

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**CASE NO: 867/2015**

In the application of:

HELEN SUZMAN FOUNDATION Applicant for admission as *amicus curiae*

and

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT** First Respondent**THE DIRECTOR-GENERAL OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT** Second Respondent**THE MINISTER OF POLICE** Third Respondent**THE COMMISSIONER OF POLICE** Fourth Respondent**THE MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION** Fifth Respondent**THE DIRECTOR-GENERAL OF
INTERNATIONAL
RELATIONS AND COOPERATION** Sixth Respondent**THE MINISTER OF HOME AFFAIRS** Seventh Respondent**THE DIRECTOR-GENERAL OF
HOME AFFAIRS** Eighth Respondent**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE** Ninth Respondent**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS** Tenth Respondent

**THE HEAD OF THE DIRECTORATE FOR
PRIORITY CRIMES INVESTIGATION**

Eleventh Respondent

**THE DIRECTOR OF THE PRIORITY CRIMES
LITIGATION UNIT**

Twelfth Respondent

**THE SOUTHERN AFRICAN LITIGATION
CENTRE**

Thirteenth Respondent

In the matter between:

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT AND 11 OTHERS**

Applicants in the leave
to appeal application

and

**THE SOUTHERN AFRICAN LITIGATION
CENTRE**

Respondent in the leave
to appeal application

FOUNDING AFFIDAVIT:

APPLICATION TO BE ADMITTED AS *AMICUS CURIAE*

I, the undersigned

DANIEL JOHN RAFFERTY

do hereby make oath and say that:



INTRODUCTION

1. I am an attorney of the High Court of South Africa, practising as such in the firm Webber Wentzel, situated at 90 Rivonia Road, Sandton, Johannesburg. Webber Wentzel are the attorneys of record in this application for the Helen Suzman Foundation ("**HSF**"), a non-governmental organisation whose objectives are to defend the values that underpin our liberal democracy and to promote respect for human rights.
2. I am duly authorised to depose to this affidavit and bring this application on behalf of the HSF.
3. The facts contained in this affidavit are, unless otherwise stated or indicated by the context, within my personal knowledge, and are, to the best of my knowledge and belief, true and correct.

NATURE OF THIS APPLICATION

4. This is an application in terms of Rule 16 of the Supreme Court of Appeal Rules for admission of the HSF as *amicus curiae* in the appeal to this Honourable Court by the Applicants for leave to appeal ("**the Proceedings**") of the decision of the Gauteng Division of the High Court, Pretoria under case number 27740/2015 ("**the High Court Proceedings**") ("**the High Court judgment**").
5. For ease of reference, I refer to the parties to this application as they are referred to in the High Court Proceedings: the Applicants for leave to appeal ("**the State Entities**") being the Minister of Justice and Constitutional



Development and 11 others and the South African Litigation Centre being the Respondent ("**the Respondent**").

6. In brief, the purpose of the HSF's application to be admitted as *amicus curiae* in this matter is to make submissions on the proper interpretation of section 4(1)(a) of the Diplomatic Immunities and Privileges Act, 2001 ("**DIPA**") in light of the requirements of the Constitution.
7. The HSF submits that having regard to the Preamble, Chapter 1 and Chapter 2 of the Constitution, and the State's constitutional obligations, section 4(1)(a) of DIPA should not be interpreted to afford heads of state complete immunity in all circumstances.
8. The HSF intends to argue that, taking into account the properly construed requirements and dictates of the Constitution, the State has not set out a case that justifies the granting of immunity to President Al Bashir in terms of section 4(1)(a) of DIPA.
9. The remainder of this application is structured as follows:
 - 9.1 factual background;
 - 9.2 the interest of the HSF in the Proceedings;
 - 9.3 the submissions which the HSF seeks to make in the Proceedings should it be admitted as *amicus curiae*; the relevance of these submissions and how they will assist the above Honourable Court in determining the issues before it; and how these submissions differ from those of the other parties to the Proceedings;



- 9.4 the appropriate timetable, should the HSF be admitted as *amicus curiae*, for the filing of argument and the future conduct of this matter.

FACTUAL BACKGROUND

10. In terms of Rule 16(5) of the Supreme Court of Appeal Rules ("**the Rules**"), an applicant must make application to be admitted as *amicus curiae*, should consent of the parties not be secured, within one month after the record has been lodged with the Registrar. In terms of Rule 1(2)(b), the period between 16 December and 15 January (both dates inclusive) shall not be taken into account in the calculation of any period in terms of the Rules.
11. On 24 December 2015, it came to HSF's attention that the record in this matter had been lodged by the State Entities on 2 December 2015 and that the matter had, on an expedited basis, been set down for hearing on 13 February 2016. The record was lodged almost four months prior to the due date for such lodging: 24 March 2016. Before 24 December 2015, HSF was not aware that a request had been made for this matter to be heard on an expedited basis nor that such a request had been granted.
12. On 24 December 2015, and as soon as it became aware that the record had been lodged, the HSF wrote a letter to the parties requesting the consent of the parties to be admitted as *amicus curiae* in this matter ("**the 24 December 2015 letter**"). The 24 December 2015 letter is attached marked "**DJR1**". The 24 December 2015 letter requests the parties to inform the HSF whether they consent to the HSF being admitted as *amicus curiae* by no later than Monday, 4 January 2016.



13. The 24 December 2015 letter also sets out that should it be admitted as *amicus curiae*, the HSF undertakes to file its heads of argument simultaneously with the Respondent on 29 January 2015. The HSF submits that should it be admitted as *amicus curiae* by this Honourable Court and be permitted to file written heads of argument, it will, should the Court so direct, file its heads of argument by 29 January 2016. For the reasons set forth below, the State Entities will suffer no prejudice if the HSF is allowed to file its written submissions on 29 January 2016.
14. On 27 December 2015, the Respondent directed a letter to the HSF in which consent to be admitted as *amicus curiae* was granted to the HSF, as requested. This letter is attached hereto as annex "**DJR2**".
15. On 29 December 2015, the State Entities directed a letter to the HSF ("**the 29 December 2015 letter**") in which consent to be admitted as *amicus curiae* was declined on the basis that:
 - 15.1 the request was made "*unwarrantably late*";
 - 15.2 the 24 December 2015 letter contemplates the HSF filing submissions after the State Entities thus disabling the State Entities from dealing with submissions which were not made before the court *a quo*;
 - 15.3 the request failed to explain how the HSF's submissions would be useful to the Court and different from those of the Respondent and; further, that such submissions would burden the Court with "unnecessary" "late argument" in the context of an already expedited hearing; and



- 15.4 the Respondent *"is itself an NGO, with a specialist involvement and record in international law litigation in the region"* and brought the proceedings in that capacity. The overall purpose which would be served *"by the competitive involvement at this late stage by another NGO is not with respect apparent from [the 24 December 2015 letter]"*.
16. The 29 December 2015 letter is attached marked "**DJR3**".
17. As set forth fully below, the submissions which the HSF intends to make are directly relevant to the determination of this matter and will be of assistance to the Court. The importance of this matter for the rule of law dictates that all relevant arguments should be ventilated before, and decided by, this Honourable Court. The importance of having all relevant argument heard outweighs any perceived prejudice on the part of the State Entities.
18. In any event, HSF submits that there will be no prejudice to the parties as the HSF will endeavour, if so directed, to file its heads of argument on 29 January 2015 concurrently with the Respondent, which can be addressed by the State Entities, before the hearing of this matter as directed by this Honourable Court, alternatively, at the hearing of this matter as directed by this Honourable Court, alternatively, at the hearing of this matter.
19. It is in any event unclear why HSF's submissions should be treated in any way differently (from a procedural perspective) to those of the Respondent. HSF's argument will, just as in the case of the Respondent (although for different reasons and on a different basis), argue against the interpretation adopted by the State Entities. Yet, there is no provision for the Respondent to file its



submissions prior to those of the State Entities. The State Entities are now aware of the outline of the submissions which HSF will be making and can deal with any of the issues arising in its written submissions due on 15 January 2016. This is precisely the position which the State Entities are vis-à-vis the Respondent's potential arguments.

20. If the State Entities consider it appropriate or necessary to deal with an argument raised by the Respondent in its submissions of 29 January 2016, they can either seek special leave to file responding submissions or (more customarily) to deal with those issues at the hearing on 13 February 2016.
21. Having requested the Respondent to keep it updated on the progress of the matter, and being informed by the Respondent on 24 December 2015 that the record had been filed, the HSF immediately took all reasonable steps as expeditiously as possible to seek the consent of the parties, and when such consent was not granted by the State Entities, to prepare this application. Under the Rules of this Court, HSF's application would only be due by 2 February 2016; thus, it is well in time. In any event, the HSF took steps to be admitted as amicus by this Court as soon as possible after becoming aware of the lodging of the record.
22. The fact that the Respondent is also an NGO is irrelevant to the HSF's application which it is entitled, as a matter of law, to bring in its own interest and in the public interest. The test is whether HSF can show an interest in the matter and whether the submissions will be useful to the Court and different from those of the other parties. The HSF submits, as set forth fully below, that these requirements have, in fact, been met.



23. It is respectfully submitted that it is in the interest of justice for matters of paramount public importance, such as the present, to be ventilated fully and that the submissions which the HSF intends to make will materially benefit this Honourable Court in the adjudication of this matter.
24. In the circumstances, and for the reasons set forth below, the HSF prays that this Honourable Court grant the relief sought in the Notice of Motion to which this affidavit is attached.

THE HSF'S INTEREST IN THE PROCEEDINGS

25. The HSF is a non-governmental, public interest, organisation which has as its purpose the promotion of South African democracy and constitutionalism. Its objectives are *"to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights"*. These issues are directly implicated in this matter.
26. As an organisation concerned with the principles of democracy and constitutionalism, as well as the rule of law, the HSF is concerned with the proper interpretation of section 4 of DIPA in light of the requirements of the Constitution and how this impacts on the lawfulness of the decision of the State Entities not to arrest and detain President Al Bashir, a sitting head of state, taking into consideration the allegations of the serious international crimes against him.
27. This case is of vital importance to constitutionalism, the rule of law and the doctrine of separation of powers in South Africa. It is squarely in the public interest for these issues to be ventilated fully and decided by this Court.



28. The HSF has an interest in the Proceedings owing to the fact that State action that is inconsistent with the Constitution undermines the rights enshrined in our Bill of Rights, the foundational values of the Constitution and the rule of law.
29. The HSF has a history of promoting South Africa's domestic and international law commitments to uphold democracy and the rule of law, constitutionalism and human rights. The HSF has specialised expertise and interest in national, regional and international law standards in relation to the issues before this Honourable Court.
30. The submissions of the HSF are relevant and will assist the Court as such submissions have not been advanced by other parties to the Proceedings. The points which the HSF intends to argue are *clearly* of paramount public interest.
31. Should the HSF be admitted as *amicus curiae*, it will advance the submissions set out below.

THE HSF'S SUBMISSIONS

32. At a high level, the HSF's involvement in this matter will be to address a discrete legal issue regarding the relationship between customary international law and the Constitution, proper statutory interpretation in light of the contents of Chapter 2 of the Constitution and the bearing that this has on section 4(1)(a) of DIPA, on which the State Entities rely, and the facts of this case. Its submission will address the proper interpretation of section 4(1)(a) of DIPA in light of the Constitution, including section 232 of the Constitution, which provides that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.



33. The HSF's submissions can be broadly outlined as follows:
- 33.1 The Constitution is the supreme law of the Republic, and any law or conduct inconsistent with it is invalid.
- 33.2 Section 232 of the Constitution entrenches customary international law as law in South Africa, but this is only insofar as it is consistent with the Constitution.
- 33.3 Where possible, a court must prefer an interpretation of legislation that is consistent with the Constitution over one that is not.
- 33.4 Thus, 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, 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]".
- 33.5 The Constitution requires the State to take reasonable steps to ensure that persons accused of having committed crimes against humanity, genocide and/or war crimes are detained, arrested and/or prosecuted in a forum that has jurisdiction over the alleged perpetrator.
- 33.6 The State has a *prima facie* duty to detain, arrest and/or prosecute all persons who *prima facie* appear to have committed such crimes.
- 33.7 The State has this duty not just because of international law (though, international law reinforces this duty). Nor is it a duty that it has because



South Africa has signed and ratified the Rome Statute and domesticated it through the Rome Statute of the International Criminal Court Act, 2002 (though, signature, ratification and domestication does recognise, concretise and particularise this duty).

33.8 Rather, the State has this duty because South Africa is a nation that is founded on the values of human dignity and the advancement of human rights and freedoms, and is committed to the building of a united and democratic nation that is able to take its rightful place as a sovereign state in the family of nations.


33.9 For the State to respect human dignity and advance rights and freedoms, and for South Africa to take our rightful place in the family of nations as a responsible global citizen, it must, where appropriate, detain, arrest and/or prosecute alleged perpetrators of crimes against humanity, war crimes or genocide.

33.10 The State must prosecute such persons even when they are foreign nationals.

33.11 This is because such crimes offend not just the laws of the states of which these individuals are citizens or international law to which we are bound through choice or as a matter of custom. They offend our basic law—the Constitution—which is founded on the basis that although South Africa is a sovereign state, it is also a member of a community of nations which universally recognises international crimes as an affront to democracy and prosperity in every State, as well as international peace.

A handwritten signature in black ink, located in the bottom right corner of the page. The signature is stylized and appears to be a cursive name.

- 33.12 This is particularly so as the State has an especial constitutional obligation to protect, promote, fulfil and advance each of the rights in the Bill of Rights (sections 7 and 8 of the Constitution). Permitting persons (wherever they may be placed in the hierarchy of a foreign government) to escape justice with impunity when within South African jurisdiction is antithetical to those values and obligations.
- 33.13 Moreover, allowing such persons to escape with impunity infringes the rights of every person in South Africa, including their dignity and physical and psychological integrity. It also prejudices the rights of every person who was subjected to and/or escaped persecution by the person accused of international crimes, as well as all relatives and friends of a persecuted person. This is especially the case for persecuted and persons related to them that live in South Africa, perhaps finding refuge from the very persecutions in issue.
- 33.14 The duty to detain, arrest and/or prosecute persons who have committed heinous international crimes of this nature, therefore, is not created by international law or by domestic legislation. The duty emanates from the structure, text and values of the Constitution. *The source of this duty is the Constitution itself.*
- 33.15 In the absence of significant constitutionally cognisable reasons justifying non-conformity with this duty, the State must take reasonable steps to detain, arrest and/or prosecute sitting heads of who have committed war crimes, crimes against humanity and/or genocide.



- 33.16 This duty to detain, arrest and/or prosecute persons who have committed war crimes, crimes against humanity and/or genocide, and the limited circumstances in which the State may decline to conform to it, extends to sitting heads of state.
- 33.17 When regard is had to the reasons that ground head of state immunity—that is, the need to promote efficient relations between states—a rule that establishes an absolute procedural bar (as asserted by the State) to the detention, arrest and/or prosecution of heads of state in cases of alleged crimes against humanity, war crimes and genocide is inconsistent with the Constitution.
- 33.18 Therefore, section 4(1)(a) of DIPA cannot be interpreted to afford heads of state immunity in all circumstances. Rather, they only have immunity 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 of all perpetrators of such crimes.
- 33.19 Given the *prima facie* duty to detain, arrest and/or prosecute perpetrators of such crimes, the burden of establishing that there are constitutionally cognisable reasons that outweigh this duty are present, lies with the State.
- 33.20 The State Entities have not set out a case which justifies the grant of any immunity in terms of section 4(1)(a) of DIPA. And there is, in fact, none.
34. The HSF, therefore, intends to make specific submissions on the nature and content of the reasons that underlie the rule of customary international law that afford heads of state immunity, as well as the reasons that ground the duty of



the state to take reasonable steps to ensure that alleged perpetrators of crimes against humanity, genocide and/or war crimes are detained, arrested and/or prosecuted in a forum that has jurisdiction over the alleged perpetrator.

35. These arguments are relevant to the proper interpretation of section 4(1)(a) of DIPA. They will be of assistance to the Court in determining the ultimate issue in this case, that is, whether the State, in the circumstances, has a legal duty to arrest and detain President Al Bashir.

36. The HSF's submissions are not canvassed in the papers of the State Entities or the Respondent:

36.1 The State Entities contend that section 4(1) of the DIPA effectively and completely bars the arrest of President Al Bashir.

36.2 The Respondent argues that the state has the duty to arrest President Al Bashir based, for the most part, on the provisions and proper interpretation of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 and the Rome Statute.

36.3 Neither party deals with the argument relating to the relation and interplay between customary international law and the Constitution in the context of and with specific reference to section 4(1)(a) of the DIPA.

37. The HSF submits that the submissions it wishes to advance are relevant, distinctive and will be of assistance to the court.



FUTURE CONDUCT OF THIS MATTER

38. The HSF seeks leave of this Honourable Court to be admitted as *amicus curiae* in the Proceedings and requests that the President of the Court regulate the participation of the HSF therein. The HSF seeks an order directing it to:
- 38.1 Lodge written submissions in the Proceedings; and
- 38.2 Present oral submissions at the hearing of this matter.
39. Due to the fact that this matter has been set down for hearing on 13 February 2016, HSF requests that the Court direct that this application be heard on an expedited basis.
40. Should the Court so direct, and to negate any argument of prejudice by any of the parties, HSF will endeavour to lodge written submission simultaneously with the Respondent, on 29 January 2016.
41. Should this Court deem it appropriate to do so, HSF submits that the State Entities and the Respondent be permitted to deliver submissions in response to HSF's submissions within 5 days of HSF's delivery of its submissions, or at any other time and on any other date determined by this Court.
42. There is no prejudice to the State Entities as they have had sight of the arguments which the HSF intends to raise since at least 29 December 2015, as adumbrated and explicated in this affidavit.



COSTS

43. The withholding of consent by the State Entities in a matter of clear public importance, and in which the HSF has an obvious interest, is unjustifiable. The arguments HSF intends to make are clearly relevant to this matter; are different to the arguments raised by the other parties; and will be of assistance to this Court.
44. The withholding of consent by the State Entities is without foundation.
45. Should the State Entities persist in their opposition to the HSF's admission as amicus by opposing this application, the HSF prays for an order that the costs of this application is borne by those parties who oppose it, on the scale of attorney and own client, including the costs of two counsel.

WHEREFORE, the HSF prays for the relief set forth in the notice of motion to which this affidavit is attached.



DANIEL JOHN RAFFERTY

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Sandton on 11th January 2016, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

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Capacity:

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URGENT

Your reference

Our reference

Date

V Movshovich / P Dela / D Cron /
D Rafferty

24 December 2015

Dear Sirs

The Minister of Justice and Constitutional Development // The Southern African Litigation Centre (SCA case no. 867/2015)

1. We refer to the above matter and we confirm that we act for the Helen Suzman Foundation ("our client").
2. On 24 December 2015, our client became aware that the record in this matter was filed by the applicants on 2 December 2015, almost four months prior to the due date, 24 March 2016, for the filing of the record. We were also made aware on this date that the above matter was set down for hearing on 13 February 2016.
3. Having perused the parties' papers, our client is of the view that it has a substantial interest in these proceedings on the basis of what is set forth immediately below. In the circumstances, it seeks the parties' consent to intervene as *amicus curiae* in this matter.

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Senior Partner: JC Els Managing Partner: SJ Hutton Partners: RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley PG Bradshaw EG Brandt JL Brink S Browne MS Burger T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies ME Davis PM Daya JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley KZ Diothi G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman MM Gibson H Goolam CI Gouws JP Gouws PD Grealy A Harley VW Harrison JM Harvey MH Hathorn JS Henning KR Hillis NA Hlatshwayo XNC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser MD Kota J Lamb PSG Leon PG Leyden L Marals S McCafferty MC McIntosh M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu LA Morphet VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Palge AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips HK Potgieter S Rajah D Ramjettan NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DMJ Simaan AJ Simpson J Simpson N Singh MP Spalding L Stein PS Stein LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen ED van der Vyver M van der Walt N van Dyk A van Niekerk JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken
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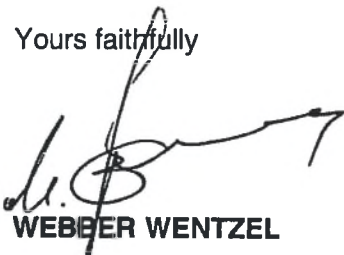


4. Our client is a non-governmental, public interest, organisation, which has as its purpose the promotion of South African democracy and constitutionalism. Its objectives are to 'defend the values that underpin liberal constitutional democracy and to promote respect for human rights'. All of these issues are implicated in this matter.
5. The submissions that our client intends to make may, broadly speaking, be outlined as follows:
 - 5.1 A court should prefer an interpretation of legislation which is consonant with the Constitution and particularly the Bill of Rights above an interpretation which is inconsistent with the Constitution and the Bill of Rights. Section 232 of the Constitution entrenches customary international law as law in South Africa, only insofar as it is consistent with the Constitution. The immunity that is afforded to heads of state under section 4(1)(a) of the Diplomatic Immunities and Privileges Act, 2001 ("DIPA") must be read consistently with the rights and values contained in the Constitution.
 - 5.2 The Constitution requires the state to take reasonable steps to ensure that persons accused of having committed crimes against humanity, genocide and/or war crimes are detained, arrested and/or prosecuted in a forum that has jurisdiction over the alleged perpetrator. Thus, the state has a *prima facie* duty to detain, arrest and prosecute all persons who *prima facie* appear to have committed such crimes. This duty extends to sitting heads of state. In the absence of significant constitutionally cognisable reasons that justify limitation of that duty, the Constitution requires the state to take reasonable steps to comply with this duty.
 - 5.3 A rule that establishes an absolute procedural bar to the detention, arrest and/or prosecution of heads of state in cases of alleged crimes against humanity, war crimes and genocide is inconsistent with the Constitution.
 - 5.4 Thus, section 4(1)(a) of DIPA, read together with the Constitution, should not be interpreted to afford heads of state complete immunity in all circumstances. Heads of state are only afforded immunity in circumstances when this may be justified by the state showing that the reasons that justify affording a specific head of state immunity in a case outweigh the strong constitutional reasons that otherwise require detention, arrest and prosecution of all perpetrators of such crimes. This burden of justification has not been discharged by the state in this case.



- 5.5 Our client intends to make submissions on the nature and content of the reasons that underlie the rule of customary international law that ordinarily affords heads of state immunity, as well as the reasons that ground the *prima facie* duty of the state to take reasonable steps to ensure that alleged perpetrators of crimes against humanity, genocide and/or war crimes are detained, arrested and/or prosecuted in a forum that has jurisdiction over the alleged perpetrator. Our client intends to submit that the state has not set out a case which justifies the grant of any immunity in terms of section 4(1)(a) of DIPA.
6. Our client has a clear interest in these proceedings and believes that its submissions will be of material benefit to the Honourable Court hearing the matter. Its submissions will differ in substance from the submissions of the applicants and the respondent.
7. Should the parties consent to our client's intervention as *amicus curiae*, our client hereby undertakes to file its heads of argument simultaneously with the respondent on 29 January 2015.
8. Please let us know by no later than Monday, 4 January 2016, whether your respective clients consent to our client being admitted as *amicus curiae* in this matter. Should you require any further information, please let us know.

Yours faithfully



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Your reference
V Movshovich/P Dela/
D Cron/ D Rafferty

Our reference
Mr M Hathorn

Date
27 December 2015

3001972

Dear Sir

Letter of Consent to the Helen Suzman Foundation entering as Amicus Curiae in Case no: 867/2015 in the Supreme Court of Appeal : The Minister of Justice and Constitutional Development & Others ("Applicants") and The Southern African Litigation Centre ("Respondent")

We refer to your letter dated 24 December 2015.

Our client, the Southern African Litigation Centre, consents to the admission of the Helen Suzman Foundation as amicus curiae in this matter.

Yours sincerely

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Senior Partner: JC Els Managing Partner: SJ Hutton Partners: RB Africa NG Alp OA Ampofo-Anti RL Appelbaum BA Baillie JM Bellew AE Bennett DHL Booyesen AR Bowley PG Bradshaw EG Brandt JL Brink MS Burger RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies ME Davis PM Daya JHB de Lange DW de Villiers BEC Dickinson MA Diermont DA Dingley KZ Dlothi G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhulzen MJR Evans AA Felekis GA Fichardt JB Forman MM Gibson H Goolam CI Gouws JP Gouws PD Grealy A Harley VW Harrison JM Harvey MH Hathorn JS Henning KR Hillis NA Hlatshwayo XNC Hlatshwayo S Hockey CM Hofeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser MD Kota J Lamb PSG Leon PG Leyden L Marais S McCafferty MC McIntosh M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Mlilo NP Mngomezulu LA Morphet VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips C Pillay HK Potgieter S Rajah D Ramjetan NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DM Simaan AJ Simpson J Simpson N Singh MP Spalding L Stein PS Stein LJ Swaine ER Swanepoel Z Swanepoel A Thakor A Toefy D Vallabh PZ Vanda SE van der Meulen ED van der Vyver M van der Walt N van Dyk A van Niekerk MM van Schaardenburgh JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson JWL Westgate KL Williams K Wilson RH Wilson M Yudaken Chief Operating Officer: SA Boyd

Webber Wentzel is associated with ALN



Office of the State Attorney Pretoria

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29 DECEMBER 2015

ENQ: J MEIER
EMAIL: eturner@justice.gov.za

MY REF: 3604/2015/Z49
YOUR REF: V Movshovich/P Dela
D Cron/D Rafferty

WEBBER WENTZEL
JOHANNESBURG


Att: V Movshovich
E-mail: vlad.movshovich@webberwentzel.com

Sirs

**RE: MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND
OTHERS vs THE SOUTHERN AFRICA LITIGATION CENTRE**

1. Your letter in the above matter marked 'urgent' dated 24 December reached the writer on the morning of 28th of December 2015.
2. As a matter of principle, our client would consent to the admission of *amici curiae* to advance legal argument ("submissions") in accordance with SCA Rule 16(6)(c). As you would be aware, this requires the submissions to be relevant, useful to the Court and different from those of other parties.
3. Your letter addresses none of these requirements.

4. The points listed in your letter are all matters canvassed by SALC in its argument to date. There is no reason to assume, prior to the filing of SALC's heads of argument, that it will now not do so.
5. Your letter moreover does not suggest that you have first inquired from SALC whether the points you wish to advance are in any material respect different from what it intends to canvass.
6. The High Court application and judgment in June received the greatest national and international coverage. So did the statement on behalf of our clients in July that they would seek leave to appeal. We place on record that at no time did your client ask of us to be apprised of enrolment, or intimate a wish to intervene in any hearing. We are unaware that it made any similar inquiry to the Registrar.
7. Our client has sought as early a hearing as possible. (Your client would have been aware that the proceedings in the court below were all conducted urgently.) It was last week notified that this request has been granted, and that the application (and merits of the appeal) is to be heard on 13 February 2016, with the applicants' heads of argument to be filed by 15 January 2016.
8. In the circumstances your request is declined on four grounds.
9. Firstly, it is made unwarrantably late.
10. Secondly, it evidently contemplates your client filing submissions after our clients' heads of argument - you propose no earlier date - thus disabling our clients from dealing with submissions not made by your client before the court *a quo*.
11. Thirdly, it fails to explain what it is about the contemplated points which would be both useful to the court and different from those of SALC, as required by SCA Rule 16(6)(c). The points you list stand only to repeat or substantially overlap those of SALC, and to burden the Court with unnecessary, late argument - this in the context of an expedited hearing.

A handwritten signature in black ink, consisting of a stylized 'S' and 'A' followed by a downward-pointing arrow.

12. Fourthly, the SALC is itself an NGO, with a specialist involvement and record in international law litigation in the region. It brought the proceedings in that capacity, not as an 'own interest' litigant. What overall purpose would be served by the competitive involvement at this late stage by another NGO is not with respect apparent from your letter.

Yours Faithfully


J MEIER
FOR STATE ATTORNEY PRETORIA

