

THE CONSTITUTIONAL COURT OF THE REPUBLIC
OF SOUTH AFRICA

CASE NO: 315/16

IN THE MATTER BETWEEN:

THE STATE

THE FIRST APPLICANT

THE NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

THE SECOND APPLICANT

AND

HENRY EMOMOTIMI OKAH



RESPONDENT'S SUBMISSION

CONTENTS

THE ESSENCE OF THE APPEAL	2
THE FACTS	4
THE SCA'S <i>RATIO</i>	4
THE DEFINITION OF A "SPECIFIED OFFENSE"	5
Introduction	5
The ordinary meaning of the language	5
The context of the definition	6
The incongruous consequences of the SCA's interpretation	7
South Africa's duties under international law	8

Conclusion	11
THE REQUIREMENTS FOR LEAVE TO APPEAL	11
Condonation	12
PRAYER	12

THE ESSENCE OF THE APPEAL

- 1 The Respondent had been convicted in the High Court, Johannesburg on thirteen counts of contraventions of Act 33 of 2004, Protection of Constitutional Democracy against Terrorist and Related Activities Act. Counts 1 – 12 emanated from the Wari car bombing¹ of 15 March 2010 and the Abuja car bombings² of 1 October 2010. Count 13 emanated from threats to South African Companies in Nigeria made at the cells of the Johannesburg Court. Count 13 does not form part of this appeal.

- 2 The Supreme Court of Appeal overturned the Respondents conviction on Counts 1, 3, 5 and 7 on the basis that the South African Courts only have extra-territorial jurisdiction in terms of Section 15(1) of the Act in relation to the financing of the offences set out in paragraph (a) of the definition of a “specified offense”.³

- 3 The Respondent supports this interpretation.

- 4.1 Section 15 of the Act deals with Jurisdiction in respect of offences.

- 4.2 A South African court “has jurisdiction in respect of any specified offense as defined in paragraph (a) of the definition of “specified offense” if –
 - (a) “The accused was arrested in the territory of the Republic”.⁴

¹ Counts 1,3,5,7,9 and 11.

² Counts 2,4,6,8,10 and 12.

³ SCA judgement par 43.

⁴ Section 15(1)(a).

- 4.3 Section 15(1)(b) – It is submitted that this section will confer jurisdiction upon a South African Court where a specified offence had occurred in (a) South Africa⁵ or on or at any of the places described in subsection (ii) and (b) it had to be committed by a citizen of the Republic or person ordinarily resident in the Republic⁶ and (c) against South African interests⁷ and (d) with the intent to compel the Republic to act or refrain from acting.⁸
5. In Section 1(1) of the Act a “specified offence” is defined, “with reference to section 4, 14 (as it relates to section 4), and 23 means –
- (a) the offence of terrorism referred to in Section 2, an offence associated or connected with terrorist activities referred to in section 3, a Convention offence or an offence referred to in Section 13 or 14 (in as it relates to the aforementioned sections); or
 - (b) Any activity outside the Republic which constitutes an offence under the law of another state or which would have constituted an offence as referred to in paragraph (a), had that activity taken place within South Africa”. The Supreme Court of Appeal did not pronounce on the circumstances when it would find application.⁹
6. Section 4 of the Act deals with offences associated or connected with financing of specified offences. It is respectfully submitted that section 15(1) bestowed jurisdiction on the trial court only in respect of counts 9 and 10 as the definition of specified offence with reference to section 4 and 14 (in as far as it relates to Section 4) restricts its application to the financing of specified offences.

THE FACTS

7. The Respondent, at the hearing of the appeal, accepted the factual findings of the trial court.¹⁰

⁵ Section 15(1)(b)(i).

⁶ Section 15(1)(b)(iii).

⁷ Section 15(1)(b)(iv)-(viii).

⁸ Section 15(1)(b)(viii).

⁹ SCA judgement par 38.

¹⁰ SCA judgement par 26.

THE SUPREME COURT OF APPEALS *RATIO*

8. The Supreme Court of Appeal found "It follows that the definition of 'specified offence' provides for two categories of offences, namely, (1) the financing of an offence listed in paragraph (a) of the definition, i.e. an offence in terms of the Act wherever committed and (ii) the financing of an activity outside the Republic described in paragraph (b) of the definition, i.e. one which constituted an offence under the law of another state that would have constituted an offence in terms of the Act had that activity taken place in the Republic. Section 15(1) caters only for extra-territorial jurisdiction in relation to (i) above."¹¹
9. "... Extra-territorial jurisdiction in respect of offences in terms of the Act, other than financing thereof, are provided for in s15(2)."¹²
10. As none of the offences in counts 1 to 12 affected South African interests, s15(2) does not provide for extra-territorial jurisdiction in this case.¹³
11. When dealing with counts 1,3,5 and 7 the Supreme court of appeal held "every act committed by the appellant which constituted those offences as set out in the indictment, was committed by him outside of the Republic of South Africa. None of the counts set out at the beginning of this paragraph involve the financing of offences".¹⁴
12. "The provisions of s15(4) which deals with conspiracy and incitement . . . are not applicable. . . because none of the offences envisaged in that section occurred within South Africa. There is no compelling evidence of a conspiracy or incitement here to commit the offences in question."¹⁵

The Definition of a specified offense.

¹¹ SCA judgement para 38.

¹² SCA judgement par 40.

¹³ SCA judgement par 41.

¹⁴ SCA judgement par 43.

¹⁵ SCA judgement par 44.

13. It is respectfully submitted that : “Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document”.¹⁶
14. It is respectfully submitted that the Legislature saw fit to define – “specified offence” as found in the definition section to be read in conjunction with Section 4, 14 and 23.
15. Terrorism (s2), Terrorist activities (s3), convention offences (s4-10), hoax offences (s13) , threat and conspiracy (s14) are specified in paragraph (a) of the definition of “specified offence” in as far as it relates to s4, s14 (in as far as it relates to s4) and s23.
16. Section 11 (harbouring or concealment of persons committing specified offences) specifically refers to paragraph (a) of the definition of a specified offence.
17. Section 4 and 11 are the only sections that create offences referred to as “specified offences”. Had the Legislature intended to include section 11 and 15 in the definition of “specified offence” it would have done so.

¹⁶ NATAL JOINT MUNICIPAL FUND V ENDUMENI MUNICIPALITY 2012 (4) SA 593 (SCA) at [18].

18. Sections 4(1)(a) – (i) deal with property, financial or other services and economic support for the purpose of terrorist activities. Section 14 does not deal with “specified offences” whatsoever, but the legislature saw fit to include it in the definition. Section 23 fits perfectly into the scheme of section 4 in that it deals with property used in connection with terrorism, which would which would fall foul of section 4 of the Act.
19. Had the Legislature intended the interpretation the applicant proposes, the words “with reference to section 4, 14 (in as far as it relates to section 4) and 23...” would not have formed part of the definition at all.

THE CONTEXT OF THE DEFINITION:

- 20.1 “explosive or other lethal device” makes specific reference to section 5 and 13. The device described in section 6(d) which is likely to destroy the fixed platform is not defined and must be excluded from the definition of “explosive or other lethal device”
- 20.2 “Entity” is defined with reference to section 3, 4 and 14 (in as far as it relates to the aforementioned sections). It is respectfully submitted that, like the definition of specified offense, it limits the definition to the crimes mentioned in those sections. “Entity” does not however feature in the section 14 of the act.
- 20.3 Similarly “explosive” is defined as referred to in Act 15 of 2003, Explosives Act and limited to section 5 and 13. It does not refer to the device/substance in section 6(d) of the Act.
- 21.1 It is respectfully submitted that the applicant’s submission in paragraph 24 cannot be correct. “Property” is defined in section 1 to mean: “money, or any other movable, immovable, corporeal or incorporeal thing, and is under any rights, privileges, claims and securities and any intent therein and all proceeds thereof”. Property is defined without any cross-reference to any sections in which it is used. E.g. section 4, section 12 and section 15 and in the definition of “terrorist activities”.
- 21.2 The fact that the Legislature saw fit to define “substance” in section 13(2) specifically also militates against the Applicant’s interpretation.

The incongruous consequence of the SCA's Judgement.

22. Terrorism is not a universal crime. Genocide¹⁷, Crimes against humanity¹⁸ and war crimes¹⁹ are Universal, as a *ratio iurisdictio* in customary international law provides that certain offences exist for which any nation obtaining personal jurisdiction over a person may prosecute such as piracy, slave trade, torture and genocide.
- 23.1 This honourable court²⁰ accepted that universal jurisdiction is supported in international law subject to the following principles, namely:
- 23.1.1 There must be a substantial or bona fide connection between the subject matter and the source of the jurisdiction;
- 23.1.2 The principle of non-interference in the domestic or territorial jurisdiction of other States should be observed;
- 23.1.3 Elements of accommodation, mutuality and proportionality should be applied.
24. As far as universal crimes, as envisaged in the Rome statute, section 4(3) sets the limits to universal jurisdiction. A South African Court will only have jurisdiction if at least 1 of the connecting factors is present. The accused must be (i) a citizen or ordinarily resident in South Africa or (ii) must be present in South Africa after the commission of the crime or (iii) the crime must have been committed against a citizen of the Republic or a person ordinarily resident in the Republic of South Africa.²¹
25. It is respectfully submitted that the Supreme Court of Appeal had correctly found that section 15(2) of the Act does not apply to a person mentioned in section 15(1). Any offence prosecuted in terms of section 15(2) must affect

¹⁷ Schedule 1 part 1 of Act 27 of 2002 Implementation of the Rome Statute of the International Criminal Court.

¹⁸ Part 2 of Schedule 1 of the Rome Statute.

¹⁹ Part 3 of Schedule 1 of the Rome Statute.

²⁰ National commissioner of the South African Police Service v South African Human Rights Litigation Centre 2015 (1) SA 315 (CC)

²¹ National Commissioner supra [42]

or intend to affect a public body, person or business within the Republic, the person must be found in the republic and the person has not been extradited or no application for extradition had been made.²²

26. Any other interpretation of section 15(2) would mean that there would not have to be a bona fide connection between the Republic and the acts perpetrated. No link based on the passive personality, protective or territorial principles. Such an interpretation would offend the principles of customary international law.
27. Section 11 and 23 had been addressed in paragraph 16, 17 and 18 above.

South Africa's duties under international law.

28. Nowhere in the long title of the Act or the Preamble is fugitives from Justice accused of terrorism mentioned.
29. "*aut dedere aut punire*" means "when appealed to, a state shall either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal".²³
30. According to the international Law Commission Final Report (2014), no determination of the customary international law status of the "*aut dedere aut judicare*" principle has been made yet.
31. It is respectfully submitted that the relationship between the obligation to extradite and an obligation to prosecute falls into two main categories, namely:
 - (i) The obligation to prosecute is triggered by the refusal to extradite after an extradition request has been made; and
 - (ii) An ipso facto obligation to prosecute the universal crimes as set out in the Rome Statute.

²² SCA judgement par 41.

²³ Hugo Grotius, De Iure Belli ac Pacis.

Book II Chapter XXI Section IV: English Translation by Francis W Kelsey. Footnote 425 in the Final report of the International law commission, 2014 on the obligation to extradite or prosecute.

32. Section 6 of the International Convention for the Suppression of Terrorist Bombings, 1999, states as follows:

"Article 6

1. *Each state party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:*
 - (a) *The offence is committed in the territory of the State; or*
 - (b) *The offence is committed on board a vessel flying the flag of the state or an aircraft which is registered under the laws of that state at the time that the offence is committed; or*
 - (c) *The offence is committed by a national of that state.*
 2. *A State Party may also establish its jurisdiction over any such offence when:*
 - (a) *The offence is committed against a national of that state; or*
 - (b) *The offence is committed against a state or government facility of that state abroad, including an embassy or other diplomatic or consular premises of that state; or*
 - (c) *The offence is committed by a stateless person who has his or her habitual residence in the territory of that state; or*
 - (d) *The offence is committed in an attempt to compel that state to do or abstain from doing any act; or*
 - (e) *The offence is committed on board an aircraft which is operated by the Government of that state.*
 3. *Upon ratifying, accepting, approving or acceding to this Convention, each state party shall notify the Secretary General of the United Nations of the jurisdiction it has established in accordance with paragraph 2 under its domestic law. Should any change take place, the State Party concerned shall immediately notify the Secretary General.*
 4. *Each state Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the state parties which have established their jurisdiction in accordance with paragraph 1 or 2."*
33. All the mentioned conventions contain similar provisions.
34. As indicated in paragraph 22 and 23 above, terrorism is not a universal crime, largely because the international community is unable to agree on a

definition of international terrorism²⁴ and the exception some states require with regard to Freedom fighters.²⁵

35. The draft Conventions on International Terrorism requires a Party State who does not extradite a person, to prosecute without exception.
36. In the present case it is common cause that Nigeria, as the “victim state” elected not to apply for extradition of the Respondent.
37. Extradition requires (a) double criminality; (b) no double jeopardy (*non bis in idem*); (c) prosecution only for the crimes specified in the extradition request (speciality) and (d) a guaranteed fair trial.²⁶
38. Section 7.4 of the international Convention for the Suppression of the Financing of Terrorism, 1999, states “Each Party State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the State Parties that have established their jurisdiction in accordance with paragraphs 1 or 2”.
39. Section 6(4) of the OAU Convention on the Prevention and Combating of Terrorism contains a similar provision.
40. The obligation on the “host state” is to establish jurisdiction where the person is not extradited. None of the treaties prescribe any obligation to the “host state” where the “victim state” decides not to request extradition.
- 41.1 Resolution 1566 (2004) in paragraph 2 stresses the *aut dedere aut judicare* principle.

²⁴ Draft Comprehensive Convention on International Terrorism as contained in the 5/10/2016 update of the Centre of Non-proliferation studies.

²⁵ Section 1(5) of the Act.

²⁶ M WATNEY: *A South African Perspective on Mutual legal assistance and extradition in a globalized world*: Potchefstroom Electronic Law Journal [2012] PER 24.

- 41.2 Similarly 2253 (2015) in paragraph 15 also relies on “extradite or prosecute”.
42. The above mentioned resolutions also do not place any obligation on the “host state” where the “victim state” decides not to request extradition.²⁷

CONCLUSION:

43. The Supreme Court of Appeal’s judgement that “it is the legislature’s prerogative to decide to what it would extend the jurisdiction of domestic courts in respect of all terrorist and related activities. It chose to do so in the terms set out above. It chose in its wisdom, to restrict the category to those of financing or assisting in the financing of terrorist activities and those mentioned in section 15(2).²⁸
44. It is submitted that by convicting the respondent on counts 2,4,6,8, 10 and 12, the Abuja bombings, the Court did exercise universal jurisdiction over “terrorist activity” as described in S1(1)(XXV)(a)(i) – (vii), (b)(ii) and (iii) and (c) where no South African interests were at stake.

THE REQUIREMENTS FOR LEAVE TO APPEAL:

45. The Respondent does not agree with paragraphs 45, 46 and 47 of the Applicant’s submissions. It is submitted that the Supreme Court of Appeals’ Judgement does not raise constitutional matters or points of law of general public interest. It is further submitted that it is not in the interests of justice within the meaning of the concept but merely deals with the interpretation of sections of Act 33 of 2004. The Supreme court of Appeal’s interpretation of Section 15 (the jurisdiction clause) is in accordance with the Act. It cannot be read down as any reading down would be inconsistent with the express provisions of the Act.

²⁷ Section 15(2)(c) of the Act is only applicable where South African Interests are affected.

²⁸ SCA judgement para 40.

POINTS OF LAW OF GENERAL IMPORTANCE:

46. The respondent agrees with paragraph 47 of the Applicants submission.

THE INTERESTS OF JUSTICE:

47. The respondent submits that it is in the interests of justice that both parties be heard.

CONDONATION:

- 48.1 Both parties seek condonation. The Respondent seeks Condonation of the late filing of his submissions.
- 48.2 It is respectfully submitted that reasons for the late filing of the submission has been adequately explained in the respondent's affidavits relied upon in the Condonation application.
- 48.3 The respondent has been in custody since October of 2010 and due to financial constraints could only instruct counsel now.

PRAYER:

- 49.1 The Respondent asks that the late filing of the opposition and submissions be condoned.
- 49.2 The respondent asks that the applicants' application for leave to appeal be dismissed.
-



MARIUS VAN HUYSSTEEN

McMENAMIN VAN HUYSSTEEN AND BOTES INC

528 JORISSEN STREET

SUNNYSIDE

PRETORIA

(012) 344 0525

(012) 344 2086

REF:M VAN HUYSSTEEN/MV5815

Advocate JP Marais

Centaur house

Lynnwood Glen

Pretoria

AUTHORITIES:

CASES:

NATAL JOINT MUNICIPAL FUND V ENDUMENI MUNICIPALITY 2012 (4) SA 593 (SCA)

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE V SOUTH AFRICAN HUMAN RIGHTS LITIGATION CENTRE 2015 (1) SA 315 (CC).

LITERATURE:

M Watney: *A South African Perspective on Mutual legal assistance and Extradition in a globalized world*: Potchefstroom, Electronic law Journal [2012] PER 24.

INTERNATIONAL INSTRUMENTS:

FINAL REPORT OF THE INTERNATIONAL LAW COMMISSION, 2014 – OBLIGATION TO EXTRADITE OR PROSECUTE

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS, 1999.

DRAFT COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM: 5/10/2010 UPDATE: CENTRE OF NON-PROLIFERATION STUDIES.

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM, 1999.

