THE SUPREME COURT OF APPEAL

SCA CASE NO: 867/2015

CASE NO: 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**1st Applicant**
DIRECTOR GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**2nd Applicant**
MINISTER OF POLICE	**3rd Applicant**
COMMISSIONER OF POLICE	**4th Applicant**
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	**5th Applicant**
DIRECTOR GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	**6th Applicant**
MINISTER OF HOME AFFAIRS	**7th Applicant**
DIRECTOR GENERAL OF HOME AFFAIRS	**8th Applicant**
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	**9th Applicant**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**10th Applicant**

HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION — **11th Applicant**

DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT — **12th Applicant**

and

THE SOUTHERN AFRICAN LITIGATION CENTRE — **Respondent**

HELEN SUZMAN FOUNDATION — **Amicus curiae**

FILING SHEET

DOCUMENT: **GOVERNMENT'S HEADS OF ARGUMENT IN RESPONSE TO THE HELEN SUZMAN FOUNDATION**

DELIVERED BY:

1st to 12th APPLICANTS' ATTORNEY
STATE ATTORNEY PRETORIA
SALU BUILDING
316 THABO SEHUME STREET
PRETORIA,
Ref: 3604/2015/Z49
Tel: 012 – 309 1563
Fax: 086 507 0909
Enq: J Meier

C/O THE STATE ATTORNEY
11TH FLOOR, FEDSURE BUILDING
49 CHARLOTTE MAXEKE STREET
Tel: 051 400 4301
Enq: Mrs R Hechter

TO: THE REGISTRAR OF THE
SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND
TO: **RESPONDENT'S ATTORNEY (SALC)**
WEBBER WENTZEL
10 FRICKER ROAD
ILLOVO BOULEVARD
JOHANNESBURG, 2196
Tel: 076 402 4556 / 063 003 0640
Ref: M Hathorn / 3001742

C/O WEBBER ATTORNEYS
WEBBERS BUILDING
96 CHARLES STREET
BLOEMFONTEIN, 9300
Ref: Ms Bianca Strydom
Tel: 051 430 1340
Fax: 051 430 8987
E-mail: mail@webberslaw.com

COPY RECEIVED ON

DATE:

TIME:

_____

AND
TO: **APPLICANT FOR ADMISSION AS *AMICUS CURIAE***
HELEN SUZMAN FOUNDATION
WEBBER WENTZEL
90 RIVONIA ROAD
SANDTON
JOHANNESBURG
Tel: 011 530 5128
Fax: 011 530 6218
E-mail: Dylan.cron@webberwentzel.com
Ref: V Movshovich / P Dela / D Cron / D Rafferty
3005285

C/O SYMINGTON & DE KOK
SYMINGTON & DE KOK BUILDING
169B NELSON MANDELA DRIVE
WESTDENE
BLOEMFONTEIN
Ref: L Venter

COPY RECEIVED ON

DATE:

TIME:

_____

AND TO:

APPLICANTS FOR ADMISSION AS *AMICUS CURIAE*
PEACE AND JUSTICE INITIATIVE & CENTRE FOR HUMAN RIGHTS
LEGAL RESOURCES CENTRE
FLOOR 16, BRAM FISCHER TOWERS
20 ALBERT STREET, MARSHALL TOWN
JOHANNESBURG
Tel: 011 836 9831
Fax: 011 836 8680
E-mail: Michael@lrc.org.za / avani@lrc.org.za
Ref: 1113715L/MJ POWER/A Singh

C/O HONEY ATTORNEYS
HONEY CHAMBERS, NORTHRIDGE MALL
KENNETH KAUNDA ROAD
BLOEMFONTEIN 9301
Tel: 051 403 6679
Fax: 051 403 6705
E-mail: unlinda@honey.co.za
Ref: Ms Unlinda Terblanche

COPY RECEIVED ON

DATE:

TIME:

_____

AND
TO:

APPLICANTS FOR ADMISSION AS *AMICUS CURIAE*
THE AFRICAN CENTRE FOR JUSTICE AND PEACE STUDIES & THE INTERNATIONAL REFUGEE RIGHTS INITIATIVE
LAWYERS FOR HUMAN RIGHTS
JOHANNESBURG LAW CLINIC
4TH FLOOR, HEERENGRACHT BUILDING
87 DE KORTE STREET
BRAAMFONTEIN
Tel: 011 339 1960
Fax: 011 339 2665
E-mail: wayne@lhr.org.za

C/O WEBBERS ATTORNEYS
WEBBERS BUILDING
96 CHARLES STREET
BLOEMFONTEIN
Ref: 1/2016/SLP Wayne/David

COPY RECEIVED ON

DATE:

TIME:

_____

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case no. 867/2015
HC case no. 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second applicant
MINISTER OF POLICE	Third applicant
COMMISSIONER OF POLICE	Fourth applicant
MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	Fifth applicant
DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	Sixth applicant
MINISTER OF HOME AFFAIRS	Seventh applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Tenth applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	Eleventh applicant
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	Twelfth applicant

and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent
HELEN SUZMAN FOUNDATION	Amicus curiae

GOVERNMENT'S HEADS OF ARGUMENT
IN RESPONSE TO THE HELEN SUZMAN FOUNDATION

A. Introduction

1. These short heads of argument are filed pursuant to the order of this Court of 11 January 2016, in response to heads of argument filed by the Helen Suzman Foundation (HSF).

2. On that day HSF was admitted as *amicus curiae*, the application having been served on Government at noon. Not knowing that a summary order had been made, despite the express provision in the notice of motion inviting an answering affidavit,[1] Government filed an answering affidavit on 19 January 2016 (preceded by an earlier electronic copy). Government was only then told by the Registrar's office that the order admitting HSF had been summarily granted (by the Deputy President, it was later explained) on the same day it was made. The same-day order directs the parties to deliver responding submissions by 9 February 2016.[2]

3. In what follows we briefly identify the key contentions advanced by HSF in its heads of argument, and demonstrate shortly in relation to each that it is untenable. At the outset it should be noted, however, that HSF's heads are silent on Government's answering affidavit. Significantly none of the submissions advanced by Government has been met by HSF in its heads.

B. Each of HSF's contentions is legally misconceived

4. The flaws in HSF's argument are threefold: (i) it violates the principle of subsidiarity; (ii) it purports to resort to reading down in circumstances where this is not

---

[1] See the final, unnumbered, paragraph of HSF's notice of motion.
[2] Para 5 of the order.

competent; and (iii) it advances an argument already advanced by SALC, and in doing so fails to distinguish between personal and functional immunity. We deal with each separately.

(1) HSF's argument is inconsistent with the principle of subsidiarity

5. The first flaw in HSF's approach permeates its entire argument.[3] This is HSF's direct reliance on the Constitution to found an "independent" duty on the State to arrest President Bashir.[4] This contention was presaged in HSF's founding affidavit, which articulated HSF's position as follows: the "source of [Government's duty to arrest President Bashir] is the Constitution itself.[5] Nothing could be clearer. The contention has now been promoted to the first paragraph of HSF's heads of argument.[6] This despite Government's answering affidavit identifying this as a violation of the principle of subsidiarity.[7]

6. This principle is now well-established.[8] It requires a litigant to rely on national legislation giving effect to the Constitution, and precludes a direct reliance on the

---

[3] Apart from prefacing its heads of argument by identifying this as what HSF "submits", the contention resurfaces throughout HSF's heads of argument (see e.g. paras 10, 12, 14, 15, 18, 29). These paragraphs purport to leapfrog or bypass statutory provisions, contrary to the principle of subsidiarity.

[4] Para 1 of HSF's heads of argument.

[5] Para 33.14 of HSF's founding affidavit, emphasising the importance of this proposition by italics.

[6] However, the summary of HSF's argument in its practice note (paras 5-7) ranks this argument behind SALC's submissions on section 4(1)(a) of the Diplomatic Immunities and Privileges Act 37 of 2001 ("the Immunities Act"). The practice note articulates the same contention thus: the State's duty to arrest President Bashir is "quite apart from any requirement of the Implementation Act or the Rome Statute"; it is a constitutional obligation (para 7, emphasis added).

[7] Para 11 of Government's answering affidavit.

[8] See e.g. *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 437:

> "Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and

Constitution itself.[9] The most recent reported judgments applying it are *My Vote Counts NPC v Speaker of the National Assembly*[10] and *Comair Ltd v Minister of Public Enterprises.*[11] The current case is of a piece with *Comair* and *My Vote Counts*, persisting in a clearly rejected approach to the principle of subsidiarity.

7. In this instance the argument invoking the Constitution directly is formulated as follows

> "International crimes are crimes in international customary law and, by virtue of section 232 of the Constitution, crimes in South African law. Those listed in schedule 1 of the ICC Act are also statutory crimes in our national law through domestication of the Rome Statute. They violate the Constitution and accordingly the State has a constitutional power and duty to detain and/or arrest perpetrators of these crimes."[12]

8. From the first two sentences it is clear that HSF correctly recognises that the ICC Act implements the Rome Statute and criminalises international crimes as national crimes.[13] Thus it is the ICC Act on which reliance must be placed, not section 232 (or any other provision) of the Constitution.[14] The final sentence of this paragraph makes this point

---

to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question."

[9] As Cameron J stated in *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at para 46

> "Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail."

[10] 2016 (1) SA 132 (CC) at paras 160-183. See too *id* at paras 44-74 of the minority judgment, explaining that the principle of subsidiarity is violated where a "litigant has entirely omitted or failed to challenge the constitutionality of legislation enacted to fulfil the right the litigant seeks to enforce by invoking the Constitution directly" (*id* at para 72).

[11] 2016 (1) SA 1 (GP) at paras 22 and 50.

[12] Para 29 of HSF's heads of argument.

[13] As the Constitutional Court held in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para 57, "international crimes ... [are] domesticated into our law by the ICC Act".

[14] This is effectively conceded by HSF in citing *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at paras 55-56, which makes it clear – as HSF further concedes – that "[t]he source of the duty was s 205(3) [of the Constitution], read with s 4(1) of the ICC Act and s 17D(1)(a) of the South African Police Service Act 68 of 1995" (para 34 of HSF's heads of argument). Thus the Constitutional Court itself implicitly applied the principle of subsidiarity, because it did not impose a constitutional duty "in addition to" or "independent of" the ICC Act (as para 1 of HSF's heads of argument contend for).

yet clearer, because it cites in a footnote sections 179 and 205 of the Constitution as source of the "power and duty" to "detain and/or arrest".[15] Both section 179 and section 205 expressly contemplate the enactment of national legislation to implement these constitutional provisions,[16] and national legislation has indeed been enacted pursuant to these provisions.[17] HSF's direct reliance on the Constitution itself is accordingly impermissible,[18] and also inconsistent with this Court's approach to the interplay between the Constitution, the ICC Act and related legislation.[19]

9. HSF compounds the error by contending that "[t]he State has advanced no justification for the claim of immunity in this case, let alone a convincing one".[20] As *My Vote Counts* explained,[21] as a matter of (oft-repeated) first principle justification is an issue which arises only after the anterior question of constitutional inconsistency has been determined. But if there is no case that a provision infringes the Constitution, justification is not reached.[22] The rule of law requires compliance with legislation which is not challenged. Neither SALC nor Government has challenged any of the Acts relevant to the case. It is therefore a legally misconceived criticism that Government should somehow have provided a convincing justification for complying with the law.

---

[15] Fn 28 of HSF's heads of argument.
[16] Section 179(3), (4) and (7) and section 205(2).
[17] The National Prosecuting Authority Act 32 of 1998 and South African Police Service Act 68 of 1995.
[18] It is also inconsistent with *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 44, which holds that there are no parallel legal systems in South Africa, but only one.
[19] *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA) at para 55.
[20] Para 38 of HSF's heads of argument.
[21] *My Vote Counts supra* at paras 173 and 175.
[22] As *inter alia* para 33.18-20 of HSF's founding affidavit reveals, HSF contends for a position where the operation of legislation is subject to an *ad hoc* application of a limitations analysis. It contends that section 4(1)(a) of the Immunities Act should be interpreted as affording immunity "only ... in circumstances where the reasons for affording immunity to a specific head of state outweigh the strong constitutional reasons that otherwise require detention, arrest and prosecution" (para 33.18). The correct legal position is that a balancing exercise is conducted as part of a section 36 analysis when legislation is impugned, not when unimpugned legislation is applied. It is not open to the Executive (nor to the Judiciary, absent a constitutional challenge) to determine on an *ad hoc* basis when to observe and when to ignore a statutory prohibition visited by the Legislature with criminal sanctions (as section 15 of the Immunities Act does).

It only serves to demonstrate that HSF advances a case which contemplates a need for "justification" when justification cannot arise, because there is no contention that any statutory provision is unconstitutional. If HSF's case is that (if it is wrong in its interpretation of section 4(1)) the Immunities Act is unconstitutional, it needed to make that case. Like SALC, which it shadows in this respect too, it has not done so.

(2) HSF's argument is inconsistent with the correct approach to statutory interpretation

10. HSF advances both a "plain meaning" and "reading down" interpretative argument, apparently in the alternative.[23] Neither is sustainable. Nor is the premise from which HSF advances them.

11. The premise is that Government "argue[s] that the State granted President Al-Bashir immunity in terms of section 4(1)(a) of the [Immunities Act], which codifies the doctrine of immunity in customary international law in respect of any and all crimes that he committed as head of state."[24] This is simply wrong. Government does not contend that immunity exists for international crimes committed as head of state. Immunity for crimes committed as heads of state is, as Government's main heads of argument explained,[25] immunity *ratione materiae* (i.e. functional immunity). Government's position is that, and this case concerns whether, section 4(1) confers immunity *ratione personae* (i.e. personal immunity). While this immunity is absolute, it applies only for a

[23] Paras 5-6 of HSF's heads of argument.
[24] Para 2 of HSF's heads of argument (emphasis added).
[25] Fn 1 of Government's main heads of argument.

limited duration: while the head of State remains in office.[26] It follows that HSF's submissions are irrelevant, because they deal with an issue not before court.

12. HSF's "plain reading" argument is flawed. It contends that paragraphs (a) to (c) of section 4(1) apply to immunity, because otherwise these paragraphs would be redundant. That is a misreading. It is very clear that section 4(1) confers two distinct things. One is immunity. The other is privileges. It is the latter which is qualified by paragraphs (a) to (c).[27] It is accordingly HSF's construction which itself falls foul of the presumption against redundancy (which HSF invokes), because it renders the specific distinction between immunities and privileges in section 4(1) redundant. The correct construction is that section 4(1) renders "[a] head of State ... immune from criminal and civil jurisdiction of the courts of the Republic". This construction follows the exact language of the provision. The language of section 4(1) does not qualify immunity. For immunity to be qualified, a restriction has to be read into section 4(1). Here HSF's subsidiarity problem repeats itself: because the Act is not under constitutional attack, the *remedy* of reading-in is not available.[28]

---

[26] It is this misunderstanding which accounts for HSF's conflation of immunity and impunity (which is the error on which section D of HSF's heads rest, culminating in para 27). As the ICJ held in the *Arrest Warrant* case (cited in Government's main heads of argument), personal immunity cannot be conflated with impunity.

[27] HSF itself acknowledged this in its founding affidavit, contending (then) that

> "section 4(1)(a) of DIPA (the section refers to 'such privileges as heads of state enjoy in accordance with the rules of customary international law') must be read as, [sic] affording sitting heads of state 'such privileges as heads of state enjoy in accordance with the rules of customary international law [insofar as these rules are consistent with the Constitution]" (emphases added, block brackets in original).

The position adopted by HSF in its founding papers is inconsistent with what it now seeks to argue – in the teeth of the ordinary grammatical meaning of section 4(1)(a). HSF's heads of argument now seek to substitute the word "immunity" for "privileges".

[28] Yet HSF contends that "the legislature ... [is] not immune from the discipline and control of the Constitution" (para 15 of HSF's heads of argument), clearly contemplating what should have been a constitutional challenge for HSF's argument to succeed. This is confirmed throughout HSF's heads of argument. See e.g. para 18, expressly stating that it is "[t]he nub of [HSF's] submissions ... that a rule that affords heads of state absolute immunity ... transgresses the limits the Constitution places on legislation".

13. This obvious conclusion HSF seeks to circumvent by resorting to what it calls its "reading down" argument.[29] It rests on a circular and misconceived application of section 232 of the Constitution.[30] The correct application of section 232 of the Constitution is well-understood. It is that customary international law is law in South Africa to the extent that customary law is not inconsistent with the Constitution or national legislation.[31] In other words, to the extent that there is no contradictory legislation (or constitutional provision), international customary law applies as law in South Africa. This does not mean that where customary international law is expressly enacted as law in South Africa through national legislation (as section 4(1) of the Immunities Act has done, post-constitutionally to boot) such legislation is somehow subject to a clawback under section 232 of the Constitution.

14. Section 232 does not countermand legislation enacted by the legislature. Its function is to codify the common law's monist approach to customary international law, but only to the extent that Parliament remains passive and customary international law is not constitutionally repugnant. It is, moreover, "[o]nly a provision of the Constitution or an Act of Parliament that is clearly inconsistent with customary international law [that] will trump it."[32] HSF could identify no such provision in the Constitution. This is because there is no provision in the Constitution which detracts from the fundamental principle of customary international law: immunity *ratione personae*.

15. There is accordingly no merit in HSF's "read down" argument. As section 232's immediate context demonstrates, the correct position is that "[w]hen interpreting any

---

[29] Para 6 of HSF's heads of argument.
[30] Para 5.2 of HSF's heads of argument.
[31] Section 232 provides: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."
[32] Dugard *International Law: A South African Perspective* 4th ed (Juta, Cape Town 2011) at 50.

legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[33] HSF has correctly not contended that international law does not recognise immunity *ratione personae* in the context of international crimes.[34] Accordingly the correct application of a "read down" approach is the one under section 233 of the Constitution. It requires that a court must prefer Government's construction of section 4(1) of the Immunities Act, because it is consistent with international law.

16. A further fundamental flaw in HSF's "read down" argument is that it fails to apply the principle it invokes. Reading down is competent only where different interpretations are reasonably open to a court; in other words, both interpretations must be reconcilable with the text of the provision.[35] HSF does not formulate the "alternative" for which it contends, other than to resort to circularity. It argues

---

[33] Section 233 of the Constitution.

[34] First, HSF's position is that "[i]f any doctrine of absolute immunity exists, it does not withstand constitutional scrutiny" (para 10 of HSF's heads of argument). Yet the provision conferring immunity is not subjected to "constitutional scrutiny". For it stands unimpugned. Second, HSF also concedes that "[h]eads of State are afforded immunity under customary international law" (para 13 of HSF's heads of argument). HSF cannot bring itself within the application of the maxim *cessante ratione legis cessat ipsa lex*. Yet it contends that the rationale for affording immunity to heads of states falls away if a head of state is accused of international crimes (para 14 of HSF's heads of argument). The logic fails. By their very nature international crimes arise in the context of regime changes, threats to the wold peace and inter-state stability, and associated human rights violations. It is precisely in such circumstances where heads of state must be able to consult in person without any threat to their personal inviolability. Third, HSF cites multiple authorities (a fifth of its entire list of authorities) for the proposition that customary international law recognises head of state immunity (fn 9 of HSF's heads of argument), and cites two further authorities (fn 44) for the proposition that such immunity must be construed as having been waived. This is a concession that immunity does apply also to international crimes, otherwise there would have been nothing to waive.

[35] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at paras 23-24. See, too, *British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] 3 All SA 593 (SCA) at para 27, applying *Daniels v Campbell NO* 2004 (5) SA 331 (CC) at para 83 where Moseneke J held

> "However, this affirmative duty to 'read' legislation in order to bring it within constitutional confines is not without bounds. An impugned statute may be read to survive constitutional invalidity only if it is reasonably capable of such compliant meaning. To be permissible, the interpretation must not be fanciful or far-fetched but one that reasonably arises from the challenged text without unwarranted strain, distortion or violence to the language. This is so because statutes are

> "[t]o the extent necessary, this means that section 4(1)(a) must be read down: Sitting heads of state enjoy immunity 'in accordance with the rules of customary international law [insofar as these rules are consistent with the Constitution.]'."[36]

17. The phrase which HSF marks with the opening of block brackets (left unclosed) is clearly what HSF contends should be read in. HSF advances no formulation of the construction for which it contends. HSF simply inserts the rationale for reading in (*viz* rendering legislation consistent with the Constitution), instead of advancing a formulation which, on its approach, is (i) consistent with the Constitution;[37] (ii) permitted by the wording of the provision;[38] and (iii) capable of being articulated with any degree of precision.[39] The conceptual problem is that the viability of reading down

---

> '... products of conscious and planned law-making by demonstrable and authorised law making authors and are therefore meant to be of effect. By replacing them as final authority, the Constitution has not deprived statutes of their worth or force, but has given them new direction.'"

[36] Para 6 of HSF's heads of argument (emphasis added, typographical errors corrected).

[37] HSF's formulation merely confirms that it should not lead to constitutional inconsistency, but without stating when or in what circumstances – on its approach – this would be the case.

[38] HSF cites *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at paras 21-25, thus recognising the correct principle. It is that "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, *provided that such an interpretation can be reasonably ascribed to the section*" (*id* at para 23, emphasis added); that such an interpretation should not be unduly strained (*id* at para 24); and that interpreting legislation in a way which "promotes the spirit, purport and objects of the Bill of Rights as required by s 39(2) of the Constitution ... is limited to what the text is reasonably capable of meaning" (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at paras 23-24).

[39] *Mkhize v Umvoti Municipality* 2012 (1) SA 1 (SCA) at para 12

> "In considering whether the order in *Jaftha* was unconstitutional, Wallis J discussed the purposes of the constitutional remedies of reading in, reading down, severance or notional severance and concluded that it always took place within the context of the separation of powers:
>
> > 'Under the Constitution responsibility for legislation lies with the legislative bodies established in terms of the Constitution. Where a court interferes with legislation it does so within the ambit of its own constitutional responsibility for determining whether legislative provisions comply with the Constitution. Whether it applies a remedy of severance or one of reading-in, or a combination of the two, its sole aim and function are to render the legislation compliant with the provisions of the Constitution. It is not vested with any general legislative capacity merely by virtue of the fact that it has found a particular statutory provision not to comply with the Constitution. Its function is to frame an appropriate order that remedies the constitutional defect. It is for this reason that stress is laid on the court's obligation to endeavour to be faithful to the legislative scheme.'
>
> The dominant inquiry, he continued, is whether the chosen remedy is an unconstitutional intrusion into the domain of the legislature. Reading in must conform and be consistent with the Constitution and its fundamental values, and should interfere as little as possible with the laws adopted by the legislature. Words should not be read in unless a court can define with sufficient precision how the statute ought to be extended. Deference to the legislature and restraint are called for to avoid a court's engagement in lawmaking."

depends on the ability to first formulate the alternative interpretation contended for. HSF cannot provide such formulation.[40] This is because HSF itself conceives of circumstances in which immunity will indeed pass constitutional muster.[41]

18. Accordingly HSF's attempted reading-in, for this is clearly its true attempt (despite presenting it as an exercise in reading down),[42] falls foul of the correct test.[43] Simultaneously it also falls foul of the subsidiarity principle.[44]

(3) HSF's argument on the Genocide Convention is neither novel nor tenable

19. HSF's final argument on the merits spans one page. It is that Sudan's accession to the Genocide Convention constitutes a waiver of immunity.[45] This is not, in substance, a

---

[40] Significantly, in its founding affidavit HSF advanced a different one. Para 33.4 of its founding affidavit contends that

> "section 4(1)(a) of DIPA (the section refers to 'such privileges as heads of state enjoy in accordance with the rules of customary international law') must be read as, [sic] affording sitting heads of state 'such privileges as heads of state enjoy in accordance with the rules of customary international law [insofar as these rules are consistent with the Constitution" (emphases added, block brackets in original).

Now HSF argument substitutes "immunity" for "privileges". This is a word-changing constructing which is directly contradicted by the words used by the Legislature. It is thus not open to a court to choose this interpretation unless it does so after a successful constitutional challenge, to remedy any unconstitutionality.

[41] Para 30 of HSF's heads of argument: HSF can put it no higher than that the rationale for immunity "will not in most circumstances negate the constitutional imperative [to arrest] perpetrators of crimes against humanity, war crimes and genocide". Similarly HSF's founding affidavit qualified its submission on South Africa's duty to arrest thus: "it must, where appropriate, detain, arrest and/or prosecute alleged perpetrators of crimes against humanity, war crimes or genocide" (para 33.9, emphasis added). HSF cannot formulate when it would be "appropriate" to arrest or under what circumstances the rationale for immunity would not be "negated". It accordingly insists on a reading incapable of objective application, rendering it contrary to the constitutional doctrine of vagueness, the requirement of legal certainty and the principle of objective constitutionality (*Ferreira v Levin NO v Powell NO* 1996 (1) SA 984 (CC) at para 26, applied in many of the Constitutional Court's subsidiarity caselaw). Accordingly HSF's reading is constitutionally impermissible also for this reason.

[42] It goes so far as purporting to formulate a phrase to be inserted into section 4(1).

[43] *Rennie NO v Gordon* 1988 (1) SA 1 (A) at 22G-H, approving *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557E-G: "a strong factor militating against the implication of any such limitation is the difficulty of formulating it." HSF contends "section 4(1)(a) should be interpreted to limit the rules of customary law [which section 4(1)(a) incorporates], to the extent that such rules are consistent with the Constitution" (para 9 of HSF's heads of argument). By contending for limiting the rules incorporated by section 4(1), HSF contends for limiting section 4(1) itself. But HSF forebears formulating the limitation it seeks to have read in.

[44] This is because this principle precludes a litigant from obtaining relief which is in effect consequent upon the invalidity of a provision of an Act of Parliament without any formal declaration of the invalidity of that provision (*Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC) at para 61).

different argument.[46] SALC itself contends that because Sudan has acceded to the Genocide Convention therefore President Bashir enjoys no immunity.[47] Novelty is not generated by casting the same argument advanced by SALC (by using the nomenclature "negates ... immunity"[48] or "strips ... immunity") as one of "waiver ... of the immunity".[49] To do so is an exercise in semantics.

20. The exercise, furthermore, is impermissible, because HSF's application nowhere identifies the Genocide Convention or waiver as part of the issues sought to be invoked or ventilated by HSF. Not only are the words "Genocide Convention" and "waiver" entirely absent from HSF's founding affidavit; the founding affidavit does not even advance anything remotely associated with these concepts.

21. Furthermore, HSF's contentions are in any event without merit. For the same reasons why the Genocide Convention does not assist SALC, it equally does not assist HSF.[50] These reasons have been identified in Government's main heads of argument,[51] its replying affidavit in the application to this Court,[52] and in its opposing affidavit[53] filed in response to the Peace and Justice Initiative and the Centre for Human Rights (which,

---

[45] Para 39 of HSF's heads of argument.
[46] Purporting to advance it violates the order granting HSF's *amicus* application. Paragraph 3 of the order requires HSF to comply in particular with *inter alia* Rule 16(7). Rule 16(7)(a) precludes an *amicus* from repeating "any matter set forth in the argument of the other parties". In *Barko Financial Services (Pty) Ltd v National Credit Regulator* [2014] 4 All SA 411 (SCA) at para 23 this Court criticised a similar violation of its order.
[47] Paras 65-68 of SALC's heads of argument.
[48] Paras 65 and 66 of SALC's heads of argument.
[49] Para 44 of HSF's heads of argument.
[50] HSF's resort to *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) does not assist it. *Fick* concerns the registration and implementation of SADC Tribunal judgments in a member state. The treaty regime to which Zimbabwe was a party permitted this in express terms. It is *qua* member to this treaty regime that Zimbabwe was held to have waived immunity against execution. The Genocide Convention does not deal with immunity *ratione personae* from arrest by a domestic court. It deals with immunity *ratione materiae*. The immunity *ratione personae* of a member state to the Geneva Convention is accordingly not waived by acceding to the Genocide Convention.
[51] Para 39 of Government's main heads of argument.
[52] Petition record pp 235-236 paras 22-23.
[53] Para 10 of Government's opposing affidavit filed in response to the founding affidavit filed on behalf of PJI and CHR.

unlike HSF, did invoke the Genocide Convention in their founding affidavit).[54] In short, the Genocide Convention deals only with immunity *ratione materiae*.[55] Acceding to it accordingly cannot constitute a waiver of immunity *ratione personae*.[56] HSF's heads of argument (filed after the affidavits and heads of argument already addressing the flawed reliance on the Genocide Convention) do not address Government's argument at all. Like SALC, HSF ignores the distinction between personal and functional immunity. Accordingly HSF's argument is not only not novel, but also not helpful.

(4) HSF's contentions on costs are legally and factually misconceived

22. The remainder of HSF's heads of argument (pp 17-29) are, peculiarly, devoted to costs.[57] HSF's submissions are factually misconceived, because while the application itself recognised that Government is entitled to file an opposing affidavit,[58] HSF does not deal with Government's opposing affidavit which amplifies Government's principled bases for opposing HSF's application.[59] With respect, the principled nature of Government's opposition has now been borne out: HSF's submissions are not relevant, helpful and different. They are of no assistance (because they fail to comply with established caselaw on the principle of subsidiarity and the principles of statutory construction), they are repetitive (in that they advance argument on the Genocide Convention already advanced by SALC), and they are irrelevant (in that they advance

[54] Para 42 of the founding affidavit filed on behalf of PJI and CHR.
[55] Article IV.
[56] Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, Oxford 2003) at 143.
[57] Paras 34-54 of HSF's heads of argument.
[58] See again the final paragraph of HSF's notice of motion.
[59] HSF limits its submissions to Government's letter of 29 December 2015 (paras 47-53).

interpretative and waiver arguments based on functional immunity when it is personal immunity which is in issue).

23. Indeed, even the submissions on costs themselves depart from the correct legal position. The correct position is that costs are awarded on an attorney-and-client basis (which is the scale for which HSF asks)[60] only in exceptional circumstances, and should not be granted simply because in retrospect a court considers a litigant's position unsustainable.[61] An unsustainable argument is a reason to fail, not to be punished. Yet HSF contends only that Government's refusal to concede to HSF's intervention is not "sustainable".[62] This is not a basis for a special costs order, especially not in circumstances where Government's opposition was "principled" and "reasonable", and ventilated matters central to "the interests of justice",[63] and HSF did not demonstrate the contrary.

C. Conclusion

24. For the reasons set out above, none of HSF's arguments has any merit. It is nonetheless significant that HSF itself contemplates that it is the appeal itself which properly serves before this Court,[64] implying that there is no merit in SALC's opposition to the application for leave to appeal – a stance on which SALC itself has made not a single submission in its head of argument.[65]

---

[60] Para 54 of HSF's heads of argument.
[61] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 22B-E.
[62] Para 48 of HSF's heads of argument.
[63] Para 20 of Government's answering affidavit.
[64] Para 55 of HSF's heads of argument asks "that this appeal should be dismissed".
[65] It is only in para 77 of SALC's heads of argument (the final paragraph, headed "prayer") that SALC mentions the application for leave to appeal, asking that it "be dismissed or, if leave is granted, that the appeal be dismissed".

25. Although HSF sought to invoke the only previous South African litigation on the ICC Act in contending that immunity is inconsistent with the Constitution,[66] it fails to show how this contention is consistent with this Court's judgment in that matter.[67] This Court held that issues of sovereignty and comity impacted on SAPS' duty to investigate international crimes.[68] Immunity is the fundamental doctrine of international law which gives effect to sovereignty and comity. By recognising sovereignty and comity as relevant to SARS' duties under the ICC Act, this Court accepted that even "the struggle against impunity"[69] does not render the rationale for immunity redundant in the context of international crimes.[70] Thus HSF's stance has already been rejected by this Court, and HSF does not seek to persuade this Court that its previous unanimous judgment (upheld by the Constitutional Court) is clearly wrong and therefore should be overruled.

J.J. GAUNTLETT SC
F.B. PELSER
L. DZAI

Counsel for Government

Chambers
Cape Town

7 February 2016

---

[66] Culminating in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC), cited by HSF in *inter alia* paras 24, 29, 31, 32, 34 and 35 of its heads of argument.

[67] *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA).

[68] *Id* at para 68.

[69] *Id* at para 37.

[70] The Constitutional Court's judgment in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) does not detract from this recognition. To the contrary, it upholds this Court's reasoning that the duty to investigate international crimes may be limited by the considerations identified by this Court (*id* at para 81), recognises that an investigation in South Africa would not offend the principle of non-interference with another sovereign state (*id* at para 78); and, although it expressly refers to "the international-law doctrine of state sovereignty" (*id* at para 75), does not suggest that this doctrine is abolished (or that its rationale has ceased) in the context of international crimes.