THE SUPREME COURT OF APPEAL

SCA CASE NO: 867/2015

CASE NO: 27740/2015

In the application of between:

HELEN SUZMAN FOUNDATION	**Applicant for admission as *amicus curiae***

and

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

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**10th Respondent**
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	**11th Respondent**
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	**12th Respondent**
THE SOUTHERN AFRICAN LITIGATION CENTRE	**13th 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**

FILING SHEET

DOCUMENT: **FIRST TO TWELFTH RESPONDENTS' OPPOSING AFFIDAVIT**

FILED BY:

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TO: THE REGISTRAR OF THE
SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND
TO: **APPLICANT'S ATTORNEYS**
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TIME:

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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

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

In the application for leave to intervene as amicus curiae between:

HELEN SUZMAN FOUNDATION — Applicant

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ELEVEN OTHERS — First to twelfth respondents

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ELEVEN OTHERS — First to twelfth applicants

and

SOUTHERN AFRICAN LITIGATION CENTRE — Respondent

OPPOSING AFFIDAVIT

I, the undersigned,

JAKOBUS MEIER

do hereby make oath and state as follows:

1. I am an attorney of the High Court of South Africa, employed in the office of the State Attorney, Pretoria at SALU Building, 316 Thambo Sehume Street, Pretoria. I

am the attorney of record representing the applicants. I have acted in this capacity throughout the proceedings giving rise to this application.

2. The facts to which I depose are within my own knowledge, or derived from documents under my control. They are true and correct.

3. The application for admission as an *amicus curiae* by the Helen Suzman Foundation ("HSF") is opposed on behalf of the applicants for leave to appeal (collectively "Government"). Government has adopted the in-principle approach that it should not oppose applications to be admitted in this matter as *amici* which demonstrate compliance with SCA Rule 16(6)(c). Regrettably the deficiencies identified on behalf of Government in the letter, annexure DJR3, to the founding affidavit by HSF's attorney, have not been materially overcome.

4. The basis of HSF's application is explained on behalf of HSF as follows:

   (1) HSF seeks admission "to make submissions on the proper interpretation of section 4(1)(a) of the Diplomatic Immunities and Privileges Act, 2001 ['the Act']" (para 6).

   (2) Taking into account "the properly construed requirements and [sic] dictates of the Constitution", Government has not "set out a case that justifies the granting of immunity … in terms of section 4(1)(a) …" (para 8).

   (3) HSF wants to make "specific submissions on the reasons underlying the customary international law rule that afford [HSF implicitly accepts] heads of state immunity" (para 34).

   (4) These submissions "are not canvassed" by the parties, more particularly because neither side "deals with the argument relating to the relation and [sic]

interplay between customary international law and the Constitution … in the context of and [sic] with specific reference to section 4(1)(a) of the [Act]" (para 36.3).

(5) This argument is relevant distinctive [sic] and will be of assistance to the court" (para 37).

5. These contentions – notably the conclusions in (4) and (5) – are with respect simply not so. Both SALC and Government, as the affidavits reflect, focus centrally on the relation between section 4(1) of the Act and the rule of customary international law. Both sides have always also focused, of course, on the correct approach to interpretation of the statutory provision and the international law rule.

6. This is clear on the most basic perusal of the application record (as regards SALC's contentions, see pp 118-136; and as regards Government's, see pp 21-25 and further pp 156-168).

7. Accordingly the central premise for HSF's contention that it would bring to this Court a distinctive argument is untrue.

8. Government is concerned that the Court will not be assisted by the intervention as *amicus* by HSF (this when others have also intimated the intention to seek leave to intervene, and whose applications must of course be dealt with on their own merits). What HSF purposes is to file written argument, and also to deliver oral argument, which quite clearly will repeat what will be before Court at the instance of Government and SALC. The Court and the parties' legal representatives will be

obliged (this within a very short timeframe) to sort out the overlap, and to contend with an inevitable physical burdening of what is before Court. Making provision moreover for oral argument in circumstances where it is not clear that anything materially different to that for the parties will ensure can only have the consequence of burdening the Court, as well as the parties, and of cutting into limited court time.

9. Moreover, the proposed HSF argument is not only not distinctive. It also fails to meet the additional requirement of being useful to the Court. This is because the argument is flawed in each of its fundamental premises.

10. The first premise is that Government did not acquit itself of what HSF represents as a burden "to set out a case" that "justifies the granting of immunity … in terms of section 4(1) of the [Act]" (para 8). The correct position is that section 4(1) has only one jurisdictional fact. It is that the person to whom immunity attaches be a head of a foreign State. President Bashir is the head of a foreign State. This is common cause. Thus Government did demonstrate that section 4(1) of the Act applies.

11. The second premise is that the State's duty under the ICC Act is in truth not one imposed by that Act (para 33.7), but "[r]ather" (para 33.8) one arising under "our basic law – the Constitution" (para 33.11), invoking "sections 7 and 8 of the Constitution" (para 33.12). HSF's case is that the duty contended for "is not created by international law or by domestic legislation": "*The source of this duty is the Constitution itself*" (para 33.14, original italics). Thus HSF relies *directly* on the Constitution, bypassing two Acts of Parliament governing the position. This is legally impermissible, I am advised, firstly because it offends against the principle of

subsidiarity repeatedly enforced by the Constitutional Court. But in addition it ignores what the Constitutional Court laid down in *Kaunda*, specifically addressing the predecessor of section 7 of the Constitution. The Constitutional Court held emphatically that the Constitution has no extraterritorial reach.

12. The third premise is that advancing basic legal propositions – that the Constitution is supreme (para 33.1); that section 232 of the Constitution recognises customary international law (para 33.2); that a constitutionally compliant interpretation of national legislation should be preferred (para 33.3) – is of any assistance to this Court. These truisms are not in dispute in this case.

13. Accordingly it is submitted that there is no evident prospect of the HSF argument being "useful to the Court", quite apart from the enduring failure by HSF to demonstrate that its argument "raises new contentions" (as Rule 16(7)(a) requires).

14. There is one further aspect to which the Court's attention should be drawn. HSF seeks to explain its delay in expeditiously seeking consent and thereafter preparing this application by pointing to a failure by SALC to keep HSF updated as regards the filing of the record (para 21). The record was filed on 2 December, yet it was only on 24 December that this "came to HSF's attention" (para 11) – HSF does not explain how. The failure to explain is rendered the more unacceptable given the fact that HSF has appointed the same firm of attorneys as SALC to act as its attorneys of record (as appears from the notices of motion).

15. Lastly, there is no substance in HSF's contention that the parties had not been, and will not be, prejudiced by its proposed admission as an *amicus* (para 18). As a result of its failure to bring its application earlier, immediately after its attorneys of record – who had known since June that an application by Government for leave to appeal would be brought – had received the record, Government prepared its heads of argument without knowledge of what HSF now proposes to advance before Court. Government's heads of argument were sent to me on Thursday 14 January for filing; HSF's application only reached my office on 13 January, and could only be forwarded to counsel in Cape Town later the next day. By this time Government's heads of argument had already reached me, in order to be filed in Bloemfontein as required on the next day.

16. Moreover, the proposition that Government would have an adequate time as between the date on which HSF wishes to file its full argument (29 January) and the hearing on 12 February to evaluate that argument and respond to it is clearly unfounded. Government has been prejudiced by the HSF application, and stands to be further prejudiced if it is allowed.

17. Should this Honourable Court however accede to HSF's application (which I respectfully submit should not be the case for the reasons set out), the Court is asked to direct that HSF deliver any written submissions (not to exceed 20 pages), not repeating any matter set forth in the argument or papers filed by the other parties and raising only new contentions which may be useful to the Court, by no later than Monday 1 February 2016.

18. This in fact would accord HSF three calendar days more than its notice of motion seeks, but ensure that HSF does not file argument which repeats or overlaps with that of the parties. That HSF proposes to file on the same day as SALC is indicative of three things. First, it has no real interest in, or expectation of, ensuring a truly different argument from SALC's. Second, it acknowledges implicitly that any date later than 29 January *is* indefensibly prejudicial to the Court and the parties. Third, that HSF has framed its relief and timed its application with an inadequate regard for the consequences. Government only proposes a yet later date for HSF to file (having argued that the application should not be allowed at all) because the relief as framed is with respect absurd.

19. It is submitted that leave should not be granted to HSF in any event to deliver oral argument before the Court has had sight of written argument by HSF.

20. Finally, as regards costs, it is submitted that HSF's prayer for costs on the scale of attorney and own client against Government, should it persist in opposing this application, is unwarranted and indeed inappropriate. The opposition advanced by Government has been on the explicit basis that the HSF application does not reasonably comply with the rigorous requirements of this Court's rule. It is submitted that that opposition has been principled and, if despite what has been advanced above, is not sustained, the opposition was wholly reasonable. The opposition has highlighted obvious deficiencies in the application, delay on the part of HSF, consequential prejudice to the parties and the Court, and other matters central to the interests of justice in this case.

JAKOBUS MEIER

I certify that the deponent acknowledged to me that he knows and understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on her conscience; that the deponent thereafter uttered the words, I swear that the contents of this declaration are true, so help me God; and signed this declaration in my presence at Pretoria on this 18th day of January 2016.

COMMISSIONER OF OATHS

Full names: THABO THUTO MAFATLHENG

Designation: ADMIN CLERK

Area: PRETORIA

DIRECTOR OF PUBLIC PROSECUTIONS
PRIVATE BAG X300
18 JAN 2016
APPEAL SECTION
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NORTH GAUTENG: PRETORIA