IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT02/2014

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

SAPS' WRITTEN SUBMISSIONS
(Enrolled for hearing on 19 May 2014)

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A. Introduction

1. This case concerns the responsibility of the South African Police Service ("SAPS") under section 205 of the Constitution.[1] The Constitution requires that SAPS "discharge[s] its responsibilities effectively".[2] The Constitution clearly contemplates that SAPS' responsibility is firstly towards the citizens, residents and national interests of South Africa.[3]

2. Less clear is SAPS' responsibility to the rest of the world, pursuant to the Implementation of the Rome Statute of the International Criminal Court Act[4] ("the ICC Act").[5] Essentially, the substantive issue for consideration is whether

> "South African authorities [can] realistically be expected to open up criminal proceedings whenever a crime envisaged in the ICC Act is committed anywhere in the world, just because the suspects might one day enter South African territory."[6]

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[1] As the record demonstrates (Record vol 2 p 201 para 12; Record vol 13 p 1282 para 59), SAPS has consistently approached the matter from the perspective of section 205 of the Constitution, which is the highest norm governing SAPS.

[2] Section 205(2) of the Constitution.

[3] Section 205(3) of the Constitution, referring specifically to SAPS' duty "to protect and secure the inhabitants of the Republic and their property".

[4] Act 27 of 2002. The ICC Act provides for the implementation of the Rome Statute of the International Criminal Court, 1998 ("the Rome Statute").

[5] The question is not what SAPS' responsibility might be in relation to cooperation in an international investigation to establish the presence of an international fugitive from justice. Nor is the question what SAPS' responsibility might be in collecting evidence for purposes of an international or foreign prosecution. As the respondents' founding affidavit in the High Court confirms, the issue in this case pertinently raises "South African authorities' [response to a request] to investigate and prosecute individuals in Zimbabwe" (Record vol 1 p 14 para 8).

[6] Werle "Torture in Zimbabwe under Scrutiny in South Africa" (2013) 11 *J Int Criminal Justice* 659 at 671, writing on the High Court judgment leading to the Supreme Court of Appeal's judgment.

3. This is commonly known as the absolutist position in applying the principle of universal jurisdiction. SAPS submits that Prof Werle (who formulated the above question) is (in this respect)[7] correct. The legal answer is clearly: No,

> "[t]here must be additional elements justifying the conclusion that the prosecution and the police are obliged to investigate. In particular, there must be a reasonable prospect that proceedings will be successful, meaning that they may lead to the prosecution of the suspects in South Africa or support prosecutions elsewhere by securing evidence. Conversely, if there are no avenues for South African authorities to contribute towards the prosecution of persons suspected of crimes under international law, the authorities should refrain from initiating proceedings."[8]

4. We submit that the Supreme Court of Appeal erred in three key respects: first, in explicitly adopting the absolutist position; second, in simultaneously

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[7] It the article in which this question is thus formulated which the respondents annexed to their opposing affidavit in this Court. They however rely on Prof Werle in another respect – for his assertion that "there are various examples of states investigating crimes under the heading of universal jurisdiction without the suspects being present in their territory" (*op cit* at 667). But actually only two countries are cited as examples in the footnote accompanying the quoted text (which is not replicated in the opposing affidavit): Belgium and Spain. Even they, on closer analysis, are not as represented by Werle. In support of Werle's reliance on these two examples, he cites Langer "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes" (2011) 105 *Am J Int'l L* 1 at 30, 37-38. However, if Langer (*op cit* at 40) is read, this reveals that Spain's initial embrace of absolute universal jurisdiction has in fact been reversed by legislation adopted by a landslide majority in its legislature (329 votes in favour, 9 against, and 6 abstentions). The Spanish experienced absolute universal jurisdiction as unrealistic and unworkable, and now require either the perpetrator's presence or another nexus (*ibid*). Belgium's controversial absolute jurisdiction legislation suffered the same fate. Langer's article on which Werle relies indeed reflects this equally clearly: amendments affected already in 2003 limited universal jurisdiction to people who became Belgian citizens or residents after committing a core crime (Langer *op cit* at 31). Accordingly, Werle is not supported by the authority on which he relies. Instead, the only two examples he invokes for his proposition regarding "various states" applying universal jurisdiction without regard for actual presence actually defeat his thesis.

[8] *Id* at 671-672. It is so that Werle goes on to suggest that a factual basis exists to conclude that on the evidence before the High Court a duty existed in the present circumstances to investigate (*id* at 673). SAPS submits that the professor's suggestion does not accord with the papers, which he does not claim to have studied (and which is, in any event, a question for the court). Moreover, the decision whether there is a reasonable prospect of a successful prosecution is one reserved (at least initially) for the NDPP. Courts and commentators cannot prematurely pre-empt the NDPP's discretion (as Werle purports to do).

granting relief not sought; third, predetermining the manner in which SAPS is required to exercise its investigatory discretion.[9] The exercise of this discretion is SAPS' constitutional responsibility, and requires a determination by the constitutionally-authorised organ of State, giving due regard to

- strengthening law-enforcement in South Africa;[10]
- effectively allocating limited human and financial resources;[11] and
- balancing SAPS' domestic law-enforcement duty to South African citizens with any responsibility it may have to the international community to investigate crimes with no connection to South Africa.[12]

5. The Supreme Court of Appeal answered the substantive question in the affirmative, and issued a mandamus. It did so *mero motu*: a mandamus was not part of the relief sought from it. The Supreme Court of Appeal compounded its extraordinary approach in this respect by refusing to remit the impugned decision to the decision-maker (the relief actually sought in the notice of motion and founding affidavit). Instead, the Supreme Court of

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[9] As we show below, it has correctly been accepted *a quo* that the initiation of an investigation and prosecution of core crimes requires the exercise of a discretion by the relevant authority. This is consistent with commentators' acceptance that it is unrealistic to expect the prosecution (and implicitly investigation, we would add) of "every single crime that is committed" (see e.g. Langer "Universal Jurisdiction as Janus-Faced" (2013) 11 *J Int Criminal Justice* 737 at 750).

[10] Effective law-enforcement is undermined and impunity furthered by futile investigations (Record vol 14 p 1295 para 91).

[11] See e.g. para 33 of Lieutenant General Dramat's founding affidavit in the Supreme Court of Appeal (excluded from the record before this Court) and Record vol 13 p 1287 para 71.

[12] See *The AU-EU Expert Report on the Principle of Universal Jurisdiction* Council of the European Union, 16 April 2009, to which we revert below.

Appeal summarily substituted its decision for that of the designated decision-maker.

6. In doing so, the Supreme Court of Appeal not only disregarded precedent binding on it.[13] It also formulated a legal rule binding itself and all lower courts in future. The effect of the rule it formulated is that *whenever there is a mere (i.e. a not-entirely-discountable) prospect that the perpetrator of an international crime may in future be present in South Africa, SAPS must investigate the alleged crime in the suspect's absence*. South Africa (as far we could ascertain) now stands alone in adopting this extreme variant of absolutism as regards universal jurisdiction.

7. For the reasons set out below, SAPS submits that the Supreme Court of Appeal erred in formulating this rule and that its order requires correction on appeal to this Court. Our submissions follow the scheme set out in the above index.

B. <u>SAPS' submissions in outline</u>

8. SAPS challenges the Supreme Court of Appeal's judgment on two separate bases.

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[13] *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at para 58ff and authorities there collected.

9. First, on the merits. The Supreme Court of Appeal erred in law in establishing what amounts to an absolute legal rule to the effect that SAPS must in all circumstances investigate core crimes, even when there is no existing nexus (as envisaged by the ICC Act) with South Africa, and even in the absence of the suspect. The Supreme Court of Appeal further erred in its assessment of the evidence, and failed to apply the established principle governing factual disputes in motion proceedings.[14]

10. Second, as regards relief. The Supreme Court of Appeal erred in this regard in the two respects outlined in paragraph 4 above. First, in this respect, in *mero motu* substituting its decision for that of SAPS. Second, an order of substitution is *extraordinary* relief. It was granted in circumstances where it was not sought, no case was made out for it, no argument was presented on it, and no submissions or debate was invited on it by the Supreme Court of Appeal.[15]

11. We develop SAPS' arguments on these two separate issues below, after dealing shortly with the application for leave to appeal.

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[14] *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E-635C; *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at para 8.

[15] As the Supreme Court of Appeal's judgment reflects, only the respondents were invited to submit a draft order, but the Supreme Court of Appeal rejected their formulation on the basis that it "[put] the cart before the horse" (Record vol 13 p 1248 para 69). The judgment reflects no evidence, argument or analysis supporting an order substituting the impugned decision.

12. Space constraints do not permit a repetition of the factual and procedural background, or of the analysis of the High Court and (in particular) the Supreme Court of Appeal judgments. These aspects are dealt with in SAPS' founding affidavit in its application for leave to appeal to this Court,[16] and do not require repetition.[17] Moreover, a summary of what SAPS submits is the pertinent factual background is provided in SAPS' statement of facts pursuant to the directions of the Chief Justice.[18]

C. Leave to appeal

13. SAPS' exercise of its powers under section 205 of the Constitution and constitutionally-mandated legislation is clearly a constitutional issue. So is the interpretation and application of legislation domesticating an international treaty. The appropriateness of a court order *mero motu* substituting SAPS exercise of its discretion for the views of a court is similarly a constitutional issue. Indeed, the manner in which this was done – not only absent any request, pleading or argument; but also absent any analysis or reasoning supporting this extraordinary relief – is a matter of

[16] We respectfully ask that it be read with special focus on the following parts: Record vol 13 pp 1262-1262 paras 8-11 (factual synopsis); Record vol 13 pp 1262-1267 paras 12-20 (summary of legal argument); Record vol 13 pp 1269-1275 paras 29-42 (overview of High Court judgment); Record vol 13 pp 1277-1298 paras 48-97 (analysis of Supreme Court of Appeal judgment); Record vol 13 pp 1298-1301 paras 98-107 (leave to appeal). Regrettably the respondents did not accede to SAPS' proposal to truncate the record, as envisaged in the founding affidavit (Record vol 13 p 1301 para 108) and sought in a subsequent letter (excluded from the record).

[17] Least of all in circumstances where the respondents' opposing affidavit did not meaningfully engage with SAPS' analysis and criticisms of the Supreme Court of Appeal's judgment.

[18] Record vol 14 p 1377-1388. The respondents' statement of facts is at Record vol 14 pp 1389-1402.

grave constitutional concern, because it violates the separation of powers,[19] and sets an example for High Courts to repeat.

14. The respondents correctly concede that this application inherently raises constitutional issues.[20] They equally concede the general public importance of the matter.[21] We submit that the substance and importance of the constitutional issues are such as to justify this Court's authoritative pronouncement on them.

15. Furthermore, commentators confirm deep divides in academic circles and states' practice regarding the question on which the Supreme Court of Appeal adopted its absolutist stance. They also confirm the desirability of obtaining clarity on the interpretation and application of the ICC Act.[22] Commentators further recognise that the application of universal jurisdiction, which underlies the impugned decision, is of considerable public importance. It indeed "dominated discussions at both the international and African regional levels, with many voicing practical, political and policy concerns with regard to its application."[23] An organ of State's purported enforcement

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[19] See e.g. *National Treasury v Opposition To Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 47.
[20] Record vol 14 p 1357 para 173.
[21] Record vol 14 p 1357 para 174.
[22] Gevers "Southern African Litigation Centre v National Director of Public Prosecutions" (2013) 130 *SALJ* 293 at 309, commenting (in the context of the application for leave to appeal to the Supreme Court of Appeal) that "[f]rom the perspective of obtaining further clarity, the … decision to appeal is welcomed."
[23] Chenwi "Universal jurisdiction and South Africa's perspective on the investigation of international crimes" (2014) 131 *SALJ* 27 at 27. See too *id* at 28, referring to the African Union's "concerns regarding the content, application and use of the concept. … The AU believes that this has the effect of

of any form of universal jurisdiction is controversial[24] (especially when exercised *in absentia*),[25] and liable to international reaction.[26]

16. Therefore the "general public importance" requirement for granting leave to appeal is clearly satisfied. This matter raises issues important to SAPS, the South African society as a whole, the international community, and the interests of the administration of justice and law-enforcement.

17. Moreover, "[a]ccording to a widely held view, international law requires the presence of the accused in order for a state to exercise universal jurisdiction."[27] The Supreme Court of Appeal's judgment adopted a

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destabilising or impeding the political and socio-economic progress of African States and is a breach of their territorial integrity and sovereignty", citing relevant AU resolutions. Moreover, "the exercise of universal jurisdiction" evidently gives rise to "a chain of political, practical and policy challenges" (*id* at 44).

[24] Langer "Universal Jurisdiction as Janus-Faced" (2013) 11 *J Int Criminal Justice* 737 at 737, describing universal jurisdiction as "the subject of heated controversy in recent years".

[25] Werle *op cit* at 665-666; Kreβ "Universal Jurisdiction over International Crimes and the Institut de Droit International" (2006) 4 *J Int Criminal Justice* 561 at 572.

[26] Crawford *Brownlie's Principles of Public International Law* 8th ed (Oxford University Press, Oxford 2012) at 688. See too Jennings *Oppenheim's International Law* 9th ed (Oxford University Press, Oxford 1996) vol 1 at 476: "any assertion of criminal jurisdiction in relation to conduct of aliens in a foreign state [presents] ... a danger of infringing the sovereign rights of that state to regulate matters taking place in its territory".

[27] Werle *op cit* at 666. As noted above, Prof Werle is a proponent of the view that presence is not a requirement at the pre-trial investigation stage. He nevertheless accepts that formidable scholars and judges hold a contrary view. He cites the following authorities against his view: *Case Concerning the Arrest Warrant*, Separate Opinion of Judge Guillaume, ICJ Reports (2002) 3 at 43, and Declaration of Judge Ranjeva at 58; Akande "Arrest Warrant Case" in Cassese *et al* (eds) *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 586-587 at 587; Cassel "Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court" 35 *New England Law Review* (2000-2001) 421-445 at 427; Cassese "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" 1 *JICJ* (2003) 589-595 at 592; Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2003) at 224. There are also other authorities to the contrary, however. In short, views are divided on this issue, and the position adopted by the Supreme Court of Appeal favours a minority view.

contrarian position, opposed by eminent international lawyers and judges.[28] Accordingly, it is self-evident that there is a reasonable prospect of another court concluding differently. It is far more than merely "arguable"[29] that the Supreme Court of Appeal's extraordinary approach is wrong.

18. Accordingly, this application satisfies both disjunctive bases for granting leave to appeal. First, it raises a constitutional issue of considerable substance which is in the interests of justice to be determined by this Court (*inter alia* because there is a reasonable prospect of success, and because of the overwhelming public interest in the issue).[30] Second, it "raises an arguable point of law of general public importance which ought to be considered by th[is] Court".[31]

19. We submit that there are no compelling countervailing considerations,[32] and therefore ask that leave to appeal be granted.

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[28] See again the authorities cited in the preceding footnote.

[29] As section 167(3)(ii) of the Constitution, as amended by the Constitution Seventeenth Amendment Act of 2012, now requires.

[30] Section 167(3)(a)(i) of the Constitution.

[31] Section 167(3)(ii) of the Constitution.

[32] In opposition to leave to appeal being granted, the respondents invoke *Van Heerden v Cronwright* 1985 (2) SA 342 (T) where Eloff J held that the sole question for leave to appeal under the Supreme Court Act 59 of 1959 was prospects of success (Record vol 14 p 1325 para 54 fn 11). It has been repeatedly emphasised by this Court that prospects of success are not the only criterion for leave to appeal under the Constitution to this Court. Even poor prospects of success do not disqualify a matter of significant constitutional and public interest (see e.g. *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC) at para 26; *Concerned Land Claimants' Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association* 2007 (2) SA 531 (CC) at para 21). For the reasons set out above, the correct test is clearly met; and for the reasons set out below and those advanced in SAPS' founding affidavit, we submit that the prospects of success are good. The same applies even on the narrow ambit of this appeal contended for by the respondents, viewing the matter as turning only on whether "the basic principles of criminal investigation and prosecutorial discretion" "have been applied correctly in this case" (Record vol 14 p 1335 para 85).

D. The merits: The Supreme Court of Appeal erred in imposing an absolute duty to investigate *in absentia*

20. As mentioned, SAPS challenges both the rule established by the Supreme Court of Appeal and the application of this rule in the circumstances of this case. In demonstrating that the Supreme Court of Appeal erred in both respects, we deal with the most important aspects underlying the judgment and orders.

(1) "Universal jurisdiction", in short

21. At the outset it is important to summarise SAPS' position on the controversial issue of universal jurisdiction and its application.[33]

This, too, is a constitutional matter of substance which should be considered in the interests of justice, not least because it bears reasonable prospects of success. Even the very limited factual matters raised in the application for leave to appeal are issues bearing directly on the constitutional issues involved, and are readily apparent from the parties' statements of facts and the appeal record. This Court often resolves matters of fact which impact on the constitutional issues for consideration, and the recent constitutional amendment mandates this approach yet further. See e.g. *MM v MN* 2013 (4) SA 415 (CC) at paras 52-53, explaining that factual evidence was invited by this Court after oral argument in circumstances where neither the High Court nor the Supreme Court of Appeal considered the issue (which related to customary law). Neither of these courts "gave any attention to either [of the two aspects of the relevant issue]. Because the issue was raised squarely before us for the first time it needed to be addressed." The respondents' suggestion that the limited factual issues inherent in the question they themselves accept arises for consideration (i.e. whether the investigating and prosecutorial discretion was correctly exercised), all of which is ventilated in the papers, should somehow disqualify the application for leave to appeal confuses constitutional litigation with a game of forfeit, which it is not (*Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at para 55, Farlam JA; Mthiyane DP conc). In the absence of any suggestion that SAPS has formally abandoned reliance on factual matter inherent in the issues for consideration, the respondents' approach amounts to no more than a misdirected criticism of SAPS' presentation of its case. The issue of remedy necessarily touches upon the exercise of a courts' constitutional power and the doctrine of separation of powers. This in itself requires the consideration of the necessary facts, and equally required the Supreme Court of Appeal to consider the very limited necessary facts – at least for purposes of establishing that the remedy was appropriate in the circumstances.

[33] In para 45 of their heads of argument before the Supreme Court of Appeal, the respondents characterised the position under international law, and in particular universal jurisdiction, as "red herrings" – despite the issue of jurisdiction and universal jurisdiction under international law forming

22. The definition[34] and application of universal jurisdiction are complex and enmeshed in extensive academic discourse.[35] The definition most recently adopted in a South African publication is "jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognised linking point between the crime and the prosecuting State".[36]

23. It is clear that the Rome Statute does not confer this type of jurisdiction on the ICC. Its jurisdiction is based on two conventional *rationes jurisdictiones*: nationality or territoriality.[37] Accordingly the ICC itself does not have

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such a substantial part of the respondents' motivation for their request in the memorandum accompanying their dossier (see e.g. Record vol 2 pp 109-117 paras 47-69). In paras 53-77 of their heads of argument *a quo* the respondents made extensive submissions on this "red herring". The belated purported repudiation of the respondents' own reliance on universal jurisdiction (and, indeed, section 4(3) of the ICC Act itself) is not open to the respondents: it forms the substratum of their case.

At this stage we record that space limitations do not permit anticipating every argument advanced *a quo*. We nevertheless seek to address some of the more relevant contentions already in these submissions.

[34] Generally, "[t]he principle of universal jurisdiction involves jurisdiction to prescribe without nexus or link between the forum and the relevant conduct at the time of its commission" (Crawford *Brownlie's Principles of Public International Law* 8th ed (Oxford University Press, Oxford 2012) at 687-688). In the related context of extra-territorial jurisdiction, the "cardinal principle emerging ... is that of genuine connection between the subject-matter of jurisdiction and the territorial base or reasonable interest of the State in question" (*ibid* at 457). Applied to the current context, this connection is the *presence* of the accused. Applying the cardinal principle identified in *Brownlie* (albeit in the context of extra-territorial jurisdiction), an accused's presence must accordingly be "genuine", i.e. actual (not merely anticipated, prospective or possible).

[35] See e.g. Kreβ *op cit* at 561, citing *inter alios* Scheffer "The Future of Atrocity Law" (2002) 25 *Suffolk Transnational Law Review* at 422 ("[a]ny effort to identify a universally accepted definition of universal jurisdiction ... remains ... futile ...").

[36] Chenwi *op cit* at 31, noting that "universal jurisdiction is a marked departure from the usual rules of criminal jurisdiction."

[37] Article 12(2) of the Rome Statute.

universal jurisdiction. Nor does the Rome Statute purport to confer such (absolute) universal jurisdiction on its member States.[38]

24. It is section 4 of the ICC Act which is the source of universal jurisdiction. The text of section 4(3) however makes it immediately apparent that this limited form of universal jurisdiction is not free of any connecting factor.[39] One of the four connecting factors Parliament adopted is the one contained in section 4(3)(c): *presence*. It requires that the perpetrator must be "present in the territory of the Republic".

25. Thus the form of universal jurisdiction contemplated by the ICC Act is conditional, as opposed to absolute. In principle, only "[a]bsolute universal jurisdiction allows for the exercise of jurisdiction *in absentia*."[40] This necessarily implies that States can investigate and prosecute core crimes in

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[38] The only provision dealing with the jurisdiction of member states is the sixth recital in the preamble. It merely recalls a state's duty "to exercise its jurisdiction". It does not confer or extend state parties' jurisdiction, but confirm its existing jurisdiction. The preamble confirms that states must refrain from infringing the independence of any other state (seventh recital), and that "nothing in this Statute shall be taken as authorising any State party to intervene ... in the internal affairs of any [other] State".

[39] For this reason it is accepted that – at best – the ICC Act gives rise to qualified or conditional universal jurisdiction (Du Plessis "South Africa's International Criminal Court Act" (2008) *ISS Paper* 172 at 4).

[40] Chenwi *op cit* at 32. We would qualify this statement by noting that some commentators argue in favour of universal jurisdiction to investigate *in absentia*. Chenwi appears to support this approach. This is a terrain of particularly "intensive scholarly debate", many commentators considering the exercise of universal jurisdiction *in absentia* as abhorrent (see e.g. Kreβ *op cit* at 563: referring to publications by eminent scholars like Henzelin, Reydams, Fletcher, and Cassese). Even the 2005 Resolution of the Institute de Droit International (which the respondents invoke in support of *in absentia* investigations) reflects strong disagreement amongst its members (*id* at 367). This resolution is not binding, of course. It is of a far lesser status than the General Comments by the United Nations Committee on Economic, Social and Cultural Rights, which did not find favour with this Court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 29 (or ever since). Moreover, the resolution is subservient to the *lex specialis*: CAT, on which we make submissions below.

the perpetrator's absence from its territory *only* if absolute universal jurisdiction applies.[41]

26. But the jurisdiction conferred by section 4(3)(c) is "contingent upon the presence of the suspect in the *forum* State".[42] Parliament's adoption of this contingent jurisdiction is "consistent with the view"[43] that "universal jurisdiction cannot sensibly be an absolute right of jurisdictional competence (such that any and every State is empowered to investigate and prosecute the occurrence of an international crime)."[44]

27. Therefore, the premise for the respondents' pleaded case is correct: "the ICC Act … empowers South Africa … to investigate and prosecute [core] crimes … if such persons [i.e. the perpetrators], after the commission of the crime, are present in the territory of the Republic";[45] and "South Africa is under a duty at international law and under the ICC Act to apprehend and prosecute" Zimbabwean officials implicated in SALC's dossier "if and when they" "visit South Africa".[46]

28. This acknowledgement notwithstanding, the respondents subsequently sought to shift their weight, repudiating their pleaded reliance on only the

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[41] *Ibid.*
[42] Du Plessis *op cit.*
[43] *Ibid.*
[44] *Ibid*, quoting Cassese (2003) at 592 (emphasis added).
[45] Record vol 1 p 24 para 38 (emphasis added).
[46] Record vol 1 p 29 para 48.2 (emphasis added).

ICC Act, the Rome Statute and the Constitution,[47] and invoking powers of investigation and prosecution under pre-existing law. The issue of pleading aside, this attempt is not supported by academic commentators.[48] Nor is it compatible with principles of judicial review.[49]

(2) Prescriptive vs enforcement jurisdiction

29. Enforcement jurisdiction (which includes police powers to investigate),[50] the respondents correctly[51] accept,[52] is qualified by section 4(3)(c). In an attempt to avoid the terminus of this concession (namely that the presence requirement of section 4(3)(c) impacts on the initiation of an investigation), the respondents apparently sought to contend that only certain aspects of enforcement jurisdiction (e.g. arrest and trial) are "conditioned" by section 4(3)(c).

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[47] The respondents' reliance on the Constitution was limited to sections 179 and 237.

[48] See e.g. Chenwi *op cit* at 34: "[t]hese crimes could not be prosecuted domestically prior to the Act because of the absence of legislation").

[49] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 27. In this case the legal basis for the cause of action was clear (the investigation was requested "under the ICC Act": Record vol 1 p 29 para 50.1; Record vol 1 p 30 para 52; Record vol 1 p 36 para 67; Record vol 1 p 37 para 70), but it was subsequently repudiated (contending suddenly that the express qualification in section 4(3) of the ICC Act did not apply). It is compliance with the ICC Act and the Rome Statute "which are central to the [now respondents'] case" (Record vol 1 p 40 para 7). The respondents expressly relied on the proposition that "through the ICC Act, Parliament ... has provided the means by which international crimes are to be investigated and prosecuted in South Africa" (Record vol 1 p 49 para 98). Subsequently the respondents suddenly purport to resort to the SAPS Act (see e.g. Record vol 14 p 1348 para 140).

[50] Coughlan *et al* "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalisation" (2007) 6 *CJLT* 32, invoked by the respondents *a quo*.

[51] Chenwi *op cit* at 35: "The exercise of 'enforcement' jurisdiction is conditioned on the presence of the accused in South Africa."

[52] Para 61 of the respondents' heads of argument in the Supreme Court of Appeal.

30. But once it is accepted, as the respondents did,[53] that the power to arrest is conditioned by the presence requirement in section 4(3)(c), there is no in-principle basis for seeking to differentiate the power to investigate. Like the power to arrest, the power to investigate equally forms part of a State's pre-trial enforcement jurisdiction.[54]

31. In the same context, the respondents placed considerable reliance on what they presented as state practice suggesting that investigations *in absentia* "abound".[55] A "dispassionate analysis"[56] demonstrates that this is not the position. Even such states as have legislated for investigations (or other forms of adjudicative jurisdiction) *in absentia* – something the South African legislature has <u>not</u> done – constitute a small minority.[57]

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[53] The concession in paras 61 is repeated in para 67 of the respondents' heads of argument in the Supreme Court of Appeal. In the latter paragraph reliance was placed on a separate joint opinion in *Democratic Republic of Congo v Belgium* ("the *Arrest Warrant* case"). But this does not assist the respondents. The *dictum* deals with extraterritorial evidence-gathering with the permission and at the discretion of the States concerned. In any event, the dealing with jurisdiction in the *Arrest Warrant* case "was *obiter* ... and reveal[s] a deeply divided court" (Crawford *Brownlie's Principles of Public International Law* 8th ed (Oxford University Press, Oxford 2012) at 469).

[54] Even to the extent that a factual distinction may be sought to be drawn between arrest and investigation on the basis that arrest requires the presence of the accused while an investigation does not necessarily requires presence, this is contrary to the facts of this case. The dispositive facts demonstrate that extensive investigations in Zimbabwe are required. A limited investigation in South Africa's territory is incapable of establishing a case capable of being responsibly brought in a South African court (even if any of the persons under investigation enters South Africa and thus establishes jurisdiction of a South African court).

[55] Paras 83-97 of the respondents' heads of argument *a quo*.

[56] Kreβ *op cit* at 573.

[57] *Ibid.* It is significant to note that most of the (very few) countries whose practice suggests some inclination to exercise adjudicative jurisdiction *in absentia* are civil law countries. Their procedural tradition is alien to that of South Africa, *inter alia* because a court is vested with inquisitorial powers.

32. Accordingly, a correct understanding of limited (or conditional) "universal jurisdiction" and the logical consequence of conceding that section 4(3)(c) restricts pre-trial enforcement jurisdiction dispose of the respondents' case.

(3) The respondents' reliance on and disavowal of section 4(3) of the ICC Act

33. Throughout the proceedings, the respondents have placed significant reliance on the ICC Act and in particular section 4(3)(c). It is for this reason that universal jurisdiction became the main focus of the High Court and Supreme Court of Appeal's judgments.

34. It is indeed the presence criterion in section 4(3)(c) of the ICC Act which formed the crux of the case. This is because the respondents were driven to argue that the presence requirement should be relaxed to only require "anticipated presence" for the initiation of an investigation.[58] Nonetheless, it appears that the respondents simultaneously sought to disavow any reliance on section 4(3)(c). This on the basis that section 4 deals only with *courts'* jurisdiction. Nevertheless, the respondents contended that the only issue before the Supreme Court of Appeal was "whether it is competent for the SAPS and the NPA to investigate a crime against humanity *outside* South Africa by someone over whom the South African courts do not yet have jurisdiction in terms of s 4(3) of the ICC Act, but who is, from time to time,

[58] Record vol 1 pp 110-117 paras 52-69.

present in South Africa *and thus subject to the jurisdiction of the South African courts, in terms of s 4(3)(c).*"[59]

35. Accordingly, the presence requirement for courts' jurisdiction is an essential element of the respondents' case (and argument) – however much they resist this rational terminus.

(4) The ICC Act's silence on the *investigation* of international crimes

36. The respondents correctly accept that – while they requested an investigation, and did so on the basis of the ICC Act itself – the ICC Act is in fact silent on the investigation of international crimes. As mentioned, the ICC Act gives effect to the Rome Statute, which (in turn) codifies core crimes. One of these crimes is the crime of torture. This application concerns allegations of torture. Torture is the subject of a bespoke international convention: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT). South Africa is a party to CAT, which is not reciprocal in nature.[60] CAT "is therefore *de jure* applicable to the present case."[61]

[59] Para 27 of the respondents heads of argument in the Supreme Court of Appeal (emphases added).
[60] Thus the fact that Zimbabwe is not a party to CAT does not affect CAT's application. CAT has been domesticated pursuant to the Prevention and Combating of Torture of Persons Act 13 of 2013.
[61] Werle *op cit* at 671.

37. CAT is clear on the investigation of torture. It contemplates a first ("preliminary") investigation following upon the presence of the person in a State party's jurisdiction.[62]

38. Thus the respondents' tendentious argument (that the silence of the ICC Act coupled with the silence of international customary law somehow supports the reading-in of a duty to investigate *in absentia*, in anticipation of a perpetrator's presence) is contradicted by express treaty law.[63] The reading-in to which the respondents are driven is accordingly legally impermissible.[64]

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[62] Article 6 of CAT provides

> "1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. ...
> 2. Such State shall immediately make a preliminary inquiry into the facts" (emphasis added).

Article 12 further confirms that investigations *in anticipando* into extraterritorial torture are quite contrary to what CAT contemplates. It provides

> "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction" (emphasis added). [62]

See also article 13, which deals with "the right to complain to, and to have [a torture] case ... examined". Article 13 clarifies that state parties are required to ensure this right in respect of a person "who alleges he has been subjected to torture in any territory under [the State Party's] jurisdiction". Nothing in CAT contemplates a duty to investigate torture perpetrated beyond a state party's territory. Indeed, all other relevant provisions confirm CAT's territorially-bound nature. See e.g. article 2(1) (requiring "legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [a State Party's] jurisdiction"); article 7(1) (dealing with the prosecution of torture by the "competent authorities" of "[t]he State Party in the territory under whose jurisdiction a person ... is found in the cases contemplated in Article 5"; and article 16 (requiring an "undertak[ing] to prevent in any territory under [a State Party's] jurisdiction other acts of cruel, inhuman or degrading treatment or punishment").

[63] As *The AU-EU Expert Report on the Principle of Universal Jurisdiction* (Council of the European Union, 16 April 2009) at para 9 confirms, "numerous treaties oblige state parties to empower their criminal justice systems to exercise universal jurisdiction over the crimes defined in those treaties, *although this obligation extends only to the exercise of such jurisdiction when a suspect is subsequently present in the territory of the forum state*" (emphasis added, footnotes omitted). The respondents' reasoning is also contradicted by this Court's judgment in *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at para 39. The respondents incorrectly place the emphasis on the *absence* of a prohibitive rule of international law. Principle and precedent requires that "the emphasis lies the other way around". As is indeed the position under (domestic) public law

(5) The reliance on German law

39. As SAPS' founding affidavit in this Court shows,[65] the Supreme Court of Appeal erred in effectively transplanting the German law into South Africa.[66] Apart from the submissions advanced in SAPS' founding affidavit,[67] the reliance on German law is anomalous for three further reasons.

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generally, "a State must find a recognised basis in international law for" intervening in the affairs of a sovereign state (Crawford *Brownlie's Principles of Public International Law* 8th ed (Oxford University Press, Oxford 2012) at 458). The argument (and, indeed, the respondents' entire approach) is also discordant with para 44 of *Kaunda*:

> "There may be special circumstances where the laws of a State are applicable to nationals beyond the State's borders, but only if the application of the law does not interfere with the sovereignty of other States. For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign State and its officials meet not only the requirements of the foreign State's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of State sovereignty. Section 7(2) should not be construed as imposing a positive obligation on government to do this" (reference omitted).

[64] Kreβ *op cit* at 563:

> "The resulting principle is as follows: to the extent that a title to *prescriptive* universal criminal jurisdiction exists under customary international law, a state that has exercised *this* title must be presumed to have the jurisdiction title to *adjudicate* the matter by way of investigation and, where applicable, prosecution and trial, unless *this* title is restricted by an applicable international rule stating the contrary. The application of this principle is important for the controversy on the so-called universal criminal jurisdiction *in absentia*, as will be shown subsequently."

[65] Record vol 13 pp 1292-1295 paras 83-92. The analysis is not repeated here. We respectfully ask that the founding affidavit be read also for this purpose.

[66] It did so without asking the two basic questions: whether the rule has proven satisfactory in its country of origin; and whether it will work in the country where it is proposed to adopt it (Zweigert *et al An Introduction to Comparative Law* 3rd ed (Clarendon Press, Oxford 1998) at 17). The German experience demonstrates that investigations *in absentia* have often been refused by the prosecutor, and that it is open to the prosecutor to do so readily. This shows that applying a rule of mandatory investigations *in absentia* whenever there is a mere possibility of presence will impose an unworkable duty on law-enforcement authorities in South Africa.

[67] Noting *inter alia* the need to apply caution when applying comparative law. As this Court held in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para 26

> "the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management. ... one should not resort to ... [a foreign] approach without recognising that our society and our criminal justice system differ from those in North America. ... It would be equally unrealistic not to recognise that the administration of our whole criminal justice system, including the law enforcement and correctional agencies, are under severe stress at the moment."

40. First, *in absentia* investigations are the exception to the rule.[68] But even under German law such investigations may be terminated at will. One of the particular reasons for doing so is if "no suspect is, or is expected to be, resident in Germany".[69] German law accordingly does not recognise an inexorable duty to investigate *in absentia* – as the Supreme Court of Appeal imposed on SAPS in purported reliance on German law. What the Supreme Court of Appeal erroneously did in reliance on German law was to convert a basis for a *discretionary termination* of an investigation (under German law) into a basis for *imposing a duty* to investigate (under South African law).

41. Second, the Supreme Court of Appeal turned *residency* into *presence*. It is clear that *presence* is not the operative concept in the German statute's text. The German provision applies the word "resident". "Present" means something else.[70] Presence is inherently more fleeting. Residency is the criterion legislated in section 4(3)(b) of the South African ICC Act. Section 4(3)(b) further qualifies this criterion by requiring residency *in the ordinary course*.[71] Thus, in its effect, the Supreme Court of Appeal's approach to section 4(3)(c) collapses section 4(3)(c) and section 4(3)(b), and

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[68] Kreβ *op cit* at 573.
[69] Section 153f(2) of the German Code of Criminal Procedure.
[70] *Tick v Braude* 1973 (1) SA 462 (T) at 468: "A person cannot be said to reside at a place where he is temporarily visiting, nor does he cease to reside at a place even though he may be temporarily absent on certain occasions and for short periods." Garner (ed) *Black's Law Dictionary* 7th ed (West Group, St Paul Minn 1999) s.v. "residence": "1. The act or fact of living in a given place for some time."
[71] Section 4(3)(b) refers to a person who "is not a South African citizen but is ordinarily resident in the Republic". The requirement of "ordinary residence" "means something more than mere temporary residence in a place" (*Ex parte Eksteen* 1938 WLD 223 at 224*fin*).

in doing so turns "is ordinarily" into "prospectively". This is not a permissible exercise of legal interpretation[72] or legal transplant.

42. Third, German law applies the complementary principle in a manner which gives priority to international (as opposed to domestic) proceedings. This means that a German prosecutor will not readily initiate an investigation, but will instead defer to the ICC or another state to exercise its jurisdiction. Deferring to the ICC is criticised by some commentators as inconsistent with the Rome Statute.[73] Deferring to another state is supported as an appropriate (horizontal) application of the complementarity principle.[74] This approach has solidified into "a principle of customary international law supplementing the principle of universal jurisdiction over crimes under international law."[75]

43. These three features render the position under German law an extraordinary choice for a legal transplant. But if this position is indeed one to be transplanted into South African law, it cannot be done selectively. Legal transplants cannot be done *in vacuo* either. They must reflect on the rationale of the transplanted rule, and give effect to it. The rationale for the position is *inter alia* that priority should be given to international

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[72] It is established that the legislature intends different things when using the descriptions "resident", "ordinarily resident", and "permanently resident" (*Biro v Minister of Interior* 1957 (1) SA 240 (T)). The difference in meaning between "is ordinarily resident" and "is present" in sections 4(3)(b) and (c) should similarly be respected. They cannot be abrogated by resort to German law.

[73] Adopting the position under German law (which displays a feature which is inconsistent with the Rome Statute) is accordingly contrary to section 233 of the Constitution. Section 233 requires a court to prefer an interpretation of a statute which is consistent with international law.

[74] *Inter alia* on the basis of procedural economy (Kreβ *op cit* at 576).

[75] Kreβ *op cit* at 576.

proceedings "because ... they have a greater ability to acquire evidence through criminal cooperation than universal jurisdiction prosecutions" before a national court in a third-party state.[76]

44. If the German approach is to be transplanted (as the Supreme Court of Appeal did), SAPS should accordingly be afforded the benefit of the application of the complementarity principle – whether on a horizontal or vertical basis. But the Supreme Court of Appeal's partial legal transplant does not allow this.

(6) No unqualified duty to prosecute

45. The present setting is a curious one in which to fashion a flat mandamus. Neither the Rome Statute nor the ICC Act imposes an absolute duty to prosecute.[77] The general prosecutorial discretion applicable under South African law subsists.[78]

46. As has correctly been pointed out in the context of the High Court's judgment,[79] the imposition of an unqualified obligation to investigate and prosecute all international crimes goes "well beyond" what this Court held in

[76] Langer "Universal Jurisdiction as Janus-Faced" (2013) 11 *J Int Criminal Justice* 737 at 756.
[77] Gevers *op cit* at 301.
[78] See e.g. *The AU-EU Expert Report on the Principle of Universal Jurisdiction* (Council of the European Union, 16 April 2009) at para 23(vi). The report notes that even a country like Germany, which notionally imposes a duty to prosecute, recognises a prosecutorial discretion – which has been exercised "on numerous occasions" against prosecuting. Other countries, too, have exercised a "prosecutorial discretion not to bring proceedings" "in many cases" (*id* at para 26).
[79] Gevers *op cit* at 300.

S v Basson.[80] In *Basson* it was held that international law imposes a duty to punish crimes against humanity, like apartheid – a crime committed not by another state, or agents of another state, in the territory of the other state; but by the apartheid government in South Africa.[81]

47. The authorities to which this Court referred in *Basson* make it further clear that the international law "obligation" is not absolute. It is qualified as a "possible" obligation;[82] or a right (without necessarily imposing a duty).[83] Even in the context of crimes against humanity, the duty to prosecute is only imposed under certain circumstances – and is generally regarded as resting only on the state where the crime was committed.[84]

48. Giving effect to the international-law position, the ICC Act clearly contemplates two further qualifications. The first is the jurisdictional connecting factors. The second is the modality of possibility.[85] The ICC Act further contemplates that the governing principle of the Rome Statute (the subsidiarity principle) be observed.[86] This principle tempers universal

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[80] 2005 (1) SA 171 (CC).
[81] *Id* at para 37.
[82] Dugard "Is the Truth and Reconciliation Process Compatible with International Law? An unanswered question" (1997) 13 *SA Journal on Human Rights* 258 at 263.
[83] The decision by the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Dusko Tadic* (1996) 35 ILM 32 at 72.
[84] Werle *op cit* at 669. Nsereko "The ICC and complementarity in principle" (2013) *Leiden Journal of International Law* 427 at 428 points out that Article 1 of the Rome Statute does not impose an absolute duty on states to exercise their criminal jurisdiction. Indeed, section 3(e) of the ICC Act recognises that the prosecuting authority may decline to prosecute a person.
[85] Section 3(d) of the ICC Act, reinforcing the *lex non cogit ad impossibilia* principle.
[86] Section 3(d).

jurisdiction in the interests of state sovereignty.[87] Every investigation into conduct of officials of another State detracts from the sovereignty of that state.[88] Where an investigation is unlikely to have the intended result (i.e. establishing, beyond reasonable doubt, in proceedings before a South African court the perpetration of a core crime), the investigation is a disproportionate violation of sovereignty.[89]

49. Whether an investigation leading to a prosecutable case was possible formed the crux of the pleadings.[90] Expert evidence was presented by SAPS (as respondent before the High Court) demonstrating that investigating a prosecutable case was not possible, especially not if the investigation were to be limited to South African territory.[91] This evidence was not properly met

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[87] Phillipe "The principles of universal jurisdiction and complementarity" (2006) 88 *International Review of the Red Cross* 375 at 380, 388.

[88] Nsereko *op cit* at 436.

[89] The presumption of innocence is codified in the Rome Statute itself (article 66(2)).

[90] The respondents insisted in their supplementary founding affidavit that their dossier constituted a prosecutable case (Record vol 2 p 165 para 24; Record vol 2 p 165 para 25.1; Record vol 2 p 166 para 25.3; Record vol 2 p 171 para 30.7; Record vol 2 p 173 para 33). Thus the respondents accepted the need to establish a prosecutable case. But if the docket truly established a prosecutable case, the request for an investigation was obviously redundant. Yet the respondents sought to criticise SAPS for applying a test applicable to a prosecutable case (or court-directed investigation) when it was the respondents who contended that their docket satisfied that standards. But even this projected criticism by the respondents is unwarranted. The Commissioner inquired whether the dossier was sufficient to *enable* a court-directed investigation, not whether it constituted such an investigation – in other words, what was considered was whether the dossier established a prosecutable case (Record vol 2 p 196 para 6; Record vol 2 p 198 para 10.1; Record vol 13 p 1272 paras 33-34).

[91] The evidence established *inter alia* the following: "[i]n order to conduct a thorough, court-directed investigation, the identity of the deponent and the contents of the statements need to be verified. For obvious reasons, this cannot be done through the utilisation of existing legitimate channels, thus hampering the collection of the required evidence" (Record vol 4 p 444 lines 1-5); "the reinvestigation of the docket would not only require interviews with the relevant deponents, but would also require verification and corroboration for the allegations, which verification/corroboration could in the main only be obtained in Zimbabwe, with the assistance of the Zimbabwean authorities" (Record vol 4 p 457 lines 2-5); a new investigation would have to start "from scratch" (Record vol 6 p 616 para 14); "[a] large number of extensive investigations would have to be conducted" (Record vol 6 p 627

in reply by the current respondents.[92] Nor could it be. It is well known that "a state whose investigations are predicated upon an exercise of universal jurisdiction will only rarely be in possession of sufficient evidence to successfully conduct a trial."[93] "[T]he failure of universality cases 'to achieve the standard of proof for a criminal conviction'" is a notorious fact.[94]

50. Accordingly, both as a matter of law[95] and fact[96] the Supreme Court of Appeal erred in construing a duty to prosecute. It follows that it erroneously deduced from this non-existing duty an obligation to investigate Zimbabwean officials in the circumstances of this case.

(7) <u>The Supreme Court of Appeal's legal rule: a mere prospect of presence requires the initiation of an investigation</u>

51. Yet the Supreme Court of Appeal imposed such a duty. It held that "[i]f there is *a prospect* of a perpetrator's presence" "an investigation should ...

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lines 18-19); the crimes involved are extremely difficult to prove and become more so with the passage of time (Record vol 6 p 597 para 11); "[a]ll the investigations [set out in Brigadier Marion's affidavit] would have to be conducted in Zimbabwe" (Record vol 6 p 620 lines 14-16), "and access would have to be had to official Zimbabwean Government documents and institutions" (Record vol 6 p 625 lines 20-21); it "would not be practical to expect SAPS to conduct such an extensive and time-consuming investigation, even if it had a legal basis upon which to do so" (Record vol 6 p 627 lines 23-25); the extensive publication of the identities of key individuals liable to be investigated "seriously compromise[s] any investigation" (Record vol 6 p 631 line 1); and the docket did not disclose any basis for implicating the command structure, and only one document suggested this – but speculatively (Record vol 6 p 633 lines 1-5).

[92] Brigadier Marion's evidence was only met thematically, advancing argumentative assertions and repeating the respondents' reliance on the dossier's contents (see e.g. Record vol 9 pp paras 29-46).

[93] Kreß *op cit* at 574. The current case does not involve an investigation in preparation for an extradition or legal assistance to the *forum conveniens*. The respondents requested an investigation to enable a prosecution in a South African court.

[94] Chenwi *op cit* at 39.

[95] *Ibid.*

[96] The demonstrable impossibility of mustering a prosecutable case means that no duty to prosecute exists.

be initiated."[97] Formulated negatively, SAPS is only excluded from the duty to initiate an investigation when there is "no prospect of a perpetrator ever being within [South Africa]".[98] This absolute test for investigations is inconsistent with the ICC Act, which qualifies the related duty to prosecute not only with reference to actual presence, but also by the operative words "as far as possible".[99] Thus the Supreme Court of Appeal imposed a more burdensome standard on investigative authorities than the ICC Act imposes on prosecuting authorities. This is contrary to the general recognition that "the discretion whether to investigate [i]s even more *open-ended* than the decision to prosecute."[100]

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[97] Record vol 13 p 1246 para 66 (emphasis added).

[98] *Ibid.* A third formulation as it appears from the judgment is: when "the possibility of future visits" "[can]not [be] discount[ed] entirely" (Record vol 13 p 1247 para 67).

[99] Section 3(d) of the ICC Act.

[100] *R (on the application of Corner House Research) v Director of Serious Fraud Office (BAE Systems plc)* [2008] 4 All ER 927 at para 51:

> "That the width of this prosecutorial discretion is wide cannot be doubted. Although the decision of a prosecutor is susceptible to judicial review, the courts have traditionally been most reluctant to interfere with the exercise of his discretion (see e.g. the citation of domestic authority in *Sharma v Antoine* [2006] UKPC 57 at [14], [2007] 4 LRC 10 at [14], [2007] 1 WLR 780). Recently Laws LJ said that it would 'take a wholly exceptional case on its legal merits to justify a judicial review' of the Director's decision to investigate or not (*R (on the application of Bermingham) v Director of the Serious Fraud Office, Bermingham v Govt of the USA* [2006] EWHC 200 (Admin) at [63]-[64], [2006] 3 All ER 239 at [63]-[64], [2007] QB 727). He described the discretion whether to investigate as even more *open-ended* than the decision to prosecute."

In *Corner House* the Queen's Bench reviewed and set aside a decision to discontinue a criminal investigation (of a British company) pursuant to an international convention. Significantly, the court of first instance remitted the decision to the decision-maker to reconsider it (it did not substitute the decision, as the Supreme Court of Appeal did). On appeal to the House of Lords, the Queen's Bench's decision was overruled. At para 30 of its judgment, the House of Lords (per Lord Bingham, unanimous) confirmed that "only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator". At para 31 Lord Bingham provided the threefold rationale underlying this legal principle:

> "first, ... the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage of *Matalulu*'s case):

52. That the standard established by the Supreme Court of Appeal (a mere "prospect of a perpetrator's presence") is far too expansive is demonstrated by the respondents' own understanding of it.[101] They seem to suggest that the Supreme Court of Appeal's standard is met whenever "it is not inconceivable that alleged perpetrators ... may visit in future".[102] Thus, whenever presence is conceivable, investigations must be instituted *in absentia*. On this basis SAPS is obliged to commence investigations into allegations of torture in countries like China and Russia,[103] because it is

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'the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.'

Thirdly, the powers are conferred in very broad and unprescriptive terms."

Lord Bingham's approach resonates strongly with this Court's caselaw, and demonstrates the application of universally-accepted principles in a closely comparable scenario. *Corner House* is relevant for yet further reasons. The judgment demonstrates that *bona fide* views regarding matters of principle and evidentiary weight may legitimately differ. This bears not only on the proper remedy (if any): remittal. It also demonstrates that the emphasis placed by the courts below on some officers' views on the docket's weight is misplaced. It was for the decision-maker to make an independent assessment on this aspect, and views may legitimately differ on this issue. *Corner House* also demonstrates how highest courts in comparable jurisdictions deal with lower courts' judgments laying down (by design or result) a new legal rule (which, as here, is "novel and unsupported by authority"), and which detracts for the true legal test: whether the office-bearer "made a decision outside the lawful bounds of the discretion entrusted to him by Parliament" (*id* at para 38). As in *Corner House*, *in casu* the court *a quo* evaluated the decision against a novel standard, unsupported by precedent or statute.

[101] Demonstrably they are unable to suggest that the Supreme Court of Appeal's test is one of reasonable possibility or is otherwise qualified (see e.g. Record vol 14 p 1349 para 144: referring to "the [i.e. unqualified] possibility of future presence"). From the three formulations in the Supreme Court of Appeal's judgment, it is clear that what was established was indeed a standard intended to compel SAPS to investigate whenever the possibility of future presence cannot be discounted "entirely".

[102] Record vol 14 pp 1345-1346 para 130, suggesting speculatively that they may have visited South Africa in the intervening period since the institution of the proceedings.

[103] As is well-known, China and Russia are BRICS countries often criticised for practices constituting core crimes. For instance, Amnesty International reports that "[m]odern justice in Russia adheres to the principle that 'confession is the queen of evidence'. Even if all other evidence contradicts the confession of the accused, the very confession obtained under torture, which is apparent to everyone – the defendant will still be convicted" (http://www.amnesty.org/en/news/torture-russia-torture-traditional-component-proof-2013-06-27). On the Supreme Court of Appeal's approach, there is no reason not to (and thus no justification for declining to) initiate an investigation into torture in Russia.

conceivable that an official of one of the other BRICS countries (of which South Africa is an active member) may visit South Africa in future. A test which imposes this burden on SAPS is self-evidently inappropriate.

(8) Section 4(3) of the ICC Act: Interaction between investigation, prosecution and trial

53. Legal powers are conferred for a purpose, and empowering provisions must accordingly be interpreted purposively.[104] The power to investigate is conferred for the purpose of preparing a prosecutable case.[105] A prosecutable case is, in turn, intended to be presented in a court of competent jurisdiction.[106] The exercise of investigative authority is accordingly "logically antecedent" to "the exercise of jurisdiction by a domestic

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The same applies to all countries with a poor human rights record and whose officials' potential visit to South Africa within the unforeseeable future cannot be discounted entirely. (We say "unforeseeable", because the respondents expressly invoke the fact that core crimes have no prescription period.)

[104] See e.g. *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) at para 52.

[105] The respondents' own acknowledgment of the clear nexus between investigations and prosecutions is apparent from their decision to submit the dossier to the NPA, invoking section 5(1) of the ICC Act, and citing the NDPP as first respondent in their review application culminating in this application (Record vol 1 pp 19-20 paras 20 and 21). The relief was claimed "in the first instance" against South Africa's prosecuting authority (Record vol 1 p 20 para 22). The second respondent cited in the High Court was the Head of the National Prosecuting Authority's Priority Crimes Litigation Unit (Record vol 1 p 20 para 23), by virtue of his authority to "manage and direct the investigation and prosecution of [core] crimes" (Record vol 1 p 21 para 25.2, both emphases in the original). The entire application was premised on an alleged "refus[al] and/or fail[ure] to comply with the ICC Act" itself (see e.g. Record vol 1 p 22 para 27). As the respondents' founding affidavit clarifies, the review application rests on the Rome Statute, the ICC Act and the Constitution (Record vol 1 p 26 para 43). The request was moreover directed to the NPA, "the prosecuting arm of government" (Record vol 1 p 29 para 50.1). The founding papers never invoked any investigative powers under any other legislation. Subsequently, the respondents repudiate the premise of their case by seeking to disavow reliance on the ICC Act and the Rome Statute. Their pleaded case expressly "[ac]knowledge[d] ... the ICC Act's requirement of 'presence'" (Record vol 1 p 25 para 40), and accepted the need for "the ICC Act's requirement of 'presence' [to] be satisfied" (Record vol 2 p 186 para 73).

[106] As the respondents' founding affidavit acknowledges, "the primary objective of [the ICC Act] is to secure a prosecution" (Record vol 1 p 44 para 94). A prosecution can only be secured in a court of competent jurisdiction.

court."[107] For it to be exercised rationally and purposively, it must be capable of resulting in a prosecution.[108]

54. Section 4(3) of the ICC Act sets out in what circumstances a South African court will be a court of competent jurisdiction in which a prosecution may be pursued. To be a court of competent jurisdiction, a connecting factor must exist. The relevant connecting factor applicable to this case is contained in section 4(3)(c). It requires "that [the] person, after the commission of the crime, [be] present in the territory of the Republic". Thus, contrary to the Supreme Court of Appeal's judgment, a connecting factor does not exist whenever there is merely "a prospect of a perpetrator's presence".

55. To require SAPS to open an investigation and to continue to assemble a prosecutable case in circumstances where the jurisdictional fact for prosecuting that case in court is not established, runs counter to the ICC Act.[109] The legislature did not intend this wasteful exercise,[110] least of all

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[107] As the Supreme Court of Appeal could not avoid putting it (Record vol 13 p 1218 para 5).
[108] Record vol 13 p 1288 para 73.
[109] As the respondents' founding affidavit itself accepted, section 4(3) of the ICC Act "confers on a South African court jurisdiction" and "[a]ccordingly, under the ICC Act the prosecuting authority and the police are empowered to initiate an investigation and prosecution" (Record vol 1 p 42 para 84).
[110] Section 3(d) spells out that one of the objects of the ICC Act is "to enable, as far as possible and in accordance with the principle of complementarity as reflected in article 1 of the Statute, the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances". Thus Parliament intended that which is possible and appropriately prosecutable *in a South African court.*

since scarcity of resources is a reality required to be taken into account.[111] Nor did Parliament, or the Rome Statute's drafters,[112] intend imposing a duty on South African authorities to act as primary investigators, prosecutors and adjudicators of international crime.[113] In enacting the ICC Act, Parliament accordingly did not impose an itinerant duty of investigation – not on SAPS,[114] nor on the NPA.[115]

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[111] Section 17B(b)(iii) of the SAPS Act requires that Chapter 6A be applied with due recognition of "the need to ensure that the Directorate is equipped with the appropriate human and financial resources to perform its functions". It is this Chapter which is invoked by the respondents.

[112] By giving states with the required nexus primary jurisdiction, the Rome Statute intended "to capitalise on the advantages of domestic jurisdiction: respect for national sovereignty, familiarity of those involved in the proceedings with the local laws and procedures, existence of a legal infrastructure, cost-effectiveness, and expeditiousness" (Nsereko *op cit* at 429).

[113] By specifically subjecting the ICC Act to the governing principle of the Rome Statute (the principle of subsidiarity), it explicitly gives effect to the universal recognition that "states having a territorial or personal link to the crime in question should be given priority over states acting only on the basis of universality. Universal jurisdiction comes into play only if no state having a link to the crime is willing or able to prosecute" (Werle *op cit* at 668). See also Langer "Universal Jurisdiction as Janus-Faced" (2013) 11 *J Int Criminal Justice* 737 at 755.

[114] Chapter 6A of the SAPS Act deals – to the exclusion of any other provision of the SAPS Act – with the mandate of the Directorate for Priority Crime Investigation. As mentioned, the respondents rely on this Chapter to found an obligation on SAPS to investigate a crime regardless of where it occurred. Section 17B(a) elevates "serious organised crime, serious commercial crime and serious corruption", to the exclusion of international crimes. Section 17D(1) provides that the functions of the Directorate is *inter alia* to investigate national priority offences, which in the opinion of the national Head of the Directorate need to be addressed by the Directorate. Thus the initiation of an investigation into international crimes is subject to the discretion of the Directorate. The discretion must be exercised with due regard to human and financial resources and the particular emphasis on serious organised crime, serious commercial crime and serious corruption (all of which are *national* crimes).

[115] As regards the powers of the head of the PCLU, the respondents relied on section 27 of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"). In terms of section 27, a Director's powers "to manage and direct the investigation and prosecution of crimes contemplated in" the ICC Act is – insofar as investigation is concerned – exercised by requesting the Provincial Commissioner of SAPS to exercise his discretion to assist in an investigation (section 24(7) of the NPA Act). The Provincial Commissioner's duty to comply is not absolute, but limited to that which is "practicable" (*ibid*). This power is further subject to two qualifications. The first is contained in section 24(1): the Director's power to "supervise, direct and co-ordinate specific investigations" is subject to "any other law". In the context of torture, his power to request assistance in the form of a Provincial Commissioner of SAPS initiating an investigation is accordingly subject to the Prevention and Combating of Torture of Persons Act 13 of 2013 (and CAT, which Act 13 of 2013 domesticates), the *lex specialis* on torture. Under CAT, an investigation into torture follows upon an accused person's presence in a member State. The second qualification is that the section 24(7) powers are only exercisable "[w]here a Director is considering the institution or conducting of a prosecution" (section 24(7)(a)). A prosecution can only be instituted or conducted in a South African court. A South African court only has jurisdiction in the circumstances of this case when the accused is present in the Republic.

56. As the appeal record demonstrates, an investigation into a core crime – which, by definition, is of a systemic nature;[116] requires proof of a particular state of mind;[117] and must, of course, be established beyond reasonable doubt[118] – is a herculean task.[119] To impose a duty on SAPS to embark on such an exercise whenever there is merely "a prospect of a perpetrator's presence" imposes an unworkable and unrealistic duty on SAPS.[120] Unsurprisingly, imposing such task on SAPS is not supported by commentators.[121]

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[116] Indeed, the respondents' application was premised on the "widespread and systemic scale [of torture] by Zimbabwean officials (Record vol 1 p 24 para 37; Record vol 1 p 31 para 53).

[117] Article 30 of the Rome Statute.

[118] Article 66(3) of the Rome Statute.

[119] Significantly, *The AU-EU Expert Report on the Principle of Universal Jurisdiction* (Council of the European Union, 16 April 2009) at p 16 recognises that "[t]he practical problems likely to be faced by AU Member States in exercising universal jurisdiction will probably be the same as those encountered by EU Member States, but, given the relative capacity of AU Member States, it stands to reason that the impediment will be greater." At para 25, the *Expert Report* specifically identifies – as first problem – "the difficulty of collecting evidence in relation to crimes committed abroad". It observes that "[p]rospective evidentiary problems are a major reason why few prosecutors in EU Member States have initiated proceedings on the basis of universal jurisdiction to date."

[120] *Cf* Cassese *International Criminal Law* (Oxford University Press, Oxford 2003) at 289-290: "If the accused never enters the country where the court is located, or is not extradited to that country, a situation that appears most likely, the judge will end up investigating hundreds of complaints about which he can do nothing". In a context where criminal proceedings are not conducted on an inquisitorial basis, it is of course not the judge who investigates, but the police. Translated to a South African context, Cassese's caution is accordingly that SAPS should not be required to investigate complex crimes when the connecting factors are absent. Were such an extraordinary position – as indeed established by the impugned judgment – to obtain, South Africa will "pose as prosecutor for all mankind", a position to which it "has neither an obligation … nor any entitlement under international law" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium* at para 81, per Judge Bula-Bula). This would mean that all international crimes would have to be investigated by SAPS, because there is always at least "a prospect of a perpetrator's presence". But in such circumstances no realistic prospect would ever exist of a perpetrator's presence, because all perpetrators would know that South Africa is perhaps the only country in the world whose appeal court construed an absolute duty to investigate a prosecutable case *in absentia*. Under such circumstances perpetrators' presence is a very remote prospect indeed. Nonetheless, SAPS is required to investigate – however remote the prospect of presence, and must do so in perpetuity (because, as the respondents insist, core crimes do not prescribe). This legal terminus imposes an interminable duty on SAPS, and is clearly not what Parliament intended.

[121] See e.g. Gevers *op cit* at 306, commenting thus on the High Court's judgment:

57. Interpreting the Rome Statute (and, in turn, the ICC Act) to impose unrealistic burdens on SAPS is not a legally-competent interpretation. Least of all in the teeth of article 15 and article 53.[122] These provisions deal with the ICC's own prosecutor, who is also vested with investigatory functions.[123] They clarify that the ICC's own investigating authority only has the function to investigate in circumstances under which the ICC itself has jurisdiction.[124]

> "Looking forward, the decision does provide the South African police and prosecutors with extensive authority to investigate international crimes the world over, without setting out any mechanism for determining which crimes should be selected. In their written arguments the applicants [the current respondents] had raised the concept of 'anticipated presence' as a mechanism for selecting potential investigations from the numerous prospects – this concept was borrowed from the equivalent German legislation – but the court chose not to consider it (See Salvatore Zappalà 'The German Federal Prosecutor's decision not to prosecute a former Uzbek minister' (2006) 4 *JICL* 602). Arguably this tricky matter will have to be decided as a matter of policy by the NPA, in conjunction with the exercise of a wide measure of prosecutorial discretion, the ICC Act itself being silent on this point."

The ICC Act expressly does <u>not</u> follow its German counterpart. The latter adopts a nexus based on residency or expected residency – not a mere "prospect of presence". Nonetheless, the Supreme Court of Appeal imposed a duty to investigate whenever there is merely "a prospect of a perpetrator's presence". Despite the statutory scheme which expressly allows for prosecutorial discretion to be exercised already in the investigation stage, the Supreme Court of Appeal's judgment abrogated any form of discretion (it found that "no reason" would exist not to initiate an investigation).

[122] Article 15(1) provides that "[t]he prosecutor may initiate investigations *proprio motu* on the basis of information on crimes <u>within the jurisdiction of the Court</u>" (emphasis added). Article 53(1)(a) provides that

> "... [i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether [t]he information available to the Prosecutor provides a reasonable basis to believe that a crime <u>within the jurisdiction of the Court</u> has been or is being committed" (emphasis added).

[123] This is an important aspect of the ICC regime (and the convention establishing it, the Rome Statute) which impacts on the interpretation of section 4 of the South African ICC Act. Under the Rome Statute, the power to investigate and prosecute a core crime is inseparable. They vest in the same repository: the ICC prosecutor. The ICC prosecutor's powers (including the power to investigate) exist only within the confines of the ICC's own jurisdiction. Because the ICC Act seeks to give effect to the Rome Statute, section 4 cannot be interpreted in a manner which attenuates the close relationship between the power to investigate, prosecute and adjudicate. The President's designation, under section 13(1)(c) of the NPA Act, of the HPCLU as authority to investigate and prosecute core crimes confirms that the attempt to disaggregate the jurisdiction to investigate and prosecute is untenable.

[124] For the ICC prosecutor to initiate (or continue with) an investigation without satisfying himself of the ICC's ultimate jurisdiction "[w]ould clearly be an abuse of his or her powers and a squandering of the Court's resources" (Nsereko *op cit* at 435). Investigations "are inevitably intrusive and derogating to a state's sovereignty" (*id* at 436) and should therefore be embarked upon only when the court would have jurisdiction. There is no reason in logic to interpret and apply the ICC Act in a manner which results in a similar abuse and waste on a national level.

Imposing a more extensive investigatory burden has no utility, and is clearly not what the Rome Statute intends.

58. Interpreting the ICC Act to impose a duty to investigate beyond a court's jurisdiction to try a prosecutable case is thus inconsistent with the Rome Statute. An interpretation which has this result is simultaneously contrary to the ICC Act's own interpretation clause[125] and with the Constitution.[126]

59. There is a further reason why such interpretation is inconsistent with the Constitution. Every police investigation *per se* constitutes the exercise of State coercive power.[127] It inherently infringes the liberty of a person whose cooperation with the investigation is required.[128] Such limitation must be justifiable in terms of section 36 of the Constitution in order to be

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[125] Section 2 of the ICC Act provides

> "In addition to the Constitution and the law, any competent court in the Republic hearing any matter arising from the application of this Act must also consider and, where appropriate, may apply –
> (a) Conventional international law, and in particular the Statute;
> (b) Customary international law; and
> (c) Comparable foreign law."

[126] Section 233 of the Constitution requires courts in imperative terms to interpret national legislation consistently with international law. Section 2 of the ICC Act's recognition of the need to "consider" international law and the Rome Statute must be read with section 233 of the Constitution, which compels courts to adopt a convention-consistent construction.

[127] The respondents accepted this in their heads of argument in the Supreme Court of Appeal, but argued that "provided no coercive enforcement measures are taken on the territory of another State (i.e. arrest or unsanctioned investigations)" "the presence of an accused in South Africa" is "not require[d]" (para 77). The expert evidence presented by SAPS in the High Court demonstrated however that a territorially-bound (i.e. South Africa only) investigation is futile. It cannot result in a prosecutable case. It could only result in a non-prosecutable case and no court in which to prosecute it – because the nexus required by section 4(3)(c) of the ICC Act is absent. There is no utility in a mandamus compelling SAPS to undertake such an investigation.

[128] Section 13(1) of the SAPS Act recognises this. It expressly subjects a SAPS member's powers, duties and functions to the Constitution and requires a SAPS member to have "due regard to the fundamental rights of every person". Even in limiting its investigation to witnesses present in South Africa, SAPS must still conduct an investigation rationally and proportionately to its outcome.

constitutionally valid. An investigation which extends beyond the jurisdiction of a court whose exercise of jurisdiction is the purpose for the investigation is a disproportionate infringement of the right to liberty. An interpretation which renders the ICC Act unconstitutional is not legally viable.

60. In short, for the above reasons, the Supreme Court of Appeal erred in interpreting section 4 of the ICC Act as imposing a duty to investigate where a court does not have jurisdiction to adjudicate.

(9) <u>The Supreme Court of Appeal's approach is contradicted by African Union and European Union experts</u>

61. Significantly, consistent with the evidence, the *AU-EU Expert Report on the Principle of Universal Jurisdiction*[129] identifies the difficulty of obtaining the necessary evidence as a particular problem for states exercising universal jurisdiction.[130] In making recommendations to African and European states, the *Expert Report* nowhere suggested that any investigation *in absentia* is required, practical or to be recommended.[131] Instead, the report recommended the following approach:

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[129] Council of the European Union, 16 April 2009.
[130] *Id* at paras 19 and 25.
[131] *Id* Recommendation 4 instead refers to the institution of criminal proceedings (which in many jurisdictions is understood to include the pre-trial investigation stage) in relation to persons "within their custody or territory". Significantly, Recommendation 6 reiterates the need for states "exercising universal jurisdiction over serious crimes of international concern such as genocide, crimes against humanity, war crimes and torture" to "bear in mind the need to avoid impairing friendly international relations", a matter considered irrelevant (and an extraneous consideration) by the High Court.

> "In prosecuting serious crimes of international concern, states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction, since such crimes, while offending against the international community as a whole by infringing universal values, primarily injure the community where they have been perpetrated and violate not only the rights of the victims but also the general demand for order and security in that community. In addition, it is within the territory of the state of alleged commission that the bulk of the evidence will usually be found."[132]

62. This is not only a matter of practicality and policy, but also one of principle for SAPS. SAPS is responsible for acquitting itself of its constitutional responsibilities to South African society as first priority. The Supreme Court of Appeal's interpretation of the ICC Act requires SAPS to investigate all international crimes in the absence of the suspect if there is only a mere prospect of his or her future presence in South Africa.[133] This restrains SAPS from prioritising South African crimes as the Constitution requires and the *AU-EU Expert Report on the Principle of Universal Jurisdiction* recommends.

63. On any of the above bases, the Supreme Court of Appeal's categorical approach in imposing an absolute duty on SAPS is wrong and requires correction.

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[132] *Id* Recommendation 9.

[133] Or, as the Supreme Court of Appeal also formulated it, if "the possibility of future visits" "[can]not [be] discount[ed] entirely".

E. The relief: The Supreme Court of Appeal erred in substituting the impugned decision *mero motu*

64. The Supreme Court of Appeal substituted for the impugned decision (rejecting a request to investigate the docket) its own decision (directing SAPS to investigate the docket). It did so contrary to (and without regard to) this Court's caselaw; contrary, too, to its own; contrary to the pleadings; and contrary to the Rome Statute itself, not to speak of the Constitution's division of powers.

65. One of the important considerations of legal policy which has been accepted throughout the proceedings by the respondents is that

> "States vest national investigating authorities with a degree of discretion when determining if and how to conduct investigations and prosecutions. As to when an investigation is to be initiated, irrespective of whether it is an international or national crime, each case should be decided on its own merits".[134]

66. This correct recognition *per se* demonstrates that – in its own terms – the order by the Supreme Court of Appeal directing the investigation of the core crimes (as opposed to reconsidering the request to do so) requires correction on appeal to this Court. The Supreme Court of Appeal was in no position to exercise an investigative discretion – and correctly had not been asked to do so.

[134] Para 100 of the respondents' heads of argument *a quo*. As the authorities cited above confirm, it is indeed correct that an investigative and prosecutorial discretion exists.

(1) <u>This Court's approach to substitution</u>

67. This Court has repeatedly cautioned that "a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government".[135] It also held, prior to PAJA, in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* that the general principle under the common law is that courts are reluctant to substitute their decisions for that of a statutorily designated decision-maker.[136]

68. In *Premier, Mpumalanga* this Court unanimously confirmed the common-law position as set out in *Johannesburg City Council v Administrator, Transvaal*.[137] The position comprises two principles:

> "1. The ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.
>
> 2. The Court will depart from the ordinary course in these circumstances:
>
> (i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or

[135] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 48, applied in *inter alia Koyabe v Minister for Home Affairs* 2009 (12) BCLR 1192 (CC) in the context of PAJA's "exceptional circumstances" criterion applicable to the exhaustion of internal remedies.

[136] 1999 (2) SA 91 (CC) at para 50. In the circumstances of that case, the bursaries which formed the subject-matter of the impugned decision expired on 31 December 1995, a mere month after the High Court's judgment and many years prior to the Constitutional Court's judgment. In those circumstances, a remittal would have served no purpose, because "nothing could effectively have been done by the [decision-maker] before the expiration of the bursaries" (*id* at para 52). Hence this Court did not change the High Court's order (which substituted the impugned decision), despite rejecting the High Court's basis for resorting to substitution.

[137] 1969 (2) SA 72 (T) at 76D-G.

functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by the reference back is significant in the context.

(ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to submit to the same jurisdiction again."

69. In applying these principles, this Court held in *Premier, Mpumalanga* that the High Court erred in substituting its decision for the decision-makers. In doing so, the High Court failed to consider sufficiently the fact that the applicable statutory provisions reserved the decision to a particular statutory functionary.[138] The decision was *per se* not a judicial decision, but one "to be taken in the light of a range of considerations".[139] In such circumstances, this Court held, "a court should generally be reluctant to assume the responsibility of exercising a discretion which the Legislature has conferred expressly upon an elected member of the executive branch of government."[140]

(2) Substitution under PAJA

70. PAJA's rationale for in-principle remittal recognises both the doctrine of separation of powers and the reality of courts' institutional disadvantage in

[138] *Id* at para 51.
[139] *Ibid.*
[140] *Ibid.*

assessing facts and exercising specialist, policy-laden discretions.[141] Hence "courts should not substitute their opinions as to what is appropriate for those of the persons in whom the power vests", they should generally limit their intervention to setting aside unlawful administrative action.[142]

71. Going further by substituting the decision, is an extraordinary remedy.[143] It results in one arm of government exercising the power vested in another arm.[144] From a constitutional, institutional and practical perspective, this is inappropriate – hence the strong legal and judicial policy in favour of remittal.[145]

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[141] Wakwa-Mandlana and Plasket "Administrative Law" (2005) *Annual Survey of SA Law* 104 at 128.
[142] *Legal Aid Board v S* 2010 (12) BCLR 1285 (SCA) at para 48.
[143] *Cf* Plasket "Administrative Law" 2009 *Annual Survey of SA Law* 1 at 24 and the authorities there collected.
[144] See e.g. *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board* 2001 (12) BCLR 1239 (C) at 1259E:

> "The purpose of judicial review is to scrutinise the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant function themselves. As a general principle, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision ...".

The same approach is applied by English and Australian courts: *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) at 143h-j; *Attorney-General, New South Wales v Quin* (1990) 93 ALR 1 at 25.
[145] See e.g. *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape* 2007 (6) SA 442 (Ck) at paras 43-47. Plasket J (writing for a unanimous full bench) "sympathise[d] with [the applicant] for the shameful treatment it had endured at the hands of some functionaries in the Provincial Government over a protracted period of time", but held that the court could not substitute the impugned decision. The Full Bench summarised the relevant principles (and authorities underlying them) as follows. First, "[t]he availability of proper and adequate information and the institutional competence of the Court to take the decision for the administrative decision-maker are necessary prerequisites that must be present, apart from 'exceptional circumstances', before a court can legitimately assume an administrative decision-making function" (*id* at para 43). Second, the availability institutional competence and adequate information "is a minimum requirement of rational decision-making", which – in turn – is "a fundamental requirement of the rule of law" (*id* at para 43, citing *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at paras 85-86). Third, in exercising their remedial discretion, courts, too, are constrained by the Constitution to exercise "to act in terms of the rule of law and its principle of legality" (*id* at para 44, citing *S v Mabena* 2007 (1) SACR 482 (SCA) at para 2). Fourth,

72. For this reason, the principle that a court should be slow to assume a discretion which has been statutorily-entrusted to another organ of State has been well-established prior to PAJA.[146] Under PAJA, the position is an *a fortiori* one. It has been summarised thus in *Gauteng Gambling Board v Silverstar Development Ltd*:[147]

(i) "The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depended upon a determination that a case is 'exceptional' as intended in s 8(1)(c)(ii)(aa) of [PAJA]."[148]

(ii) "Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary."[149]

(iii) "How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional

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courts are moreover duty-bound to respect the separation of powers (*id* at para 45). Sixth, the applicable constitutional principles compel courts to remain vigilant not to "intrud[e] ... without justification into the terrain that is reserved for the administrative branch of government" (*id* at para 46). Seventh, the constitutional "restraints on the powers of the courts are universal in democratic societies such as ours and necessarily mean that there are limits on the powers of the courts to repair damage that has been caused by a breakdown in the administrative process" (*id* at para 46). Applying these principles, the court remitted the matter to the MEC to retake the decision within one month after receiving a recommendation from an independent consultant.

[146] *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd* [2013] 1 All SA 526 (SCA) at para 42 (reference omitted).

[147] 2005 (4) SA 67 (SCA).

[148] *Id* at para 28.

[149] *Ibid.*

imperative that administrative action must be lawful, reasonable and procedurally fair."[150]

(iv) "There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties."[151]

(v) The mere fact that a court may be "in as good a position as the [decision-maker] to grant or refuse [a request]" does not *per se* warrant non-remittal.[152]

(vi) "An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by its experience, and by its access to sources of relevant information and expertise to make the right decision. The Court typically has none of these advantages and is required to recognise its own limitations."[153]

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[150] *Ibid.*

[151] *Ibid*, quoting Hefer AP in *Commissioner, Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA) at para 14. Hefer AP held that "considerations of fairness also enters the picture" and quoted *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G and cited *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council* (*Johannesburg Administration*) 1999 (1) SA 104 (SCA) at 109F-G. These authorities must however be considered and applied with due regard for this Court's judgment in *Premier, Mpumalanga* (*supra*) and the separation of powers principle.

[152] *Ibid*, quoting Hefer AP in *Commissioner, Competition Commission* (*supra*) at para 15. Hefer AP approved Baxter *Administrative Law* (Juta & Co, Cape Town 1984) at 684, stating "[t]he mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers ... ; sometimes, however, fairness to the applicant may demand that the Court should take such a view." Hefer AP added a proviso: fairness may, in a given case, require substitution – but only if the court is able to make the decision itself.

[153] *Gauteng Gambling Board* (*supra*) at para 29, citing *Bato Star Fishing* (*Pty*) *Ltd v Minister of Environmental Affairs* (*supra*) at paras 46-49 and *Minister of Environmental Affairs and Tourism v Phambili Fisheries* (*Pty*) *Ltd* 2003 (6) SA 407 (SCA) at paras 47-50.

(vii) Therefore, "remittal is almost always the prudent and proper course."[154]

73. In the light of these principles, binding on it, we submit – for the reasons set out below – that the Supreme Court of Appeal demonstrably erred by not remitting the decision after setting it aside.

(3) Substitution only in an "exceptional case"

74. The established application of the exceptional circumstances criterion by the Supreme Court of Appeal itself demonstrates that the judgment *a quo* is inconsistent with section 8(1)(c)(ii)(aa) of PAJA.

75. For instance, in *Makhanya NO v Goede Wellington Boerdery*, the Supreme Court of Appeal reiterated what it held in *Gauteng Gambling Board*: "[i]t must be emphasised that an administrative decision-making body is generally best equipped by its composition, experience, and access to sources and expertise to make the right decision."[155] *Makhanya* also confirmed that it is well established that the mere fact that a court considers itself as qualified to

[154] *Ibid.* Applying these principles, the High Court encapsulated the governing principles thus in *Vodacom (Pty) Ltd v Nelson Mandela Bay Municipality* 2012 (3) SA 240 (ECP) at para 18: "a court, having set aside a defective or unfair administrative act, may take the decision itself only if the circumstances are so exceptional as to warrant departure from the normal practice of remittal and if the applicant has established that it is just and equitable to do so."
[155] [2013] 1 All SA 526 (SCA) at para 44.

take the decision in place of the administrator is not sufficient for it to do so.[156] On this basis it was concluded that

> "A case is exceptional when, on a proper consideration of the relevant facts, a court is persuaded that a decision to exercise the power in question should not be left to the designated functionary."[157]

76. It is accordingly incumbent upon a court to find a compelling factual basis for divesting another arm of government of its constitutional and statutory power and function, transferring that power and function to the judiciary (across the separation of powers divide), and exercising a discretion itself – to the exclusion of the functionary vested with constitutional and statutory power.

77. In *Makhanya* exceptional circumstances warranting non-referral were found to exist. This was because there was only one decision which could have been made, and the board to which the decision would have to be remitted to make that decision (which was a foregone conclusion) was disestablished.[158] The Supreme Court of Appeal held that procedural fairness is a factor which

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[156] *Ibid*, citing pre-existing Supreme Court of Appeal authority: *Gauteng Gambling Board v Silverstar Development Ltd* (*supra*); *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* (*supra*); and *Commissioner, Competition Commission v General Council of the Bar of South Africa* (*supra*).

[157] *Supra* at para 43 (references omitted). The paragraph continues by referring to the need to consider established principles, like those in *Johannesburg City Council* (*supra*), when applying the "exceptional case" criterion, informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. It held that non-remittal is indicated when remittal "will operate procedurally unfairly." We deal with the application of these consideration below.

[158] *Id* at para 46.

may tilt the inquiry in favour of an applicant.[159] But this is only the situation "provided [the Court] is able to [substitute the decision]".[160]

78. This important qualification must be applied with due recognition of this Court's caselaw. A court must firstly "give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field."[161] Secondly, a court should itself verify whether an applicant for judicial review has "shown ... exceptional circumstances".[162] Thirdly, a court is not at large to yield to exasperation.[163]

79. Summarily intervening by substituting a decision is accordingly contrary both to this Court's caselaw and to the Supreme Court of Appeal's own prior precedent (based on this Court's binding pronouncements). As we shall show, without referring to any of these authorities, and without finding that

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[159] *Makhanya* (*supra*) at para 44, citing *Commissioner, Competition Commission* (*supra*) at para 15.
[160] *Ibid.*
[161] *Bato Star* (*supra*) at para 48.
[162] *Koyabe* (*supra*) at para 73. At para 74 the Court concluded – applying the same criterion ("exceptional circumstances" under section 7(2) of PAJA, which is clearly materially identical to "exceptional cases" under section 8(1)(c)(ii)(aa) of PAJA) – that the High Court was correct in its "conclusion that no exceptional circumstances existed to warrant an exemption from the duty to exhaust internal remedies."
[163] O'Regan *Helen Suzman Memorial Lecture* (Johannesburg, 22 November 2011):

> "By and large, courts in South Africa have avoided a jurisprudence of exasperation. Government action is scrutinised to ensure that it is lawful, rational and in compliance with the Bill of Rights as the Constitution requires. Beyond these parameters, government must be, and is, free to act. It is important for courts to continue to be disciplined in this regard despite criticism that may come not only from government, but also from other sources. ... Instead of a jurisprudence of exasperation, we should insist on a jurisprudence of accountability that ensures that the responsibility for government remains that of the legislature and executive, but insists that those two arms of government must account for their conduct, where required to do so, through the courts."

an exceptional case existed, the Supreme Court of Appeal substituted the impugned decision. This violates the separation of powers doctrine.[164]

(4) The Supreme Court of Appeal's departure from the pleadings, and *mero motu* substitution

80. Both the notice of motion[165] and the amended notice of motion[166] requested the ordinary relief: reviewing and setting aside the impugned decision, and remitting it to the decision-maker to reconsider. The founding affidavit further clarified that what was sought is a "mandamus directing the respondents to appropriately reconsider the decision within a reasonable period of time".[167] It requested "an order remitting the decision with clear directions" on certain matters.[168] The replying affidavit, in turn, confirmed that the respondents seek the relief set out in the amended notice of motion.[169]

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[164] *Kimberley Junior School v Head, Northern Cape Education Department* 2010 (1) SA 217 (SCA) at para 19; Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 681. The doctrine constitutes an important pillar of the Constitution (*South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) at paras 21-26). It finds particular application in the exercise of courts' remedial discretion in judicial reviews (*Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape* 2007 (6) SA 442 (Ck) at para 45).
[165] Record vol 1 p 2 prayers 1 and 3.
[166] Record vol 1 pp 7-8 prayers 1 and 4.
[167] Record vol 1 p 26 para 44.
[168] Record vol 1 p 54 para 111.
[169] Record vol 9 p 965 para 262.

81. Despite this aspect being raised squarely in the founding affidavit in this Court, the respondents have not attempted to plead *any* basis on which a substitution of the impugned decision is warranted. Correctly so.

82. Firstly, there can be no basis for claiming bias.[170] (The decision-maker responsible for the impugned decision, Acting Commissioner Williams, has long since ceased acting.[171] But even his bias was not established.)

83. Secondly, a remittal would not be futile. As the Supreme Court of Appeal's judgment itself recognises, there are complex considerations which require analysis. The outcome of the value judgment, to be made by the authority vested with the necessary discretion by Parliament, is far from a foregone conclusion. This the respondents recognised in their notice of motion and amended notice of motion, which did not seek to introduce a prayer for substitution but instead persisted in requesting a remittal.

84. Neither the High Court nor the Supreme Court of Appeal provided any reasoning for granting different relief.[172] Without any analysis justifying a departure from binding precedent and section 8(1)(c)(ii)(aa) of PAJA, the

[170] Neither the founding affidavit nor the supplementary founding affidavit asserts any bias on the part of any of the respondents before the High Court.

[171] As this Court recorded, "until June 2012 Commissioner Mkhwanazi was the acting national commissioner. On 12 June 2012 the current national commissioner, Commissioner Phiyega, was appointed" (*Minister of Police v Premier, Western Cape* 2014 (1) SA 1 (CC) at para 5 fn 5).

[172] Paragraph 3 and paragraph 5 of the High Court's order are inconsistent. Paragraph 3 remits the request to investigate the dossier to the then first, second and fourth respondents to be "assessed". Paragraph 5 directs the Priority Investigating Unit to do the necessary investigation – to the extent "practicable and lawful" (which itself requires an assessment, of course). The order is at Record vol 12 pp 1196-1198 (and also at Record vol 12 pp 1202-1204).

Supreme Court of Appeal simply substituted the impugned decision in its order. This despite recognising that at least the following issues require further consideration: methods of gathering information; Zimbabwe's sovereignty; the potential initiation of a prosecution by Zimbabwean authorities; extradition; comity; subsidiarity; the anticipated presence of the perpetrators; and resource allocation.[173] All these when the situation in Zimbabwe is a dynamic one. Thus, the Supreme Court of Appeal itself recognised that the decision is far from a foregone conclusion.

85. Thirdly, there is no residual basis for suggesting any procedural unfairness to the respondents should the ordinary order of remittal be made. Remittal itself will make no material contribution to the passage of time already incurred.[174] The respondents rightly do not suggest otherwise. There is no suggestion that another month or two would constitute a delay which *per se* redounds to procedural unfairness for the respondents.[175] Instead, the criterion of procedural unfairness operates in favour of the applicants. This is because by making an order against the applicant which was not sought by the respondents, not pleaded, not argued and not ventilated in any manner,

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[173] Record vol 13 p 1247 para 68.

[174] See e.g. *Johannesburg City Council* (*supra*) at 77D-E, where Hiemstra J observed that a three-year delay was not sufficient to justify a substitution, because the loss of time was inevitable (due to the nature of the application). Hiemstra J held that even if there have been an inordinate delay, a substitution is only warranted if "in addition, the result [is] a foregone conclusion." He concluded that a remittal was required.

[175] It is true that a substantial delay ensued after the respondents requested the NPA to institute an investigation. This delay was not suggested to warrant a substitution of the impugned decision. Invoking the delays, the respondents requested a remittal (Record vol 1 p 54 para 111), but without stipulating a time within which the decision had to be retaken.

the Supreme Court of Appeal did not provide the applicant with a fair hearing on the order made *mero motu* against it.

(5) Remittal in the context of the Rome Statute

86. Finally, the pre-eminence of remittal as relief following a successful review of a decision not to initiate an investigation or prosecution is underscored by the Rome Statute itself. Article 53(3)(a) provides that

> "... the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 [not to proceed with investigation] or 2 [not to proceed with a prosecution] ... and may request the Prosecutor to reconsider that decision."

87. Thus the Rome Statute, which is a particularly significant instrument in the application of the ICC Act, further confirms that the ordinary relief is most appropriate in the circumstances of this case.

F. Conclusion

88. For the reasons set out above, we submit that the correct position is as follows:

(i) SAPS is not under an absolute duty to investigate every international crime simply because a suspect's future presence in South Africa "[can]not [be] discount[ed] entirely";

(ii) once a perpetrator is present in South Africa, SAPS is authorised to arrest the perpetrator on the basis of any information at its disposal, and to initiate an investigation leading to a prosecution before a South African court (or in any other appropriate national or international forum);

(iii) the concern that South Africa not become a "safe haven" for perpetrators of core crimes, on which the respondents placed strong reliance in their founding affidavit,[176] does not militate in favour of an investigation *in absentia* – because presence is required in a country before it can become a "safe haven";

(iv) SAPS is vested with a discretion to consider whether there is a "real prospect"[177] of a successful prosecution in a South African court despite the absence of the suspect from South Africa at the time an investigation is contemplated;

(v) SAPS is entitled to request the NDPP to designate a Director of Public Prosecutions to investigate a core crime in terms of the NPA Act;

(vi) it is constitutionally inappropriate for a court to usurp – summarily (without a request to do so, without a case being made out in support

[176] Record vol 1 p 17 para 17.1; Record vol 1 p 25 para 39; Record vol 1 p 48 para 96.8.
[177] It is this standard which the respondents invoked in their founding affidavit (Record vol 1 p 48 para 96.9).

of it, and without legal argument) – SAPS' (and the NDPP's) power by directing SAPS to initiate an investigation itself;[178] and

(vii) on the facts of this case, conclusive evidence (applying the proper test to disputes of fact on motion) demonstrated that there was no realistic prospect of assembling a prosecutable case, and that no viable investigation *in absentia* was indicated.

89. We accordingly submit that the Supreme Court of Appeal erred in its reasoning, findings, and order. We accordingly ask that leave to appeal be granted and that the appeal be upheld. Even were this Court to conclude differently on (vii) above, the Supreme Court of Appeal's judgment holding the contrary as to (i) and its order contrary to (vi) cannot stand – a remittal is the appropriate relief, and the Supreme Court of Appeal's judgment and order should be corrected accordingly.

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Chambers, Cape Town

10 April 2014

[178] SAPS squarely raised the defect in the Supreme Court of Appeal's order in its founding affidavit in this Court (Record vol 13 p 1280 para 56). The respondents did not attempt to defend this defect (Record vol 14 p 1345 para 127).

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT02/2014

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

SAPS' LIST OF AUTHORITIES

Caselaw

1. *Attorney-General, New South Wales v Quin* (1990) 93 ALR 1 at 25.

2. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at paras 27 and 46-49.

3. *Biro v Minister of Interior* 1957 (1) SA 240 (T).

4. *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) at 143h-j.

5. *Concerned Land Claimants' Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association* 2007 (2) SA 531 (CC) at para 21.

6. *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) at para 52.

7. *Ex parte Eksteen* 1938 WLD 223 at 224*fin.*

8. *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) at paras 28-29.

9. *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at para 58ff.

10. *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 29.

11. *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape* 2007 (6) SA 442 (Ck) at paras 43-47.

12. *Johannesburg City Council v Administrator, Transvaal* 1999 (2) SA 91 (CC) at 109F-G.

13. *Kimberley Junior School v Head, Northern Cape Education Department* 2010 (1) SA 217 (SCA) para 19.

14. *Legal Aid Board v S* 2010 (12) BCLR 1285 (SCA) at para 48.

15. *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC) at para 26.

16. *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd* [2013] 1 ALL SA 526 (SCA) at para 42.

17. *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board* 2001 (12) BCLR 1239 (C) at 1259E.

18. *Minister of Police v Premier, Western Cape* 2014 (1) SA 1 (CC) at para 5 fn 5.

19. *MM v MN* 2013 (4) SA 415 (CC) at paras 52-53.

20. *National Treasury v Opposition To Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 47.

21. *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at para 55.

22. *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E-635C.

23. *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at paras 50-52.

24. *Prosecutor v Dusko Tadic* (1996) 35 ILM 32 at 72.

25. *R (on the application of Corner House Research) v Director of Serious Fraud Office (BAE Systems plc)* [2008] 4 All ER 927 at paras 30, 31, 38 and 51.

26. *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para 26.

27. *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) at paras 21-26.

28. *S v Basson* 2005 (1) SA 171 (CC) at para 37.

29. *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at para 8.

30. *Tick v Braude* 1973 (1) SA 462 (T) at 468.

Miscellaneous materials

31. *AU-EU Expert Report on the Principle of Universal Jurisdiction* Council of the European Union, 16 April 2009.

32. Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 681.

33. Cassese *International Criminal Law* (Oxford University Press, Oxford 2003) at 289-290.

34. Chenwi "Universal jurisdiction and South Africa's perspective on the investigation of international crimes" (2014) 131 *SALJ* 27 at 27, 31, 32, 34, 35, 39.

35. Coughlan *et al* "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalisation" (2007) 6 *CJLT* 32.

36. Crawford *Brownlie's Principles of Public International Law* 8th ed (Oxford University Press, Oxford 2012) at 688.

37. Dugard "Is the Truth and Reconciliation Process Compatible with International Law? An unanswered question" (1997) 13 *SA Journal on Human Rights* 258 at 263.

38. Du Plessis "South Africa's International Criminal Court Act" (2008) *ISS Paper* 172 at 4.

39. Garner (ed) *Black's Law Dictionary* 7th ed (West Group, St Paul Minn 1999) s.v. "residence".

40. Gevers "Southern African Litigation Centre v National Director of Public Prosecutions" (2013) 130 *SALJ* 293 at 300, 301, 306, 309.

41. Jennings *Oppenheim's International Law* 9th ed (Oxford University Press, Oxford 1996) vol 1 at 476.

42. Kreβ "Universal Jurisdiction over International Crimes and the Institut de Droit International" (2006) 4 *J Int Criminal Justice* 561 at 561, 563, 572, 372, 573, 574, 676.

43. Langer "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes" (2011) 105 *Am J Int'l L* 1 at 30, 37-38, 40

44. Langer "Universal Jurisdiction as Janus-Faced" (2013) 11 *J Int Criminal Justice* 737 at 737, 750, 755, 756.

45. Nsereko "The ICC and complementarity in principle" (2013) *Leiden Journal of International Law* 427 at 428, 429, 435, 436.

46. Phillipe "The principles of universal jurisdiction and complementarity" (2006) 88 *International Review of the Red Cross* 375 at 380, 388.

47. Plasket "Administrative Law" 2009 *Annual Survey of SA Law* 1 at 24.

48. Wakwa-Mandlana and Plasket "Administrative Law" (2005) *Annual Survey of SA Law* 104 at 128.

49. Werle "Torture in Zimbabwe under Scrutiny in South Africa" (2013) 11 *J Int Criminal Justice* 659 at 666, 668, 669, 671, 672.

50. Zweigert *et al An Introduction to Comparative Law* 3rd ed (Clarendon Press, Oxford 1998) at 17.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT02/2014

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

SAPS' PRACTICE NOTE

Nature of the proceedings

1. This is an application in terms of Rule 19 of the Rules of this Court for leave to appeal against a judgment and orders by the Supreme Court of Appeal, handed down on 27 November 2013.

2. Pursuant to directions issued by the Chief Justice, the parties are required to address both the application for leave to appeal and the merits of the appeal in written and oral argument.

Issues to be argued

3. Three issues arise for determination:

   (a) whether leave to appeal should be granted;

   (b) whether the Supreme Court of Appeal's judgment on the merits is correct, requiring SAPS to investigate crimes under the ICC Act whenever a mere possibility exists of a suspect's future presence in South Africa (in its own words, requiring an investigation when a suspect's future presence "[can]not [be] discount[ed] entirely"); and

   (c) whether the Supreme Court of Appeal correctly granted exceptional relief: substituting the impugned decision, without remitting the decision to the decision-maker (as is ordinarily the appropriate remedy), despite

      (i) the relief not being sought by the respondents, no case being made for it, and no argument being presented or invited on it; and

      (ii) the relief predetermining the manner in which SAPS is required to exercise its discretion whether to initiate an investigation.

4. SAPS' position on the above issues is summarised below (under the heading "Summary of SAPS' main argument").

Relevant portions of the record

5. The most important parts of the record are cited in the written submissions and statements of facts.

6. In a letter to the respondents, SAPS suggested that the only parts of the Supreme Court of Appeal record which should form part of the record before this Court are the following items:[1]

(i) *Record vol 1 pp 1-56: Notice of motion & respondents' founding affidavit*

(ii) Record vol 2 pp 83-135: Respondents' memorandum to NPA

(iii) *Record vol 2 pp 155-205: Respondents' supplementary founding affidavit & its first two annexures*

(iv) Record vol 4 pp 443-445: SAPS' letter to NDPP, dated 29 May 2009

(v) *Record vol 4 pp 455-457: Sen Sup Bester's affidavit*

(vi) *Record vol 5 pp 459-561: Acting Commissioner of SAPS' affidavit*

(vii) Record vol 6 pp 567-572: HDPCI (L-G Dramat)'s affidavit

(viii) *Record vol 6 pp 591-638: Brig Marion's affidavit*

(ix) *Record vol 6 pp 650-663: Mag Gen Jacobs' affidavit*

(x) Record vol 7 pp 664-734: Acting NDPP (Mpshe)'s affidavit

(xi) Record vol 8 pp 780-854: NDPP (Simelane)'s affidavit

(xii) Record vol 8 pp 860-868: Annexures "MS4" and "MS5" to NDPP (Simelane)'s affidavit

(xiii) *Record vol 9 pp 882-965: Respondents' replying affidavit*

(xiv) Record vol 11 pp 1062-1073: Annexure "RCM8" to Macadam's affidavit

[1] The references to the record reflected in (i)-(xxi) have subsequently been updated to reflect the record as subsequently prepared and filed before this Court.

(xv) *Record vol 12 pp 1104-1208: High Court judgments*

(xvi) *Record vol 13 pp 1211-1251: Supreme Court of Appeal judgment*

(xvii) *Record vol 13 pp 1258-1302: SAPS' founding affidavit in this Court*

(xviii) *Record vol 14 pp 1303-1359: Respondents' opposing affidavit in this Court*

(xix) Record vol 13 pp 1252-1254: Chief Justice's directions dated 3 February 2014

(xx) *Record vol 14 pp 1377-1388: SAPS' statement of facts*

(xxi) *Record vol 14 pp 1389-1402: Respondents' statement of facts*

7. The parties could not reach agreement on the contents of the record. The respondents required SAPS to reproduce the record before the Supreme Court of Appeal. The italicised items are of *particular importance*, and the items which are also underlined are *essential reading*.

Estimated duration of the argument

8. 2½ hours *in toto*.

Summary of SAPS' main argument

9. SAPS challenges the Supreme Court of Appeal's judgment on two separate bases.

10. Firstly, as regards the merits, SAPS submits that the Supreme Court of Appeal erred in law in establishing what amounts to an absolute legal rule to the effect that SAPS must in all circumstances investigate core crimes, even when there is no existing nexus (as envisaged by the ICC Act) with South Africa, and even in the absence of the suspect. The effect of the Supreme Court of Appeal's judgment is that *whenever there is a mere (i.e. a not-entirely-discountable) prospect that the perpetrator of an international crime may in future be present in South Africa, SAPS must investigate the alleged crime in the suspect's absence.*

11. As a result, an extreme variant of absolute universal jurisdiction has been adopted by the Supreme Court of Appeal, imposing a duty on SAPS which exists under no comparable jurisdiction. It goes well beyond what this Court contemplated in *S v Basson*.[2]

12. In arriving at this legal result, the Supreme Court of Appeal not only erred in applying and transplanting the position it construed to be the position under German law, but erred in its assessment of the evidence. It failed to apply the established principle governing factual disputes in motion proceedings.

13. Secondly, as regards the relief, SAPS submits that the Supreme Court of Appeal erred in two respects:

    (a) in *mero motu* substituting its decision for that of SAPS; and

[2] 2005 (1) SA 171 (CC).

(b) in granting extraordinary relief (substitution, instead of remittal) in circumstances where

- it was not sought;
- no case was made out for it;
- no argument was presented on it; and
- no submissions or debate were invited on it by the Supreme Court of Appeal.

Main authorities on which SAPS will rely

(i) *AU-EU Expert Report on the Principle of Universal Jurisdiction* Council of the European Union, 16 April 2009

(ii) *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at paras 27 and 46-49

(iii) *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) at paras 28-29

(iv) *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at paras 39 and 44

(v) Langer "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes" (2011) 105 *Am J Int'l L* 1 at 30, 37-38

(vi) *Makhanya NO v Goede Wellington Boerdery* [2013] 1 All SA 526 (SCA) at paras 43-46

(vii) *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at paras 50-52

(viii) *R (on the application of Corner House Research) v Director of Serious Fraud Office (BAE Systems plc)* [2008] 4 All ER 927 at paras 30, 31, 38 and 51

(ix) *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para 26

(x) *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at para 8

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