

IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 18052/2019

In the matter between:

**SOUTHERN AFRICA LITIGATION CENTRE**

Applicant

and

**THE MINISTER OF HOME AFFAIRS**

First Respondent

**THE DIRECTOR-GENERAL OF THE  
DEPARTMENT OF HOME AFFAIRS**

Second Respondent

**AUGUSTINUS PETRUS MARIA KOUWENHOVEN**

Third Respondent

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**THE APPLICANT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

**KAAJAL RAMJATHAN-KEOGH,**

do hereby make oath and say:

1. I am the Executive Director of the Southern Africa Litigation Centre ("SALC"), the Applicant in this matter.
2. The facts contained in this affidavit fall within my personal knowledge, unless stated to the contrary, and are both true and correct.

3. This affidavit is filed in answer to the urgent application brought by the Third Respondent on 10 March 2020 for –
  - 3.1 leave to file an affidavit in terms of rule 6(5)(e);
  - 3.2 condonation of the late filing of his heads of argument; and
  - 3.3 what appears to be conditional relief declaring the phrase “*to your country of origin*”, in Form 29 of the Immigration Act, No. 13 of 2002 (“*the Immigration Act*”), inconsistent with the Constitution of the Republic of South Africa, 1996 (“*the Constitution*”), and invalid; and dismissing the relief sought in paragraph 5 insofar as it provides for his deportation “*to the Kingdom of the Netherlands without delay*”.
4. SALC launched the application on 11 October 2019. The First and Second Respondents filed a notice to abide on 5 November 2019, and the same day the Third Respondent filed a notice of intention to oppose and a draft order setting out a timetable (drafted by the Third Respondent’s legal representatives) was made an order of court by the Honourable Mr Justice Papier.
5. In terms of paragraph 3 of the order, the Third Respondent was directed to file answering affidavits as well as his counter-application by 16 January 2020.
6. The Third Respondent filed an answering affidavit on 16 January 2020, but did not file a counter-application.

7. The Third Respondent now seeks to bring a conditional counter-application, a week before the hearing of the matter, for relief against the First and Second Respondents who elected to abide the decision of the Court.
8. Paragraph 4 of the order directs SALC to file its replying affidavits in the main application, and SALC and First and Second Respondents are directed to file their answering affidavits in the counter-application, if any, by 6 February 2020.
9. I deposed to an answering affidavit on 6 February 2020, which affidavit was filed electronically that same day.
10. Now, over a month later, and a week before the hearing, the Third Respondent brings an urgent application to file a supplementary affidavit ostensibly to deal with issues raised by me on behalf of SALC in our reply. He uses the opportunity to raise additional grounds of opposition, such as the failure of SALC to exhaust internal remedies under the Immigration Act and non-joinder, which should have been raised in his answering affidavit.
11. The supplementary affidavit is also filed a week after SALC's heads of argument were filed in terms of the order.
12. No reasons are given for the application having been brought on an urgent basis and at this late stage. Although the delay in filing heads of argument has not been adequately explained, the Applicant does not oppose the condonation of the late filing, and had a request been made, we would have given such an assurance.
13. I turn now to deal with the Third Respondent's supplementary affidavit.

14. Ad paragraphs 2 to 5

These paragraphs are noted.

15. Ad paragraphs 6 and 7

15.1 The Third Respondent indicated by his conduct in drafting the order that he would bring a counter-application.

15.2 The constitutional challenge to words contained in Form 29 of the Immigration Regulations of 2014 relates to regulations which came into force on 22 May 2014. The Third Respondent's attorney of record and both his counsel are experts in immigration law.

15.3 Prayer 5 of the notice of motion includes the phrase "*to the Kingdom of the Netherlands*" and reflects the practice of the Department of Home Affairs ("DHA") to deport foreigners to their countries of origin unless there is reason, such as the prohibition on *refoulement*, not to do so. This practice is reflected in Form 29. The DHA is not a travel agent.

15.4 As is clear from the Immigration Act, an illegal foreigner may be ordered to depart and therefore make his own arrangements to leave the country. His destination is irrelevant. Once the decision is made to deport the foreigner "*who has failed to depart on his own account*", even were the phrase to which the Third Respondent objects expunged, he can have no right to

dictate the country to which he should be deported, save for circumstances where he would face serious harm as contemplated in section 2 of the Refugees Act No. 130 of 1998.

15.5 The Third Respondent's attorney and counsel have dealt with deportation matters and must be aware of Form 29.

15.6 It is ludicrous to suggest that the conditional counter-application is necessitated by the "*allegations*" made in paragraphs 48 and 61 of my replying affidavit. While the Third Respondent himself may not be aware that legal foreigners are generally deported to their country of origin or that the notice of deportation provides for the insertion of the country of origin, his legal representatives should have advised him of this fact and brought a counter-application on 16 January 2020.

15.7 There is nothing to prevent the Third Respondent from launching a constitutional challenge to the words contained in Form 29 of the 2014 Immigration Regulations.

16. Ad paragraphs 8 to 10

I deny that the Third Respondent has made out any case at all for the late filing of his affidavit. To repeat myself, the counter-application should have been brought on 16 January 2020 and, if indeed the Third Respondent's legal representatives were unaware of the content of Form 29, immediately after SALC's replying affidavit was filed on 6 February 2020, and not the week before the hearing.

17. Ad paragraphs 11 to 16 – the judgment in the extradition enquiry

17.1 I am aware that Magistrate Arnsten discharged the Third Respondent on the grounds that the crimes were not committed within the jurisdiction of the requesting state as the outcome was extensively covered in the media. I was, for instance, informed that the Weekend Argus on 23 February 2020 poster read: “*War criminal to remain in the Cape*” or words to that effect.

17.2 Although the dismissal of the extradition effectively deals with two of the Third Respondent’s grounds of opposition (his rights under the Extradition Act and the bail conditions related to the extradition matter), the period in which the state may apply for leave to appeal expires before 19 March 2020, and therefore these two grounds of opposition may yet be relevant.

17.3 I am therefore puzzled as to why the Third Respondent should think that it was inexplicable that I failed to place the judgment before this Court. I only received a copy of the judgment on Friday, 6 March 2020.

18. Ad paragraph 17 – non-joinder

18.1 The Third Respondent now raises the issue of non-joinder.

18.2 SALC denies that this application is a disguised extradition. SALC seeks relief against the Second Respondent, the Director-General of the DHA, being the only functionary who has the power to –

18.2.1 issue or refuse to issue the Third Respondent with a visa or permit under the Immigration Act;

18.2.2 on application, declare the Third Respondent not to be a prohibited person; and

18.2.3 declare that the Third Respondent is an undesirable person and to take steps to deport him.

18.3 The First Respondent, the Minister of Home Affairs has the power, on application –

18.3.1 to waive any of the grounds of undesirability;

18.3.2 to consider an appeal against the decision to deport; and

18.3.3 when special circumstances exist which would justify such a decision, exempt the Third Respondent from the requirements of permanent residence, subject to conditions and for a limited or indefinite period.

18.4 This application deals with the Third Respondent's status as a foreigner within the Republic, and the manner in which the Second Respondent has exercised his powers under the Immigration Act, and his failure to exercise such powers. The Minister of Justice and Correctional Services and/or the Director-General of the Department of Justice and Constitutional Development and/or the Prosecuting Authorities do not have a material and

substantial interest in the relief sought in this application. However, in light of the fact that the Minister of Justice and Correctional Services had signed the extradition notice, a copy of the notice of motion and founding affidavit was served on him. A copy of the Sheriff's return of service is attached hereto marked "KRK1".

18.5 In the light of the discharge of the Third Respondent in the extradition matter, whatever interest the Minister of Justice may have had in this application falls away.

18.6 With regard to the final sentence of paragraph 17 regarding his "*success in the extradition proceedings*" supporting his argument that this application is an abuse and a disguised extradition, I wish to point out that Magistrate Arnsten stated in conclusion that "*under the circumstances, and with great regret, I am obliged to discharge the respondent in terms of section 10(3) of the Extradition Act*". Put differently, the only reason why the Third Respondent was discharged was that the offences were committed in Liberia, rather than in the Netherlands.

18.7 The Third Respondent has not denied that he has been convicted of complicity in war crimes and has been sentenced to 19 years imprisonment. His success in the extradition proceedings in no way negates the fact that he is a fugitive from justice, has been convicted of complicity in crimes which included murder and torture (and he is therefore a prohibited person), and



which crimes are serious to the extent that they are dealt with in terms of section 31(g) of the Immigration Act.

- 18.8 This application is not an abuse of the process. It is necessary to ensure that the rule of law is upheld and that the First and Second Respondents uphold the values and principles set out in the Constitution and the Immigration Act.
- 18.9 Thousands of illegal foreigners are deported every year. According to the Department of Home Affairs Annual Report 2018-2019<sup>1</sup> They are overwhelmingly black, African and poor. It is regrettable that the First and Second Respondents have elected to abide, and have failed to file explanatory affidavits in this matter, which have have given an indication as to why the Third Respondent appears to have been treated differently.
- 18.10 Although I am unaware of the number of people declared undesirable, this is clearly a common occurrence and foreigners are routinely denied visas and permits on the basis that they are prohibited and/or undesirable persons. Prior to my taking up position as the Executive Director of the SALC, I worked for Lawyers for Human Rights and the Consortium for Refugees and Migrations in South Africa five years. I therefore have extensive knowledge of the operation of the Immigration Act.

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<sup>1</sup> [http://pmg.assets.s3-website-eu-west-1.amazonaws.com/1/DHA\\_Annual\\_Report\\_201819\\_Text.pdf](http://pmg.assets.s3-website-eu-west-1.amazonaws.com/1/DHA_Annual_Report_201819_Text.pdf), (accessed on 13 March 2020)

19. Ad paragraphs 18 to 38 – standing to bring this application

- 19.1 As stated in paragraph 16 of my founding affidavit and paragraph 35 of my replying affidavit, SALC has either brought or initiated applications as applicant or been admitted as *amicus* in a number of matters in South African courts and in the region.
- 19.2 In each case a report is provided to the trustees motivating for the particular intervention, be it as applicant or as *amicus*. As only one of the current trustees resides in South Africa, this is done by email. I refer to the affidavit of the chairperson of the Southern African Human Rights Litigation Centre Trust, Zohra Dawood, filed herewith.
- 19.3 The Third Respondent objects to the fact that only one trustee signed the resolution. Paragraph 13 of the trust deed provides that the trustees may determine the manner in which documents may be signed on behalf the trust from time to time.
- 19.4 As is evident from paragraph 4 of the trust deed annexed to my replying affidavit marked "KRK1", and the resolution annexed marked "KRK2", the Southern African Human Rights Litigation Centre Trust operates as the Southern Africa Litigation Centre or SALC. The trust deed specifies that, in abbreviation it may also be know as Southern Africa Litigation Centre or SALC. "*Centre*" is defined in paragraph 1.2.2 as "*the Southern Africa Human Rights Litigation Centre/ Southern Africa Litigation Centre (SALC)*".

19.5 The founders of the Trust, the Open Society Initiative for Southern Africa (“OS/SA”) and the International Bar Association, who were the initial funders of the Centre, determined that the objectives of the Centre would be served by the procurement of the registration of a trust. When after a period of 10 years OSISA desired to relinquish its rights under the trust deed and to cease to have an involvement in the running and management of the SALC, a new deed was registered. The deed of trust was amended with effect from 2016. It is a copy of this deed that is attached to my replying affidavit marked “KRK1”.

19.6 With regard to paragraph 38, the Third Respondent is asking that this part of his affidavit be admitted as it arises from a document adduced in my replying affidavit, which should have been annexed to the founding papers. This paragraph contradicts the previous paragraph that *“strictly speaking the issues concerning ‘the trust issue’ constitute legal argument that flows from [my] affidavits and evidence is not required to make these points”*.

20. Ad paragraphs 39 to 42 – failure to exhaust internal remedies

20.1 The Third Respondent misconstrues the internal remedies available under the Immigration Act. Section 8 of the Immigration Act deals with review and appeal procedures under the Act in general. Appeal or review provisions are included in other sections. For instance, section 29(2) provides that the Director-General may, for good cause, declare a person referred to in

subsection (1) not to be a prohibited person. It is clear from the regulations that it is only the prohibited person who applies for such a declaration.

- 20.2 The relief in prayer 3 relates to the failure to declare the Third Respondent an undesirable person. Section 30 read with regulation 27(2) and Form 19 makes it clear that it is only the person who has been declared as undesirable who may make written representations to the Director-General to review the declaration.
- 20.3 The Third Respondent does not state which remedies are available to the Applicant. It will be argued at the hearing of this matter that the remedy of an internal appeal or review to the First Respondent is only available in terms of section 8(6) of the Immigration Act in the circumstances set out in section 8(3) of the Immigration Act where a person whose rights have been affected is first given notice of the adverse decision. SALC is clearly not an "*applicant*" as envisaged in section 8.
- 20.4 The failure to make the decision also does not fall within the ambit of section 8 of the Immigration Act. Therefore applicants approach this court on an almost weekly basis for relief in terms of section 6(2)(g) of PAJA in circumstances where the Second Respondent has failed to make a decision in terms of section 8(5) of the Immigration Act to compel him to finalise their appeals within a reasonable time. These applicants do not lodge an appeal to the First Respondent in terms of section 8(6) of the Immigration Act on the basis of unlawful delay, as the Form 49 clearly refers to a rejection letter,

which letter sets out the reason for the adverse decision. No decision: no internal review or appeal.

21. Ad paragraphs 43 to 58 – constitutional challenge

- 21.1 As indicated above, this conditional counter-application does not arise from what the Third Respondent terms "*the arguments*" advanced by me in the replying affidavit. Form 29 in its present form is annexed to the 2014 Immigration Regulations, and was attached to the 2005 regulations. The notice of motion provides for the deportation of the Third Respondent to the Kingdom of the Netherlands as, to the best of my knowledge, that is his country of origin.
- 21.2 The Third Respondent has given no reason for the late filing of this part of the affidavit. Even if the Third Respondent's legal representatives only realised on 6 February 2020 that they had overlooked Form 29, no explanation is given for the delay of a month. No explanation is given regarding the counter-application that they clearly considered bringing in November 2019.
- 21.3 As stated above, the relief is against the First and Second Respondents who were directed to file answering affidavits by 6 February 2020 in a counter-application. The Third Respondent's relief is to bring an application for relief against the First and Second Respondents in a separate application.

- 21.4 Although the relief is against the First and Second Respondents, the Third Respondent has referred the Court to the Mohamed case which SALC has dealt with in its heads of argument.
- 21.5 The facts in the Mohamed case are important as the state had deported Mr Mohamed to the United States of America, a country or territory other than that referred to in terms of regulation 23 under the repealed Aliens Control Act, 1991, which provided that any person to be removed from the Republic be removed to the country or territory –
- 21.5.1 where he is the holder of a passport, or if he is not the holder of such passport, to a country or territory of which he is a citizen or national;
- or
- 21.5.2 if he is stateless, to a country where he has a right of domicile.
- 21.6 While the destination of the deportee is irrelevant to the purpose of deportation, there is no right other than the right under section 2 of the Refugees Act which entitles the Third Respondent to determine the country or territory to which he should be deported.
- 21.7 An illegal foreigner who has agreed to leave voluntarily, is handed a Form 21, being an *Order to Illegal Foreigner to Depart from Republic*. He or she is ordered to leave the Republic by a certain date, and advised that failure to do so will result in arrest and detention pending deportation.

21.8 An immigration officer has a discretion whether or not to arrest an illegal foreigner for the purpose of deportation. Detention for the purpose of deportation must be confirmed by a court. Furthermore, Form 29 provides that an illegal foreigner handed a notification of deportation may appeal the decision to deport him.

21.9 The relief which the SALC is requesting in paragraph 5 is that the Second Respondent take such steps as are necessary to deport the Third Respondent to the Kingdom of the Netherlands without delay. The SALC seeks to uphold the rule of law and while the SALC is of the view that the principle of ending impunity for perpetrators of war crimes demands that the Third Respondent not be provided with a safe haven in South Africa but returned to serve the sentence imposed on him, the primary motivation is (borrowing from the Mohamed quote in paragraph 49 of the Third Respondent's supplementary affidavit) *"to get rid of an undesired alien"* and disabuse the international community and the inhabitants of the Republic of the notion that South Africa is a haven for perpetrators of international crimes.

## 22. Ad paragraphs 59 to 79 – health issues

22.1 The contents of these paragraphs are noted, as are the reports of Drs Woolf and Chapman. However, neither doctor states that he cannot travel. In fact, most of the advice allegedly given to the Third Respondent is not reflected in the reports. Dr. Chapman notes that he has fibrosis of the lungs, but there

is no mention in his report of the Third Respondent's degree of incapacity as a result of the fibrosis. There is no reference to a lung function test.

22.2 I do not dispute that the Third Respondent would face a severe risk of infection should he be detained at a crowded correctional facility or in a police station.

22.3 As stated above, an immigration officer taking steps to deport an illegal foreigner has a discretion whether or not to detain the foreigner pending deportation. Should a deportee be in possession of travel documents, there is no need for prolonged detention.

22.4 I do not dispute that the coronavirus pandemic presents obvious dangers to a person of the Third Respondent's age, and with his medical conditions. I submit that the pandemic would be regarded by the First Respondent as "*special circumstances*" which would justify an exemption under section 31(2)(b) until such time as the pandemic is contained.

23. Ad paragraphs 80 to 87 – condonation for late filing of heads of argument

23.1 These paragraphs are hearsay.

23.2 While SALC has not been prejudiced by the late filing of the heads of argument by 3 days, I cannot answer for the First and Second Respondents.

23.3 The fact that senior counsel was busy is not grounds for condonation. The Third Respondent states that his senior counsel was in Bloemfontein for



most of the week with a multi day appeal in the Supreme Court of Appeal. I note from the online court roll that the matter was set down for three days from Wednesday 4 March 2020. The heads were due on Thursday 5 March 2020.

Ad paragraphs 88 and 89 - Conclusion

24. SALC has been prejudiced by the late filing of this affidavit. The Third Respondent could have consulted with his legal representatives at any time after the filing of my replying affidavit on 6 February 2020.
25. Not only is this application clearly not urgent, it is unnecessary. SALC has not disputed that the Third Respondent is seventy seven or that he suffers from poor health. The court hearing this matter may take judicial notice of the COVID-19 pandemic. However, it is unrelated to whether the Third Respondent is a prohibited person or should be declared undesirable, and whether the decision to issue him a temporary residence visa is subject to review.
26. Under the circumstances the Applicant is justified in opposing the application and is entitled to costs.

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**KAAJAL RAMJATHAN-KEOGH**

Signed and sworn before me at \_\_\_\_\_ on this 13<sup>th</sup> day of MARCH 2020, the deponent having acknowledged that he/she knows and understands the contents of this affidavit, has no objection to taking the prescribed oath and considers the oath to be binding on his/her conscience.

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**COMMISSIONER OF OATHS**