IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no:
SCA case no: 485/2012
NGHC case no: 77150/2009

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

FOUNDING AFFIDAVIT

I, the undersigned,

JAKOBUS MEIER

do hereby make oath and state as follows:

1. I am an attorney of the High Court of South Africa, employed in the office of the State Attorney, Pretoria at SALU Building, 316 Thambo Sehume Street, Pretoria. I am the attorney of record representing the applicant, the Commissioner of the South African Police Service ("the Commissioner"). I have acted in this capacity throughout the proceedings giving rise to this application. I am authorised to bring this application on behalf of the applicant and to depose to this affidavit.

2. The facts to which I depose are within my own knowledge, or derived from documents under my control. They are true and correct. Where I make legal submissions I rely on my own professional qualifications and experience, and on advice from independent counsel instructed on behalf of the applicant.

3. I depose to this affidavit in support of an application in terms of Rule 19 of the rules of this Court for leave to appeal against the judgment and orders by the Supreme Court of Appeal. The judgment was delivered on 27 November 2013. (It is attached, marked "A".) Thus, pursuant to the Chief Justice's practice direction of 6 December 2013, this application is required to be filed by 8 January 2014. Because the applicant is not available during this period to depose to the affidavit, I do so on her behalf as envisaged by Rule 19(3).

A. Introduction

4. This application concerns the interpretation and application of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("the Act"). The Act implements a consensual international convention, the Rome Statute of the International Criminal Court ("the Rome Statute"), into the national law of South Africa. The Rome Statute, to which South Africa is a party (but Zimbabwe is not), codifies certain international crimes ("core crimes"), and creates an international court (the ICC) with complementary jurisdiction to prosecute them.

5. Neither the Act nor the Rome Statute has been the subject of any prior litigation in any South African court. The Act and the Statute accordingly constitute *res nova*.

The particular question raised in the test litigation leading to the Supreme Court of Appeal's judgment is, the applicant contends,

> whether the South African Police Service ("SAPS") is authorised and obliged to investigate allegations of core crimes allegedly committed by a non-party to the Rome Statute, in the territory of that non-party, against the non-party's own nationals, and even when none of the connecting factors set out in the Act is present (and only one connector is merely contended to be "anticipated", but its realisation is in fact unlikely).

6. This question is of profound significance for SAPS, and of general public importance. It requires this Court's consideration. Moreover, there is at least a reasonable prospect that this Court may reach a different conclusion from the court *a quo*. In demonstrating this, I adopt the following scheme in this affidavit:

(1) I first set out the essential facts and arguments in support of this application.

(2) Second, a brief description of the parties is provided.

(3) Thereafter an overview of the proceedings below and judgments of the High Court and Supreme Court of Appeal is provided, demonstrating that there are reasonable prospects of success on appeal to this Court.

(4) Against this background I deal with the remaining requirements for leave to appeal, submitting that they, too, are demonstrably satisfied.

(5) In conclusion I ask for the ordinary order.

B. <u>This application in essence</u>

7. I am advised that it may assist to provide at the outset a synopsis of the essential facts and legal propositions underlying this application.

(1) The essential facts

8. The necessary factual background is, for present purposes, sufficiently recorded in the Supreme Court of Appeal's judgment (see in particular paragraphs 7 to 15). In the interests of concision, I do not provide a full factual exposition here.

9. In short, the facts giving rise to this application concerns allegations of torture by the Zimbabwean police force of members of the official opposition (the Movement for Democratic Change). Their purpose is said to have been to suppress the political opponents of the ruling party (the Zimbabwe African National Union-Patriotic Front). The allegations of torture relate to an incident on 28 March 2007, recorded in a docket presented to the South African authorities by the first respondent. It requested that the incident be investigated with the aim of instituting a prosecution in the South African courts.

10. The request was directed to the Commissioner. After considerable reflection (which took into account not only the analysis of a senior superintendent, but also counsel's opinion and academic publications), the Commissioner decided not to institute an investigation. He provided the following reasons for his decision:

(i) SAPS was not legally authorised to initiate the investigation (SCA Record vol 1 p 197 para 7);

(ii) the type of investigation required in the circumstances was prejudiced by premature publication of sensitive information (SCA Record vol 1 p 197 para 8);

(iii) the investigation would frustrate existing and ongoing criminal investigations, inter-country police cooperation and international relations (SCA Record vol 1 p 198 para 10);

(iv) Zimbabwe's sovereignty, SAPS' limited geographical remit, and the need for a fair, objective and independent *in situ* investigation (against the Zimbabwean police force and government officials) made it impossible to conduct an investigation resulting in a prosecutable case (SCA Record vol 1 p 198 para 10); and

(v) because Zimbabwe is not a party to the Rome Statute, its sovereignty is not affected by the Rome Statute; therefore, absent authorisation by the UN Security Council, the ICC Court does not have jurisdiction over Zimbabwe, and nor does any court (and, by necessary implication, investigators and prosecutors) of a state party to the Rome Statute (SCA Record vol 1 pp 202-203 paras 14-19).

11. It is accordingly apparent that the question raised in the litigation giving rise to this application (i.e. the proper interpretation of section 4(3)(c) of the Act, and whether it authorises SAPS to institute investigations in circumstances like the present – especially against a non-member of the Rome Statute) has at all times been squarely in issue.

(2) <u>The essential legal argument</u>

12. For reasons to be developed in legal argument, the Commissioner submits that the reasons for deciding not to institute an investigation in the circumstances of this case

are supported by a correct interpretation of section 4(3)(c), in the context of the Act as a whole. In what follows I set out the essential reasoning for this submission (without citing the supporting authorities). I do so only for purposes of this application, and do not abandon the arguments advanced on behalf of any of the State parties *a quo*.

13. First, the Act must be construed in the light of the common acceptance by international commentators and lawyers that – contrary to a minority view – the Rome Statute does not impose an unqualified, uniform (and universal) obligation to investigate and prosecute core crimes. (SALC and ZEF strenuously sought to argue that such a duty exists under the Rome Statute and the Act, but could provide no authority for this proposition in their heads of argument. Demonstrably not even section 5(3) of the Act supports this assertion, because it itself qualifies any such obligation with reference to the principle of complementarity, to which I now turn.)

14. Second, the purpose of the Statute's governing principle (the principle of complementarity) is to ensure that one of the fundamental principles on which international law rests, namely sovereignty, is respected. The principle serves to promote national prosecutions by member states into crimes connected to their own jurisdictions. It serves to create a relationship between the ICC and member states. Coupled with Article 12 of the Statute (which explicitly identifies the two connecting factors: territoriality and nationality), the principle of complementarity gives member states jurisdiction over core crimes when the conditions of judicial competency have been met. Thus the Statute does not create universal jurisdiction. At most the Statute creates a network extending between its member states. The Statute can do no more

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than bind its member states; crucially, it does not purport to authorise interference with the sovereignty of non-members.

15. Third, the Act (which implements the Statute) should be interpreted to give effect to the Statute's concern and respect for sovereignty, and its governing principle. Indeed, the express wording of the Act makes this sufficiently clear. Nowhere in the Act is a duty created to prosecute subjects of non-member states. (And the Act is of course silent on any duty to investigate.) What the Act does is to enable either a prosecution in South African courts or a prosecution by the ICC itself (section 3(d) and (e)). In the case of a prosecution in South Africa, section 3(4)(d) provides three jurisdictional facts:

(i) a prosecution must be possible;

(ii) a prosecution must comply with the principle of complementarity; and

(iii) a prosecution of a crime committed beyond the borders of South Africa is only permissible "in certain circumstances", namely where the suspect is a South African citizen (section 4(3)(a)), or ordinarily resident (section 4(3)(b)) or present (section 4(3)(c)) in South Africa; or has committed the crime against a South African citizen or resident (section 4(3)(d)).

16. The Commissioner's reasons for his decision, and the evidence supporting them (to which I further refer in analysing the High Court's and Supreme Court of Appeal's judgments below), demonstrate that none of the conditions for enabling a South African prosecution was satisfied:

(i) in the circumstances of this case (as is borne out by expert evidence by senior SAPS investigators), it was not possible to conduct a prosecution capable of resulting in a conviction;

(ii) because Zimbabwe is not a party to the Rome Statute, the principle of complementarity excluded Zimbabwe from the Statute's reach and did not enable or empower South Africa to prosecute organs of a foreign state; and

(iii) because the facts demonstrate that the presence requirement was absent and any anticipated future presence of any of the suspects was highly unlikely, the circumstances for enabling a lawful prosecution were not present, and any speculative investigation initiated *in anticipando* would have been irresponsible.

17. The correct interpretation and application of the Act (and, indeed, of the Rome Statute itself) is that where the above requirements are not satisfied, South Africa's role is as set out in section 3(e) of the Act: to cooperate with the ICC's own investigation and prosecution under the Rome Statute, as authorised by the UN Security Council (if so required in the case of a non-member state like Zimbabwe).

18. I submit that these arguments bear more than a reasonable prospect of success on appeal to this Court, and that it is clearly in the public interest that they receive this Court's consideration. SALC's and ZEF's only answer thus far is that SAPS has investigative powers which are conferred by other statutory instruments – not, inexplicably, by the very Act that adopts the Statute for South Africa. This stance not only repudiates the respondents' own pleaded case. It also fails to meet the Commissioner's case. SALC's and ZEF's pleaded case was that powers to

investigate core crimes are derived from the Act. And the Commissioner's case demonstrates conclusively that, in the present circumstances, extensive investigations in Zimbabwe are required, but not possible.

19. As SALC and ZEF conceded, they could not (and did not) argue that any of the empowering provisions on which they relied in the Supreme Court of Appeal confer extraterritorial investigative powers on SAPS. Thus SALC and ZEF were placed on the horns of a dilemma. On the one hand they were constrained to limit their case to an investigation confined to South African territory. On the other hand they were faced with dispositive evidence that, on the facts before court, a South African-bound investigation is incapable of yielding a prosecutable case. It follows that on the facts of this case, the concession in paragraph 100 of SALC's and ZEF's heads of argument before the Supreme Court of Appeal that "states vest national investigating authorities with a degree of discretion when determining if and how to conduct investigations and prosecutions" and that "each case should be decided on its own merits" is destructive of their case.

20. In these circumstances the Supreme Court of Appeal demonstrably erred in imposing a duty on SAPS to institute an ineffectual investigation. That Court, with respect, in striving to address larger issues it perceived of principle had insufficient regard for the combined effect, *in the instant case*, of the two factors conceded as aforesaid by the respondents. There was, on the evidence, no basis to find a reasonable prospect of any investigation leading to a prosecutable case. Hence no basis existed for directing SAPS to interfere with a foreign state's sovereignty by embarking on an impractical

investigation of Zimbabwe's police force, heads of state departments and Cabinet members.

21. It is to correct this order (which has far-reaching legal consequences, and creates a binding precedent), and to prevent its wide-ranging consequences, that this application is brought.

C. The parties

22. As the Supreme Court of Appeal's judgment explains (in paragraphs 4 and 6), the current respondents instituted the proceedings against four government parties: the National Director of Public Prosecutions ("the NDPP"); the Head of the Priority Crimes Litigation Unit; the Director-General of Justice and Constitutional Development; and the Commissioner. It is only the Commissioner who is directly affected by the orders of the Supreme Court of Appeal. She is accordingly the only applicant in this Court.

23. The first respondent is the Southern African Human Rights Litigation Centre ("SALC"). It is described in paragraph 6 of the Supreme Court of Appeal's judgment and paragraph 12 of the High Court's judgment. In short, it is a South African non-governmental organisation with a "particular concern [for] ... the almost total collapse of the rule of law" in Zimbabwe (SCA Record vol 1 p 14 para 7). This concern inspired it "to utilise South Africa's ... ICC Act to request South African authorities to investigate and prosecute individuals in Zimbabwe" (SCA Record p 14 para 8, emphasis added).

24. The second respondent is the Zimbabwe Exiles Forum ("ZEF"). It, too, is described in paragraph 6 of the Supreme Court of Appeal's judgment and paragraph 12 of the High Court's judgment. The High Court judgment records that ZEF has as one of its objects "assist[ing] victims of human rights abuses occurring in Zimbabwe to obtain access to justice and redress that are ordinarily denied them in Zimbabwe".

25. In the proceedings below SAPS disputed SALC's and ZEF's standing. In these proceedings SAPS' arguments advanced in the context of *locus standi* are however to be considered in the context of the substantive question for determination: whether SAPS is authorised and obliged to investigate allegations by *a regional litigation NGO's or international exiles initiative* of core crimes allegedly committed by a non-party to the Rome Statute, in the territory of that non-party, against the non-party's own nationals, absent any statutory connecting factor.

26. Finally, for the sake of completeness, I note that before the Supreme Court of Appeal the Tides Centre was admitted as *amicus curiae*. (As the Supreme Court of Appeal's judgment records, the *amicus* argued largely in support of SALC's and ZEF's case. The judgment does not reflect any particular assistance derived from the *amicus*' participation.) An *amicus* is not a party to the proceedings and is accordingly not properly to be cited in a subsequent application for leave to appeal. Thus, for present purposes the only relevance of the *amicus*' intervention *a quo* is that it demonstrates the considerable public interest in the litigation giving rise to this application.

D. <u>The procedural history and judgments below</u>

27. SALC and ZEF contemplated their litigation initiative long before the ensuing review application was instituted. The expressed intention was to exert some pressure on the

conduct of the anticipated Zimbabwean election of 2007. However, they lodged their joint application in the High Court only in December 2009. The High Court heard the application on 26 – 30 March 2012, and delivered its judgment on 8 May 2012, upholding the application but making extensive orders not sought by SALC or ZEF.

28. In what follows I deal with the High Court judgment, the application for leave to the Supreme Court of Appeal and the resultant appeal judgment. In doing so, I identify what SAPS submits are errors by the courts below, requiring correction on appeal to this Court.

(1) The High Court's judgment

29. I deal only shortly with the High Court's judgment (annexed, marked "B"), because it is of course the Supreme Court of Appeal's judgment which is the subject of this application. The relevance of the High Court judgment for present purposes is threefold. First, it provides an overview of the relevant facts, pleadings and arguments. Second, it demonstrates that the issue raised in this application – the interpretation of section 4(3) of the Act – has at all times been the "central issue" (paragraph 3 of the High Court's judgment on leave to appeal) before both courts below. Third, it demonstrates that the judgments and orders below are not capable of being sustained on different bases (as SALC and ZEF initially sought to assert before the Supreme Court of Appeal).

30. The first pertinent aspect is the High Court's recordal – without adverse comment, and clearly without rejecting the then fourth respondent' version – of SAPS' expert

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evidence that "further investigations into the relevant allegations would be impractical and virtually impossible" (paragraph 3 of the main judgment).

31. In paragraph 4 the letter by the Commissioner setting out the reasons for declining to institute an investigation is quoted. The letter records that the information contained in the docket was "insufficient to constitute evidence in an investigation into contraventions of the ... Act". It thereafter recorded the main basis for SAPS' decision: that the mere "anticipated presence" of a suspect does not suffice to impose a power and duty on SAPS to investigate. The letter then proceeds to table the impediments to an investigation into events occurring in a foreign state. For brevity, I paraphrase them.

- First, no lawful channels existed through which the necessary verification could be achieved.
- Second, no lawful authority existed to ensure the necessary cooperation required from the Zimbabwean government.
- Third, because the suspects are government officials and the accusations relate to the gross abuse of this authority, an overt investigative approach could not be adopted (lest the integrity of the evidence or safety of witnesses be compromised). But any such approach would necessarily impact adversely on Zimbabwe's sovereignty.
- Fourth, the concern about the legality of the investigation was exacerbated by the significant deficiencies in the docket. While extensive investigations would have been required to overcome the deficiencies, any such investigation had been compromised by widespread publicity.

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- Further reasons included concerns over consequences for South Africa and SAPS in the light of the questionable legality of any investigation, which would unavoidably violate Zimbabwe's sovereignty.

(These reasons were also paraphrased by the NDPP, and this is replicated in paragraph 10 of the High Court's judgment.)

32. The judgment also records (in paragraph 9) that SAPS' expert evidence demonstrated that the nature of the crimes complained of present a particular problem. It is that in order to constitute a core crime, a specific *mens rea* element has to be proved (beyond reasonable doubt) by admissible evidence. In order to obtain this evidence, further extensive investigations in Zimbabwe would be required. The High Court did not reject this evidence, and no basis exists to do so – especially not on motion proceedings in which it was adduced by the then fourth respondent. (As will be seen, nor did the Supreme Court of Appeal.)

33. In paragraph 11.1 the High Court identified what it appears to have considered a material error in the NDPP's and Commissioner's approach. It is that SALC's docket was "examined to ascertain whether it contained sufficient information for a so-called court-directed investigation, i.e. whether it [i.e. SALC's docket] could enable a prosecutor to make a properly informed decision whether or not to prosecute" (emphasis added). But this is in fact a material misconstruction of the evidence. The relevant evidence is of course the Commissioner's own reasons, of which the pertinent sentence reads: "Based on an evaluation of the docket by Senior Superintendent L.J. Bester, it was clear that the information therein contained is

insufficient to conduct a thorough, Court-directed investigation ..." (SCA Record vol 1 p 196 para 6; see also SCA Record vol 1 p 198 para 10.1).

34. What is thus clear from the actual evidence is that the Commissioner did not seek to equate SALC's docket with a court-directed investigation. Nor did he evaluate the docket against that standard (which is of course in any event applied by a prosecutor, not an investigator). Instead, the Commissioner evaluated the docket for purposes of deciding whether the information contained in the docket was sufficient to enable SAPS itself to conduct the necessary comprehensive court-directed investigation.

35. While it is true that Brigadier Marion concluded that "the statements provided by [SALC] are inadequate for a Court-directed investigation" and that "[t]he allegations of torture would have to be reinvestigated from scratch" (SCA Record vol 4 p 616 para 14), it is incorrect to construe this (as paragraph 11.2 of the High Court's judgment does) as an indication that the decision-maker – the Commissioner, who relied on the evaluation of Senior Superintendent Bester – misdirected himself.

36. The section dealing with standing (at paragraphs 12 and 13, comprising pages 40 to 60 of the judgment) is not relevant for present purposes. The same applies to the section on reviewability (at paragraphs 14 to 20, comprising pages 60 to 70 of the judgment). These issues are interwoven with the merits of the matter and fall for consideration (to the limited that the High Court's reasoning remains relevant) in that context.

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37. In paragraphs 21 to 27 (at pages 70 to 82 of the judgment) the High Court described the statutory provisions contained in the Act, the NPA Act (and proclamations under it) and the SAPS Act. The statutory amendments to which the Supreme Court of Appeal's judgment refers render much of this exposition academic, however.

38. Also the next section (paragraphs 28 to 31, comprising pages 82 to 89 of the judgment) is largely academic. It deals with a subsidiary reason for the impugned decision, namely the Commissioner's concern for foreign relations. Although SALC and ZEF contended that this reason is bad in law and inseparable from the main reason for the decision (the interpretation of section 4(3) of the Act), this argument is wrong for two reasons. First, it is clear that as a matter of fact this concern constituted a subservient and severable reason for the decision. Second, if SAPS' construction of the Act is correct, it does not confer a power on SAPS to initiate an investigation in the circumstances of this case. In that event, even if the concern for foreign relations was indeed an inappropriate reason, it is irrelevant because SAPS in any event did not have the power to initiate an investigation.

39. The high watermark of the High Court's dealing with SAPS' evidence establishing the practical impossibility to investigate a prosecutable case in the circumstances of this case is found in this part of the judgment. Fabricius J simply stated that "I have little doubt that on the present facts [the Commissioner] could have initiated the investigation in South Africa by interviewing witnesses, with the assistance of [SALC] if necessary" (page 88 lines 12-15). This ignores the evidence that it is SAPS' duty to investigate independently and objectively (by also considering exculpatory evidence), and Brigadier Marion's evidence that "[a]ll the investigations,

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which I have highlighted above, would have to be conducted in Zimbabwe" (SCA Record vol 4 p 620 lines 14-16; see also SCA Record vol 4 p 625 lines 20-21; SCA Record vol 4 p 635 lines12-15; SCA Record vol 4 p 635 lines 16-17), and that SAPS was not authorised to do this without Zimbabwe's consent (SCA Record vol 4 p 620 lines 16-21; SCA Record vol 635 lines 18-19).

40. Presented with formidable evidence, it was not open to the High Court to simply second-guess the Commissioner. To do so with respect fails adequately to consider that (a) a difficult evaluative discretion was at play (b) being exercised by an experienced investigative agency (c) pursuant to the division of powers between legislature, the courts and the excutive. Nor could the evidence simply be dismissed on the basis the wrong question was asked, and therefore the wrong answer provided. Brigadier Marion made it abundantly clear that in the event that he concluded that the dossier did not constitute a court-driven investigation, he was required to set out what further investigations was required – and this he did (SCA Record vol 4 p 593 para 4; SCA Record vol 4 p 620 para 14). Accordingly, the only bases on which the High Court sought to reject Brigadier Marion's evidence are demonstrably defective.

41. Before reaching the conclusion and order, in the final two substantive pages (pages 90 and 91) of its 98-page judgment, the High Court dealt with the Commissioner's argument. For the reasons already mentioned (and further elaborated on below), the High Court's limited treatment of the main decision-makers argument did not address the issues before Court adequately. The court's conclusions are demonstrably insupportable – both on the facts and in law.

42. The concluding paragraph records that the parties were invited to prepare draft orders to substitute for prayer 4 of the amended notice of motion. Prayer 4 of the amended notice of motion asked for a direction that the NDPP, the Head of the Priority Crimes Litigation Unit and the Commissioner reconsider SALC's request to initiate an investigation. It thus sought the ordinary relief: a remittal to the decision-maker to make a decision *de novo*. No case was made out and no argument presented on the extraordinary relief, appropriate only in exceptional circumstances, of substituting the decision-maker's decision. Nor did the High Court grant such relief. It remitted the decision to SAPS and granted ancillary relief. (As will be seen, the Supreme Court of Appeal *mero motu* substituted the Commissioner's decision, and compelled him to initiate an investigation.)

(2) Subsequent proceedings

43. SAPS and the NDPP duly applied for leave to appeal against the High Court judgment. Fabricius J refused leave to appeal. He did so on the basis that his main judgment demonstrated that SAPS and the NDPP "have by and large confused the duty to prosecute alleged offences with the duty to investigate the relevant crimes" (paragraph 7 of the judgment on leave to appeal).

44. As paragraph 18 of the Supreme Court of Appeal's judgment subsequently demonstrated, there is with respect no merit in this finding. The NDPP's evidence demonstrated that the Acting NDPP appreciated that "even though the SALC sought the initiation of an investigation, it was ultimately 'urging a prosecution'". He was not confused between these two concepts, and the suggestion that such a senior

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prosecutor is incapable of differentiating between investigations and prosecutions is insupportable. Had there truly been such a basic conceptual failure, the Acting NDPP would of course not have referred the matter to SAPS to investigate (as paragraph 18 of the Supreme Court of Appeal's judgment records). Thus both the High Court's main judgment and its belief that no court could come to a different conclusion are with respect demonstrably flawed.

45. It therefore became necessary to obtain special leave from the Supreme Court of Appeal. Before the Supreme Court of Appeal SALC and ZEF initially attempted to defend the High Court judgment on the basis of peremption and the *Witbank* principle.

46. On the basis of the resort to peremption, the application for special leave was referred for oral argument. However, SALC and ZEF ultimately abandoned the point. They did so only in their heads of argument *a quo*, however.

47. The second defence to the application for leave to appeal relied on *Patel v Witbank Town Council* 1931 TPD 284. It is to the effect that bad reasons may contaminate a decision in its entirety and therefore render a decision assailable even if some reasons provided for it are valid. But the *Witbank* principle of course does not apply where one of the reasons for the decision is a lack of *vires*. If the decision-maker is indeed not authorised by law to institute an investigation, a mandamus or review seeking to impose such duty is legally incompetent. Thus SALC and ZEF could not avoid what SAPS identified as "the central issue": the interpretation of the Act before the

Supreme Court of Appeal. Special leave was accordingly granted, and the appeal was argued and decided on its merits.

(3) The Supreme Court of Appeal's judgment

48. Because it is against this judgment which this application is directed, I deal with it more fully. In what follows I identify the bases on which I submit the judgment is flawed. While it is the reasoning in the judgment which is analysed below, it is of course the orders themselves which are the subject of the appeal. As I shall show, the extraordinary order at which the Supreme Court of Appeal arrived is with respect not supported by the pleadings or the authority invoked for it.

49. For ease of reference I analyse the judgment under the headings adopted in the judgment. I doing so, I deal only with the most relevant paragraphs.

Introduction

50. The Supreme Court of Appeal's judgment proceeds by recording the relief granted by the High Court, and the far more limited relief initially sought by SALC and ZEF (paragraphs 1 and 2).

51. At paragraph 5 it formulates the question for consideration as follows: "What business is it of the South African authorities when torture on a widespread scale is alleged to have been committed by Zimbabweans against Zimbabweans in Zimbabwe?" But this formulation, Navsa ADP held, was for those "unfamiliar with International

Criminal Law". He reformulated the issue thus: "the appeal concerns 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." Or, "[p]ut jurisprudentially, this appeal concerns the exercise of jurisdiction by a domestic court (and logically antecedent exercise of investigative powers by the relevant authorities) over allegations of crimes against humanity – in particular the crime of torture – committed in another country."

52. Absent from each of these formulations is one crucial consideration. It is that Zimbabwe is not a party to the Rome Statute. Accordingly, the derogation from Zimbabwe's sovereignty pursuant to the Rome Statute (and its domestic implementation in South Africa) was erroneously predetermined by the Supreme Court of Appeal in formulating the question for consideration. By formulating the question for determination in those terms, the Supreme Court of Appeal demonstrably begged the question. The true question is what authority does SAPS have to investigate a foreign state's police service and Cabinet members? The suggestion that the answer is apparent to everyone who knows at least something about international criminal law predetermines the appeal. It is also with respect wrong, for reasons to be set out below and amplified in argument.

53. The next ten paragraphs of the judgment describe SALC and ZEF, and provide some background to their application. It is important to note what is non-contentious. It is that the conduct by the Zimbabwean Police Service leading to SALC's and ZEF's request for an investigation followed a bombing incident for which the alleged torture victims are allegedly responsible. Accordingly, it appears from the memorandum

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prepared by SALC and ZEF themselves that the allegations of torture suggest police brutality and excess, exacted in the exercise of criminal investigations. If these serious allegations are true, they are to be deprecated. But, even if true, this does not constitute a crime against humanity. An additional element – which is notoriously difficult to prove – is required to constitute a crime against humanity: *mens rea* (knowledge of a widespread or systemic attack). It is *inter alia* for this reason that SAPS' highly experienced investigator concluded that very extensive (and, indeed, impractical if not impossible) investigations would be required by SAPS before the Rome Statute's *chapeau* requirement (which is applicable to all crimes against humanity, including torture) is satisfied. For reasons provided by SAPS (but not dealt with by the Supreme Court of Appeal in its judgment), the reference to documentary evidence by human rights organisations (in paragraph 8 of the judgment) did not assist SAPS in investigating the *chapeau* requirement.

The background

54. In paragraph 10 of its judgment, the Supreme Court of Appeal deprecated the devastating effect of premature media exposures (for which SALC itself was responsible). SAPS has consistently warned that publicity should be avoided, not only to protect the integrity of any investigation. More importantly, suspects who are alerted of any intention to prosecute them in a South African court (at which stage their actual presence is required) would effectively defeat the presence requirement of section 4(3)(c) of the Act. SALC's advance publicity accordingly rendered any investigation meaningless. For once there is a basis to suspect that a South African court will never be vested with jurisdiction (which, in the present circumstances, it is

common cause, can only arise under section 4(3)(c)) the futility of a court-directed investigation by South African authorities is self-evident.

55. Although the Supreme Court of Appeal appears to have appreciated this aspect (because it recorded that it required "to be addressed further below"), the judgment and order with respect clearly do not overcome this fundamental defect. Instead, the Court immediately invoked (in paragraph 11) the graphic nature of the instances of torture provided by some of the alleged victims. There should be no doubt about SAPS' position in relation to police brutality or torture. It has repeatedly stated that these are not to be tolerated. The question, however, is whether SAPS has the authority to investigate a foreign country's police force and its Cabinet members even when the Rome Statute itself does not apply to the foreign state, when no statutory connecting factor exists, and when the practicality and possibility of procuring a prosecution in South Africa are severely compromised.

The NDPP's case

56. Under this heading the Supreme Court of Appeal considered the operative legal infrastructure. It noted (in paragraph 16) that SALC and ZEF accepted that amendments to the South African Police Service Act 68 of 1995 resulted in a legal position in terms of which a special directorate of SAPS ("the Hawks") is entitled to require the NDPP to designate a Director of Public Prosecutions to investigate the offence in terms of the NPA Act. Nevertheless, the Supreme Court of Appeal went on to order SAPS itself to investigate the offences (paragraph 3.2.2 of the order).

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57. In paragraph 18 of the judgment it is recorded that from the earliest stages the NDPP's primary concern has been as to the circumstances in which South African authorities have jurisdiction in respect of events occurring in other countries. In paragraph 20 the Commissioner's reasons for deciding not to institute an investigation are recorded. One of them is that SAPS could not conduct the investigation lawfully. In paragraph 21 it is recorded that the Acting NDPP was of the view that such further investigations as are required would have to be conducted in Zimbabwe, and that Zimbabwe's sovereignty "was impacted". But having dismissed these issues already in paragraph 5 of the judgment as a mere manifestation of unfamiliarity with international criminal law, they are not analysed in the judgment.

The Commissioner's case

58. The next section of the judgment (paragraphs 24 to 31) deals with SAPS' case. The judgment records, and significantly does not reject, the undisputed fact that a most senior and seasoned SAPS official (Senior Superintendent Bester) considered that any "further investigation would be impractical and virtually impossible" (paragraph 24). This was further confirmed by Brigadier Marion, who identified numerous deficiencies in the docket (paragraph 25). Brigadier Marion further disproved SALC's and ZEF's "assertion ... that the perpetrators visit South Africa regularly" (paragraph 27). I note that it is this assertion which formed the basis for SALC's and ZEF's contention that the presence requirement should be relaxed to extend also to an anticipated presence. But on the facts, there is not even a basis for reasonably *anticipating* the presence of the alleged perpetrators. SALC and ZEF having publicised their ambition for a prosecution of the named individuals, there is no

prospect of them travelling to South Africa in future. Thus, on the undisputed facts, there was no basis to engage in the legal question whether "anticipated presence" sufficed. This is because there was no factual basis to anticipate the presence of the relevant individuals.

59. As the judgment records in paragraph 28, the Commissioner thus concluded that SAPS was not legally authorised to investigate extraterritorially, and that – even were SAPS vested with jurisdiction to investigate Zimbabwean officials in Zimbabwe – any such investigation would in any event have been "highly impractical, if not impossible." The Commissioner's position was that when the alleged offender is a foreigner who is not present in South Africa and whose future presence is not even reasonably expected, no duty to investigate arises. He based this conclusion on section 205 of the Constitution (which he identified as the most fundamental provision when considering SAPS' powers), and on the fact that international law itself imposes a duty on states not to infringe other states' sovereignty.

60. In a self-standing paragraph the judgment then criticises the High Court's judgment's incoherence, and the wide-ranging order. As I shall show, the same criticism, with great respect, may be directed at the Supreme Court of Appeal, in both respects.

The law

61. Against this background Navsa ADP referred to some basic principles, precedents and legal instruments under the heading "The law" (paragraphs 32 to 46). The first recordal is that "this case is the first in which the question of South Africa's

competence to investigate crimes against humanity has arisen directly" (paragraph 32). This is with respect correct. The novelty and the importance of this case render it an appropriate matter for this Court's consideration – particularly in circumstances where the issues have been ventilated in both the High Court and the Supreme Court of Appeal, and where both courts' judgments reflect numerous bases on which this Court could come to a different conclusion. Especially the Supreme Court of Appeal's approach of formulating the question for consideration, and indeed resolving it, without due regard for the fact that Zimbabwe is not a party to the Rome Statute requires this Court's consideration – lest the Supreme Court of Appeal's judgment remains standing as precedent binding all High Courts and SAPS in perpetuity.

62. If the Supreme Court of Appeal's judgment goes unchecked, SAPS may effectively be constrained to institute unlimited investigations into allegations of core crimes committed by foreign state agencies of , say, Ethiopia, Israel, Libya, US, Rwanda, Somalia, Swaziland, Syria, Zimbabwe or any other non-party to the Rome Statute, with the most tenuous connection to South Africa. Contrary to what paragraph 3.2 of the order suggests, the judgment has very far-reaching consequences.

63. In dealing with the international law principle of state sovereignty, the Supreme Court of Appeal correctly noted that a state's competence to enforce and adjudicate "is severely restricted to its own territory, absent the consent of a foreign state" (paragraph 36). It however failed to apply this principle to the facts of this case. Had the Supreme Court of Appeal firstly recognised that Zimbabwe is not a party to the Rome Statute and thus did not authorise any other state to exercise such jurisdiction as

may be contemplated by the Statute, and had the Supreme Court of Appeal given effect to the determinative evidence that any meaningful investigation necessarily required SARS to investigate in Zimbabwean territory, the Supreme Court of Appeal could not have come to the conclusion – and made the orders – it did.

64. At paragraph 39 the judgment reaches the issue of universal jurisdiction. It held that crimes affecting the international community as a whole are not tied to the state's territory or some other traditional connecting factor, but are rooted in the universal nature of the offence. This proposition is however only applicable to *prescriptive* jurisdiction (i.e. a state's power to legislate). The correct legal position is that jurisdiction to investigate and prosecute a core crime is not universal.

65. This is indeed demonstrated by the very authority cited by the Supreme Court of Appeal, in the specific context of torture (Dugard *International Law: A South African Perspective* 4th ed (Juta & Co Ltd, Cape Town 2011) at 160). The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (1984) makes it sufficiently clear that the "presence" requirement means that the power and duty to establish enforcement jurisdiction over a torturer is limited to a state's territory. Such "universal jurisdiction" as exists is limited to the "parties to the Convention." Beyond that sphere, there is no universal jurisdiction under the Torture Convention. While the application of the Rome Statute itself is of course equally limited to its parties, the Statute does not confer universal jurisdiction – not even on the ICC Court itself. Therefore South Africa has no enforcement jurisdiction over Zimbabwe or any other non-party to the Rome Statute (or, for that matter, the Torture Convention).

66. The judgment thereafter replicates the first six recitals of the Rome Statute's preamble. It stops short of the seventh recital. The seventh "reaffirm[s] the Purposes and Principles of the Charter of the United Nations, and in particular that all states shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This recordal gives effect to one of the four pillars of international law: non-interference in the territory and affairs of other states (in short, sovereignty).

67. The seventh recital's emphasis on sovereignty is further affirmed by the tenth recital. It "emphasi[ses] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". This principle (the complementarity principle) is indeed the bedrock of the Statute, and finds prime place in Article 1 of the Statute. The complementarity principle is the very basis on which the Rome Statute mustered sufficient support to enter into effect. It serves to mitigate the intrinsic infringement of states' sovereignty. An infringement of sovereignty is inherent in every prosecution of a state's citizens by any other entity. Accordingly, any attempt at interpreting the Statute (and national legislation incorporating it) must have due regard to state sovereignty.

68. Instead, the Supreme Court of Appeal limited this fundamental principle's operation to giving effect to the primary jurisdiction of states and considerations of efficiency and effectiveness. It did so with reference to an informal paper on the principle of complementarity in practice (paragraph 42, footnote 18). By thus limiting its focus, the Supreme Court of Appeal with respect failed to appreciate that the

complementarity principle provides that it is the ICC Court's jurisdiction which is activated by a responsible state's unwillingness or inability to investigate or prosecute a core crime. It is not the jurisdiction of another state which is activated. What is more, even the ICC Court's own (residual, or complementary) jurisdiction is subject to Article 12 of the Statute. Thus, the Rome Statute does not authorise or require a member state to investigate or prosecute a core crime committed by another state if no connecting factor recognised by law exists between the two states.

69. The remaining paragraphs under this section of the judgment quote the Act's long title, preamble, objectives and definitions. I have already referred to some of these provisions, and their interpretation and application is a matter for legal argument. It suffices to point out at this stage that the Supreme Court of Appeal's quotation of section 3 of the Act (which contains the Act's objectives) is incomplete. It omits paragraphs (c), (d) and (e). In the context of this case – and in the light of decisive evidence demonstrating the *impossibility* and *impracticality* of any proper investigation, and the improbability of ever fulfilling the *presence* requirement for any prosecution – the mutually-reinforcing qualifications contained in section 3(d) are of particular significance. The Supreme Court of Appeal's omission of this provision from its exposition on "the law" is a material elision from the full statutory text and context. Upon a proper consideration of the statutory framework in its entirety there is every prospect that another court could come to a different conclusion.

Interpreting the provisions of the ICC Act

70. Against this partial recordal of the Act's text, the Supreme Court of Appeal turned to "interpreting the provisions of the ... Act" (paragraphs 47 to 51). At the outset the

Court recorded its difficulty with the Commissioner's case, apparently because it rested on more than one proposition. I respectfully submit that SAPS' heads of argument demonstrate that there is no incoherence or inconsistency in SAPS' argument *a quo*.

71. SAPS clearly argued, as paragraph 50 of the judgment in fact reflects, that the Act's jurisdictional facts of *possibility* and *presence* were not satisfied. Nor was there any prospect of these requirements being satisfied in the foreseeable future. To expend disproportionate investigative resources with no reasonable prospect of an authorised outcome is not consistent with section 205 of the Constitution. That requires effective policing (section 205(2)). Improvident investigative ventures thus undermine section 205 of the Constitution. To suggest that there is any lack of coherence or consistency in this proposition is to overlook section 205 of the Constitution itself. This, too, is with respect a constitutional misdirection by the Supreme Court of Appeal which requires correction by this Court.

72. In concluding this section of its judgment, the Supreme Court of Appeal held that SAPS' argument was "patently fallacious" (paragraph 51). This was because "[i]n the light of the progressive development of the idea of universality, prescriptive jurisdiction is no longer necessarily limited in the manner suggested by the Commissioner" (emphasis added). However, investigative powers are of course an instance of *enforcement* jurisdiction (not prescriptive jurisdiction). SAPS' powers are constrained by enforcement jurisdiction. The prescriptive jurisdiction exercised by the South African legislature in enacting the Act is silent on SAPS. What the Act does is firstly to criminalise certain conduct in section 4(1). This is an exercise of

prescriptive jurisdiction. Secondly, the Act vests jurisdiction in South African courts. This confers *enforcement* jurisdiction. Courts stand at the terminus of the criminal justice system; and SAPS is the gatekeeper to the same system, standing at its opposite end.

73. For SAPS to embark on an exercise in enforcement jurisdiction when it inexorably leads to a dead end (because the presence requirement prevents courts from adjudicating, and even prosecutors from prosecuting) is an exercise in futility. There is nothing "fallacious" in recognising this reality and in abstaining from infringing a foreign state's sovereignty when there can be no rational connection between the infringement and the purpose for it. It is accordingly the Supreme Court of Appeal's reasoning and order which result in an arbitrary exercise of public power. This is contrary to the rule of law and the principle of legality, and is thus unconstitutional.

Investigative competence

74. The next section of the judgment deals with SAPS' investigative competence. This question is approached on the assumption that the offenders "come to South Africa from time to time" (paragraph 52 of the judgment, quoting SALC's and ZEF's heads of argument). The determinative facts are however that the perpetrators do <u>not</u> come to South Africa from time to time, and even those instances – of years ago – when some perpetrators would sporadically travel very briefly to South Africa are now unlikely ever to be repeated.

75. The Supreme Court of Appeal referred to section 205 of the Constitution, certain provisions of the SAPS Act and section 28 of the NPA Act. It held that when these provisions are read with the Act, SAPS is authorised to investigate core crimes committed extraterritorially. This was despite the fact that the Act was silent on SARS' investigative powers. To overcome this admitted hiatus, the Supreme Court of Appeal relied on residual empowering provisions contained in the Constitution, the SAPS Act and the NPA Act. This necessarily drove the Supreme Court of Appeal back from extraterritoriality to territoriality. Thus, reverting to the true nature of SAPS' investigative powers (which is an instance not of *prescriptive* jurisdiction, but of *enforcement* jurisdiction), the Supreme Court of Appeal had to accept that SAPS' investigative powers are indeed confined to the geographical jurisdiction of South Africa (paragraph 56).

76. This terminus, the Supreme Court of Appeal appears to have considered, was not destructive of its reasoning and SALC's and ZEF's case. This is because "the respondents have not called for the requested investigation to extend outside the borders of South Africa", have "offered to make the victims and other Zimbabwean nationals available to the South African authorities in South Africa", and "submit[ed] that it is not necessary for the South African authorities to travel to Zimbabwe to conduct the investigation there" (paragraph 56). But this reasoning was with respect not open to the Supreme Court of Appeal on the facts.

77. Dispositive evidence demonstrated that the version of SALC and ZEF (as applicants before the High Court) was not sustainable, especially not on motion. In order to investigate as required by its empowering statute, extensive *in loco* investigations

were in fact required – absent which no prosecutable case could ever have been assembled. Thus, the double bind is this. The facts demonstrate that both the possibility requirement (for a prosecution) and the presence requirement (to confer jurisdiction on a South African court) were absent.

78. In such circumstances the conclusion reached by the Supreme Court of Appeal and its order (especially paragraph 3.2) are with respect unsustainable. Contrary to what the judgment suggests, both as a matter of fact and of law, SALC's and ZEF's offer of assistance to SAPS cannot be a substitute for what the Supreme Court of Appeal recognised was required: "the consent or co-operation of foreign states" (paragraph 56). With the best will in the world, neither SALC nor ZEF is able to "make … other Zimbabwean nationals [i.e. government officials, who are either essential witnesses or suspects] available" to SAPS in South Africa.

79. Therefore the conclusion in paragraph 56 of the judgment is self-destructive.

Whether the circumstances warrant an investigation

80. The final section of the judgment (paragraphs 57 to 70) commences by accepting the Commissioner's submission that an investigation is futile if the presence requirement is unlikely to be capable of satisfaction. As a matter of law, however, the issue is not one of "usefulness" or "uselessness" (as paragraph 57 of the judgment appears to suggest). It is one of statutory authority. The issue is *vires*, not utility. Because section 3(d) of the Act itself restricts prosecutions to that which is "possible", there is no legal basis to expect the impossible of SAPS. Expert evidence demonstrated that a

geographically-bound investigation limited to such evidence as SALC and ZEF is capable of making available in South Africa is incapable of achieving a competent prosecution. Thus the possibility requirement cannot be satisfied on the facts of this case.

81. The Court then embarked on a limited comparative overview to assist it in establishing the "presence threshold" applicable to the initiation of investigations. It made the following observations:

(i) in Canada the presence requirement could be extended to cover also the initiation of investigations;

(ii) in Denmark the presence requirement also applies to initiating an investigation;

(iii) in France, too, the presence requirement applies to initiating an investigation;

(iv) in Germany, actual or anticipated presence is required before an investigation may be initiated, but if anticipated presence is not established no duty to investigate exists;

(v) in the United Kingdom, the law is silent on the presence requirement in relation to investigations, but it has apparently been found (although no authority is cited for this proposition) that the commencement of an investigation is permissible despite the suspect's absence; and

(vi) under the African Union's Model Law on Universal Jurisdiction over International Crimes there is no explicit presence requirement.

82. Thus, in three of the six jurisdictions the presence of a suspect is indeed a prerequisite for initiating an investigation. And two of the six jurisdictions are in fact silent on a

presence requirement. (The suggestion that silence confers legal authority is inconsistent with the rule of law and the principle of legality, and the unsupported resort to what was supposedly found to be possible in English law is therefore not availing from a South African perspective.) Accordingly five of the six comparators do not support the conclusion sought to be reached.

83. The singular exception is German law. It adopts position which is not reflected in any of the other jurisdictions to which the Supreme Court of Appeal referred. (What is more, as I shall show, the actual position under German law is with respect not as understood by the Supreme Court of Appeal.) Yet it is this position which the Supreme Court of Appeal simply selected – without any analysis – to transplant into South African law. This Court has often warned against selective transplants. When regard is had to the actual provision and its application under German law, there is every reason not to have adopted and applied it as the Supreme Court of Appeal did.

84. Firstly, the text of the provision on which the Supreme Court of Appeal relied is section 153f(2) of the Code of Criminal Procedure (paragraph 62, footnote 28 of the Supreme Court of appeal's judgment). The section reads:

> "The public prosecution office may dispense with prosecuting an offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 [i.e. acts committed abroad] and 2, in particular if:
>
> 1. no German is suspected of having committed the crime;
> 2. the offence was not committed against a German;
> 3. no suspect is, or is expected to be, resident in Germany;

4. the offence is being prosecuted by an international court of justice or by a country on whose territory the offence was committed, a citizen of which is either suspected of the offence, or suffered injury as a result of the offence.

The same shall apply if a foreigner who is accused of a criminal offence that was committed abroad is resident in Germany but the requirements of the first sentence, numbers 2 and 4, are met and transfer to an international court of justice or extradition to the prosecuting state is admissible and intended."

85. Accordingly, the text of the provision on which the Supreme Court of Appeal relied – but which it did not replicate in its judgment, and (with respect) appears not to have examined – does not support the transplant. It in fact supports a very different legal reality, as the application of the provision demonstrates.

86. Secondly, the application of this provision is sufficiently clear from the Human Rights Watch report on which the Supreme Court of Appeal further relied for its understanding of German law. As the report reflects, German authorities have not yet opened an investigation *in absentia*. In the exercise of his discretion conferred by the actual text of the purportedly transplanted provision, the prosecutor has not yet opened an investigation where a suspect was absent from Germany.

87. Moreover, as Human Rights Watch reports, in exercising his discretion, the prosecutor will take into account the practical ability of German investigators to investigate the complaint in the absence of the suspect. And in determining whether to open an investigation, the prosecutor disregards the possibility of questioning witnesses in other European countries – even where the presence and identity of such witnesses in neighbouring countries is specified by the complainants.

91. In paragraph 66 of the judgment the Supreme Court of Appeal strives to strike a balance between fighting impunity and futile investigations. The reality that futile investigations in fact *further* impunity appears with respect not to have been reflected upon by the Supreme Court of Appeal. More importantly, it is apparent from the reasoning that absent from it is due regard for one of the important considerations stipulated by Parliament itself: the possibility of a national prosecution. On the facts of this case, this prospect is very remote. Not only is the potential presence of the suspects highly improbable, there is also no prospect of a prosecutable case being assembled.

92. Nevertheless, on the facts of this case the Supreme Court of Appeal pronounced as an unqualified legal proposition that, however remote, whenever "there is a *prospect* of a perpetrator's presence, [there is] no reason ... why an investigation should not be initiated" (paragraph 66). Accordingly the Supreme Court of Appeal adopted a position which does not even exist in Germany. Under German law, a prosecutor has a discretion to investigate *in absentia*. Left unchecked, the Supreme Court of Appeal's judgment imposes an absolute duty to investigate *in absentia* – however improbable the putative presence may be, however impossible a successful prosecution may be, and however tenuous a complaint may be. This legal terminus does not give effect to the Supreme Court of Appeal's own recognition that an over-extensive investigative obligation on SAPS would be "destructive in wasting precious time and resources that could otherwise be employed in the equally important fight against crime domestically."

or not to initiate an investigation. Even on this narrow basis at least paragraph 3.2.2 of the order cannot stand, and leave to appeal is required to correct it.

97. For the above reasons I submit that there are good prospects of success on appeal to this Court. What remains is to make submission on the residual requirements for leave to appeal.

E. Requirements for leave to appeal

98. Pursuant to the Constitution Seventeenth Amendment Act of 2012, section 167 of the Constitution was amended to confer jurisdiction on this Court in all matters. An application for leave to appeal may accordingly be granted both in constitutional matters and in any other matter, if this Court "grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by th[is] Court" (section 167(3)(ii) of the Constitution, as amended).

99. This application satisfies both of the disjunctive jurisdictional bases.

100. Firstly (as regards the application's constitutional nature), throughout the proceedings in the courts below all parties to the proceedings accepted that the crux of this matter is the correct interpretation of section 4(3) of the Act. Indeed, it was SALC and ZEF which invoked section 4(3)(c), and argued that "anticipated presence" of a suspect would suffice to authorise the initiation of an investigation where no other nexus existed.

101. It is well-established that the interpretation of a statutory provision like section 4(3) of the Act is inherently a constitutional issue. Not only does section 4(3) relate directly to the powers of organs of state. It also gives effect to South Africa's international law commitments. It further concerns investigations by SAPS into the affairs and officials of foreign states. Thus, the correct interpretation and application of the Act also impacts on sovereign states' immunity, the infringement of which exposes South Africa to sanctions under international law.

102. SALC and ZEF indeed correctly accepted the constitutional nature of the matter before the Supreme Court of Appeal. In paragraph 4 of their practice note they submitted that the appeal constituted "constitutional litigation". On this basis they asked that no costs order should be made, were they to be unsuccessful.

103. Secondly (as regards an arguable point of law of general public importance deserving this Court's attention), the following. As the above analysis demonstrates, SAPS' position is at the very least arguable. In fact, I respectfully submit that especially my submissions on the Supreme Court of Appeal's judgment demonstrate that there is more than a reasonable prospect that this Court could come to a different conclusion.

104. Furthermore, SAPS' powers and duties – and whether it should, as the Supreme Court of Appeal put it, concern itself with core crimes "alleged to have been committed by Zimbabweans against Zimbabwe in Zimbabwe" (paragraph 5 of the Supreme Court of Appeal's judgment) – clearly is of general public importance. Every non-domestic investigative exertion by SAPS necessarily consumes "precious time and resources

that could otherwise be employed in the equally important fight against crime domestically" (para 66 of the Supreme Court of Appeal's judgment). It is accordingly of great public importance to South African society that SAPS' burden to investigate crimes by foreign authorities (perpetrated against their own nationals in their own territory) receives this Court's attention.

105. Furthermore, as both the High Court's judgment and the Supreme Court of Appeal's judgment correctly reflect, the litigation leading to this application is the first of its kind in South Africa (page 52 lines 2-3 of the High Court's judgment; paragraph 32 of the Supreme Court of Appeal's judgment). This factor further supports an application for leave to appeal to this Court. It is of the utmost public interest, and in the interests of justice (including the administration of justice), that this Court provide guidance to lower courts on the proper interpretation and application of the statutory enactment incorporating the Rome Statute into South African law.

106. A further factor which militates compellingly in favour of granting leave to appeal is the Supreme Court of Appeal's own conclusion that special leave had to be granted by it. As mentioned, the High Court refused to grant leave to appeal. This necessitated a petition for special leave to the Supreme Court of Appeal. The Supreme Court of Appeal's jurisdiction in such circumstances is limited. The requirements for special leave to the Supreme Court of Appeal are therefore far more demanding than an appeal in the ordinary course to this Court (especially after the broadening of access to this Court pursuant to the recent constitutional amendment). Therefore, the NDPP's and Commissioner's success in satisfying the higher standard *a quo* itself suggests that the lower standard for leave to appeal in this Court is satisfied.

107. Finally, such issues of fact as may require consideration on appeal to this Court are limited and are closely related to the constitutional issue. They therefore justify and require this Court's consideration even on the position prevailing before the constitutional amendment. They *a fortiori* qualify for this Court's consideration after the amendment. Such factual issues as may arise are furthermore incontrovertible. They should in any event be resolved in favour of SAPS – not only because SAPS was a respondent in the court of first instance, but also because the issues are of an expert nature and not contradicted by any admissible evidence. It is perhaps for this reason that in the Supreme Court of Appeal SALC and ZEF themselves disavowed any reliance on the record (as paragraph 8 of their practice note in the Supreme Court of Appeal reveals).

108. Should leave to appeal be granted, the record should accordingly be capable of being significantly reduced. In the Supreme Court of Appeal it was already limited to some 1 200 pages. There is every reason to expect that it can be yet further reduced by agreement.

F. Conclusion and appropriate order

109. For the above reasons I submit that the application for leave to appeal should be granted, whether pursuant to the ordinary procedure of enrolling the application for leave to appeal for a hearing or directly.

JAKOBUS MEIER

I certify that this affidavit was signed and sworn to before me at PRETORIA on this the _____ day of January 2014 by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection against taking the prescribed oath, and considered the oath binding on his conscience.

COMMISSIONER OF OATHS

Name: Desmond Mabula

Address: 277 Johnny Claassen str.

Capacity: C&T.

Area: SAPS Potchefstroom

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