Criminal Tribunal for the former Yugoslavia, at the ICC, or in trials against former members of the military regime in Argentina."

Ad paragraph 90

164. I deny and disagree with the conclusions drawn in this paragraph. The point is that there is nothing – as the SCA concludes, as Professor Werle concludes, and as SALC and ZEF submitted – in international law which prevents the exercise of investigative powers into international crimes even though the perpetrator is not in your territory. The lack of that prohibition in international law, coupled with the express conferral of competence and the imposition of a duty on the SAPS to investigate all crimes under our constitutional and statutory scheme, make it plain that the Applicant's attempts to avoid opening an investigation are wrong-headed.

Ad paragraphs 91 – 92

165. I deny the contents of these paragraphs for reasons given earlier. They rely on the argument that there is no prospect of a prosecution and an absolute requirement to investigate *in absentia*. As stated above, the SCA made clear that there must be an "effective connecting factor" between the perpetrator and South Africa.

Ad paragraphs 93 – 94

166. I deny the contents of these paragraphs for the reasons set out above.

Ad paragraphs 95 – 97

167. I deny the contents of these paragraphs

168. I deny that a case was not made out for the relief granted in terms of the Notice of Motion.

169. I further deny that due to the consistently misconstrued legal interpretation of SAPS, it was entirely appropriate to order an investigation to take place. The court, however, was careful not to instruct the Applicant *how* to conduct the investigation.

170. I therefore deny that there are good prospects of success on appeal to this Court. The approach by the Applicant has been consistently rejected by both the High Court and the SCA. The Applicant persists in this approach despite the fact that

pwp 12

there is no grounding in law – and hence impermissibly, for the first time before this Court, has attempted to ground certain of its arguments on the basis of factual errors committed by the High Court.

Ad paragraph 98

171. I admit the contents of this paragraph.

Ad paragraph 99

172. I deny that this matter should be heard on appeal.

Ad paragraphs 100 – 102

173. I admit that this is constitutional litigation and that the interpretation of South Africa's international obligations and its domestic legislation is inherently a constitutional issue.

Ad paragraphs 103 – 105

174. I admit that this is a matter of general public importance, however, I deny that this factor alone suffices to grant leave to appeal.

175. I deny that the Applicant has succeeded in showing that there are reasonable prospects of another court coming to a different decision from the SCA. I have demonstrated above that the reasoning and order of the SCA are unassailable and do not necessitate correction by this Court.

Ad paragraph 106

176. I deny the contents of this paragraph. On the test for leave before this Court the Applicant should be denied a further opportunity to persist with a palpably erroneous interpretation of the ICC Act and should not be permitted to raise for the first time before this Court various alleged evidential errors perpetrated by the High Court that were never tested in the SCA.

Ad paragraph 107 – 108

177. I deny the contents of this paragraph and that the factual issues must be resolved in favour of SAPS, more particularly when no factual errors were relied upon by SAPS in grounding their appeal against the High Court's judgment.

178. SAPS has relied on a misconstrued legal argument from the inception of the case, in that section 4(3) of the ICC Act requires presence of a suspect before an *investigation* can take place. It has added an equally misconstrued argument that the fact that Zimbabwe is not a state party to the Rome Statute excludes perpetrators and acts committed in that country from the jurisdiction of an offence under South African law.

179. I further deny that the respondents have "disavowed" themselves of the record.

Ad paragraph 109

pwp

180. I deny the contents of this paragraph and submit that leave to appeal should be dismissed with costs, including costs of two counsel.

PRITI PATEL

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at ROSEBANK on this the 20 of January 2014, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.

COMMISSIONER OF OATHS

Prasothmen Vennagopal Naiker
Commissioner of Oaths
Practising Attorney R.S.A
Suite 8, 2nd Floor
2 Hood Avenue Rosebank
Tel: 011 252 3000 Fax: 011 447 9558