

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Minister of Justice and Constitutional Development v The Southern African Litigation Centre

The Government, represented by the Ministers of Justice and Constitutional Development and International Relations and Cooperation and various senior officials, sought leave to appeal against a decision by the full court of the Gauteng Division of the High Court, Pretoria, declaring that the failure of the Government to take steps to cause President Al Bashir of Sudan to be arrested when he attended the General Assembly of the African Union (AU) in June 2015 was unlawful and unconstitutional. That order was made at the instance of the Southern Africa Litigation Centre (SALC) an NGO concerned with issues of human rights in Southern Africa. Although the application for leave to appeal had been opposed, leave to appeal was granted on the basis of the importance of the issues raised and because the arguments on behalf of the Government had some prospects of success.

The International Criminal Court (ICC) had issued two warrants for the arrest of President Al Bashir arising out of events in Darfur and elsewhere in Sudan that were alleged to constitute war crimes, crimes

against humanity and genocide (international crimes). In the High Court SALC contended that, by virtue of South Africa's adherence to the Rome Statute constituting the ICC, it was obliged to assist the ICC to give effect to the arrest warrants. by arresting President Al Bashir and surrendering him to the ICC for trial on these charges.

The Government opposed SALC's application on the limited basis that in terms of the hosting agreement between the Government and the AU, in terms of which South Africa was to host the AU General Assembly, it was obliged to recognise that President Al Bashir enjoyed head of state immunity while in South Africa attending that meeting. The Minister of International Relations and Cooperation had issued a proclamation in terms of the Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA) embodying the hosting agreement. Affidavits by the Director-General of Justice and Constitutional Development and the Secretary to the Cabinet said that this was the sole justification for not arresting President Al Bashir. They also said that the Cabinet recognised that this was a purely temporary measure for the duration of the Assembly and two days afterwards.

The High Court rejected this argument because the relevant provisions of the hosting agreement related only to officials of the AU and the delegates and representatives of Inter-Governmental Organisations. It did not relate to representatives of the member states of the AU. The SCA agreed that this was correct and that, on the arguments presented to it, the High Court was entirely justified in making the order that it made.

On appeal the Government presented an entirely new and different argument. It claimed that, in terms of customary international law and section 4(1) of DIPA, President Al Bashir enjoyed head of state immunity that precluded his arrest pursuant to the two ICC warrants. SALC

countered this on two grounds. It argued that there was an international crimes exception to the general principles of customary international law that afford a head of state immunity from arrest or prosecution while visiting a foreign state, so that President Al Bashir did not enjoy the immunity claimed on his behalf. In any event it said that when Parliament enacted legislation to give effect to South Africa's adherence to the Rome Convention in the form of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act) it specifically provided that there would be no immunity for anyone, including foreign heads of state, from arrest and surrender to the ICC in respect of international crimes.

In a majority judgment, written by Wallis JA and concurred in by Shongwe JA and Majiedt JA, the SCA held that customary international law recognises that heads of state and other high-ranking office bearers enjoy immunity from arrest and prosecution or any other interference while visiting a foreign state. In the present state of development of customary international law it does not yet recognise an international crimes exception to this rule. The rule is embodied in section 4(1) of DIPA and would ordinarily have applied to afford President Al Bashir immunity from arrest.

The majority judgment went on to hold, with the concurrence of the minority, in a judgment by Ponnann JA concurred in by Lewis JA, that in the case of international crimes and South Africa's obligations to the ICC in terms of the Rome Statute, such immunity had been specifically removed in terms of section 10(9) of the Implementation Act. This was a decision by Parliament when it passed the Implementation Act. That is why in the past spokespersons for the Government had indicated that if President Al Bashir came to South Africa he would be arrested. The court noted that until now the Government has always been meticulous in its

observance of its obligations under the Rome Statute. The departure on this occasion was solely because it had been wrongly advised that it was obliged to recognise that President Al Bashir enjoyed immunity under the hosting agreement and this was a temporary exception.

In those circumstances the SC unanimously granted the Government leave to appeal, but, subject to an amendment to the order granted by the High Court, dismissed the appeal.