
Onlangse regspraak/Recent case law

The Prosecutor v Omar Hassan Ahmad Al-Bashir, **International Criminal Court, July 2017**

Achieving clarity on immunities and the full implication of a United Nations Security Council referral to the International Criminal Court

1 Introduction

On 6 July 2017, Pre-Trial Chamber II of the International Criminal Court delivered judgment concerning the Republic of South Africa's non-compliance with the court's request in terms of article 87(7) of the Rome Statute to arrest and surrender Sudanese president Omar Hassan Ahmad Al-Bashir (*The Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09-302) (hereinafter *Al-Bashir*). The aforesaid article 87 deals with requests for cooperation by the International Criminal Court to member states. Article 87(7) specifically stipulates that where a state party fails to comply with the court's request, the court may make a finding to that effect and refer the matter either to the Assembly of States Parties or, where the matter was initially referred to the court by the United Nations Security Council, to that body.

The *Al-Bashir* judgment in The Hague was preceded by national jurisprudence, respectively in the North Gauteng High Court (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 5 SA 1 (GP)) and the Supreme Court of Appeal (*Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 3 SA 317 (SCA)).

This contribution is not concerned with the court's references to the possible significance of the 1948 Genocide Convention, the effect of South Africa's interactions with the court in 2015 after Al-Bashir had already arrived on South African soil, or whether or not a referral of South Africa to the court's States Assembly or the United Nations Security Council is warranted. These, I would argue, are of little consequence to the main findings.

Instead, this note aims to show that, above everything else, the judgment contributes to legal certainty on member states' obligations towards the International Criminal Court. More specifically, it goes a long way towards clarifying the legal status of so-called Chapter VII referrals by the United Nations Security Council to the court, and the implications this has for states parties – not only for their duties in respect of the court,

but also in respect of non-states parties. Particularly the latter aspect has supplemented South African national jurisprudence, which had previously not clearly defined or dealt with the legal status of Security Council referrals to the International Criminal Court.

2 The run-up to the 2017 hearing in The Hague

The alleged gross violation of human rights in the Darfur region of Sudan saw the first United Nations Security Council referral to the International Criminal Court by way of Resolution 1593 (*UN Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*, 31 Mar 2005, S/RES/1593). Passing this resolution, the Security Council invoked its powers in terms of Chapter VII of the United Nations Charter to restore international peace and security in the region.

Resolution 1593 was preceded by another four resolutions (Resolution 1502 of 2003, Resolution 1547 of 2004, Resolution 1556 of 2004, Resolution 1564 of 2004), which progressively expressed the Security Council's concern over the genocide in Darfur. Resolution 1593 further followed on a 176-page report by a United Nations commission of inquiry, which had established that the Sudanese government was responsible for serious violations of international human rights and humanitarian law, amounting to crimes under international law (United Nations *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004* (2005) 3).

Prior to Resolution 1593, the closest the Security Council got to referral to the International Criminal Court to preserve and restore international peace and security was the establishment of ad-hoc international criminal tribunals such as those for the former Yugoslavia and Rwanda. Significantly, neither the Security Council's authority to, as part of its Chapter VII powers, set up international criminal tribunals, nor its authority to refer a situation to the International Criminal Court, has ever been seriously challenged in national or international jurisprudence, not even in *Al-Bashir* (cf Heyder 'The U.N. Security Council's Referral of the crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Court Criminal Court's Functions and Status' 2006 *Berkeley Journal of International Law* 650 et seq).

The International Criminal Court issued two warrants of arrest against President Al-Bashir in terms of article 13(b) of the Rome Statute. The first was on 4 March 2009 for war crimes and crimes against humanity; the second followed on 12 July 2010 for the crime of genocide (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development supra* par 15, 16 of applicant's founding affidavit). These followed on investigations by the court prosecutor. President Al-Bashir is suspected of being criminally responsible

... for attacks against a section of the civilian population of Darfur, Sudan, including murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians, and pillaging their property' (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development supra* par 17 of applicant's founding affidavit).

Acting in terms of article 89(1) and 91 of the Rome Statute, the court registry consequently requested member states to cooperate in arresting and surrendering President Al-Bashir should he set foot in their territories. Therefore, when the court learned from press reports in May 2015 that the Sudanese president intended to visit South Africa for an African Union summit in Johannesburg from 7 to 15 June that year, the court registrar requested the relevant South African authorities to cooperate by arresting and surrendering Al-Bashir in accordance with section 86 and 89 of the Rome Statute. In the event that South Africa was impeded or prevented from executing the request, the country was urged to 'consult with the Court without delay in order to resolve the matter' (*Al-Bashir* par 5-6).

On 11 June 2015, the court registry was contacted by the South African embassy in the Netherlands to request an urgent meeting in terms of article 97 of the Rome Statute. The request was acceded to, and a meeting between the South African embassy delegation, the court registry and the office of the prosecutor took place the next day, presided over by the presiding judge of the chamber (*Al-Bashir* par 7-9). During the meeting, the presiding judge pointed out that the issues tabled by South Africa had already been decided by the court on a previous occasion and, therefore, had 'no suspensive effect' on South Africa's obligations under the Rome Statute to cooperate with the court and arrest and surrender President Al-Bashir (*Al-Bashir* par 10).

On 13 June 2015, the day when the Sudanese president indeed entered South Africa, South Africa's chief state law adviser again met separately with members of the court registry and the prosecutor's office. Later that day, the presiding judge rejected a request from the prosecutor's office for an order to reconfirm and clarify South Africa's obligation to arrest President Al-Bashir (*Al-Bashir* par 13-14).

South Africa failed to arrest Al-Bashir before his departure from Johannesburg on 15 June 2015. Consequently, proceedings in terms of article 87(7) and regulation 109 of the Rome Statute were initiated in the International Criminal Court, and the matter was finally heard on 7 April 2017 (*Al-Bashir* par 26).

3 South Africa's submissions to the International Criminal Court

For the purposes of this contribution, South Africa's submissions can be split into two broad arguments. The first is the argument on international customary law immunity, in essence asserting that the country had not failed its obligations towards the International Criminal Court. The

second is the argument on the legal status of United Nations Security Council Chapter VII referrals to the International Criminal Court – an issue which, as mentioned in the introduction, had not been extensively dealt with nor decided by South African courts prior to this matter.

3 1 Advancing the argument on international customary law immunity

In arguing its case for not having arrested the Sudanese president, South Africa's first submission was that 'three fundamental errors' had occurred in the manner in which the article 97 consultations were conducted between the South African embassy delegation and the court in June 2015. These were that the court had wrongly dealt with both South Africa's request for consultations and the consultations themselves; that the court treated the consultations as 'quasi-judicial' instead of diplomatic and political, and that no rules applicable to such consultations were available under article 97 (*Al-Bashir* par 27).

Going into more detail, South Africa argued that it had not been afforded the opportunity to be 'appropriately represented' at the consultations, and that for want of rules of procedure under article 97 of the Rome Statute, the court 'should have erred on the side of caution in its approach to the request' (par 28).

Moreover, the questions serving before the International Criminal Court and those that had served before South Africa's national courts were different, the country asserted. The question before the International Criminal Court was whether South Africa had violated its obligations in terms of the Rome Statute and international law in general, and not whether it had violated its legal obligations under its domestic law (par 29).

The presiding judge's indication during the consultations that the issues tabled by South Africa had already been decided by the court, the country regarded as inconclusive – not only because the court's appeals chamber had not yet ruled on the matter, but also since, in spite of a prior ruling, 'the basic and most fundamental rule' was that each case ought to be argued and considered on its own merits (par 30).

South Africa maintained that the obligation to arrest and surrender Al-Bashir was ambiguous and uncertain, which was simply compounded by the court's previous inconsistent decisions in this regard. It argued that Pre-Trial Chamber I's decisions on non-compliance by Malawi and Chad (ICC-02/05-01/09-139 and ICC-02/05-01/09-151 respectively) 'conflated the presence' of the jurisdiction of an international court 'with the absence of immunity from national jurisdiction' (*Al-Bashir* par 31). Similarly, South Africa challenged the chamber's decision on non-compliance by the Democratic Republic of the Congo (ICC-02/05-01/09-195), particularly the court's finding that Resolution 1593 constituted a waiver of Al-Bashir's immunity. In its written submissions, South Africa

contended that it was ‘questionable’ whether the Security Council had the authority to waive head-of-state immunity (*Al-Bashir* par 31).

In essence, therefore, South Africa relied on customary international law not to arrest Al-Bashir on account of his head-of-state immunity. Yet in its written submissions to the International Criminal Court, the country also reverted to its assertion that South Africa was obligated to provide immunity to Al-Bashir in terms of article VIII (1) of the host agreement it had concluded with the African Union – an argument raised and rejected in both national lawsuits regarding this matter (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development supra* par 30; *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre supra* par 42).

3 2 Advancing the argument on the legal status of United Nations Security Council Chapter VII referrals to the International Criminal Court

Under this argument, South Africa firstly advanced that Resolution 1593 could not be interpreted as meaning that Al-Bashir’s immunity was waived; that only Sudan could waive immunity, and if it did not, it was a matter between Sudan and the Security Council. To hold otherwise, South Africa said, would be to pass the responsibility for non-compliance with Security Council resolutions onto individual states, creating the possibility that South Africa could become liable to Sudan because of Sudan’s ‘rights under international law’ (*Al-Bashir* par 34).

In addition, South Africa submitted that nothing in the context of the Security Council resolution suggested a waiver of (Sudan’s) immunity, and that it was not up to the International Criminal Court to ‘unilaterally’ decide that the resolution waived immunity. If such a departure from ‘the rules of international law’ was indeed the Security Council’s intention, this would have been explicitly indicated (par 35). Resolution 1593, South Africa maintained, was to be interpreted in a manner consistent with existing international law, including the law on immunities.

Finally, referring to the ‘political and diplomatic contexts’ of the matter, South Africa argued that it was ‘a leading player in peace efforts’ and could therefore not ‘disengage from the African Union or adopt a policy that would suggest that it is not going to host AU heads of state’ (par 40).

4 The International Criminal Court’s judgment – derogation from immunities, and the full implications of a Security Council referral

The court first analysed whether South Africa was entitled not to comply with the court’s request for arrest and surrender based on the two arguments the country raised – the first being international customary law that allowed serving heads of state immunity against prosecution,

and the second, Al-Bashir's immunity on account of the host agreement South Africa had concluded with the African Union (par 64-66).

The latter argument had already failed to convince the two national courts in litigation on the Al-Bashir matter, and did not satisfy the International Criminal Court either. Heads of state were clearly not staff members of the African Union Commission nor delegates or representatives of intergovernmental organisations attending the summit (par 66-67).

Therefore, the court immediately turned to the immunity afforded to serving heads of state under international law. In this regard, the court confirmed that in terms of customary law, there was no exclusion of immunity for serving heads of state sought for international crimes by another state, even if such exclusion was sought on behalf of an international court (par 68). This led to the question whether there was any 'derogation to the general regime of immunities under international law when the Court seeks the arrest and surrender' of a serving head of state (par 71).

4 1 Article 27(2) of the Rome Statute: States parties' cooperation with the International Criminal Court

With reference to article 27(2) of the Rome Statute, the court noted South Africa's argument that this provision was concerned only with the court's jurisdiction – in other words, ensuring that the court's jurisdiction would never be ousted by a defence of official capacity – but did not have any effect on states' rights and obligations towards the court (par 71). In essence, South Africa asserted that it was not the obligation of the court's member states to ensure that suspects of international crimes were arrested and handed over at the court's request.

The court rightly rejected this argument, for two reasons. Firstly, if article 27(2) were to be assigned the meaning that South Africa claimed it had, it would bar the court from ever exercising its jurisdiction. On the interpretation of the provision, the drafters clearly could not have intended for it to be understood as 'narrowly' as South Africa suggested (par 74). Secondly, and closely linked to the first reason, the court argued that requiring 'special procedural rules' – outside and additional to article 27(2), as South Africa asserted – to cooperate with the International Criminal Court with regard to persons who enjoyed official immunity would create 'an insurmountable obstacle to the Court's ability to exercise its jurisdiction' (par 75).

Considering both the vertical and horizontal levels of operation of article 27(2), the court found that the vertical operation – between a state party and the court – clearly indicated that a state party's immunity, including its head-of-state immunity, could never be used as a reason for it not to cooperate with the court. This finding the court elaborated on in its interpretation of article 98, which is presented in paragraph 4 4 below.

The court confirmed that functional immunity based on official capacity was provided for in international law – not for the individual’s benefit, but to avoid interference with the functioning and sovereignty of states (par 77-78).

Next, the court went on to articulate what I believe to have been a missing link in the South African government’s reasoning before both the International Criminal Court and the national courts, rendering its arguments fundamentally flawed: When states parties ratified the Rome Statute, they ‘accepted the irrelevance of immunities based on official capacity, including those they may otherwise possess under international law’. It follows then, as a ‘necessary corollary’, that states parties would give effect to requests for cooperation by the International Criminal Court (par 78). This also leads me to believe that the South African government, as many other states, appears to have equally misconceived their obligations in terms of the United Nations Charter – a point I will argue later on.

The court also proceeded to confirm that the horizontal application of article 27(2) – between states parties to the Rome Statute – equally implied that one state party, by way of the obligations created *inter partes* by an international treaty, was duty-bound to arrest and hand over an individual of another state party at the court’s request. Again, immunities would be irrelevant, as both states had voluntarily ratified the Rome Statute (par 79-80).

Having established states parties’ obligation to cooperate with the court in respect of other states parties, regardless of immunities, the court in the next section of its judgment turned to states parties’ obligation in respect of non-states parties.

4 2 The Rome Statute and non-states parties – article 98(1)

Of course, the irrelevance of state immunities as provided for in article 27(2) of the Rome Statute does not apply to non-states parties.

The applicable framework in the Rome Statute that would apply to non-states parties is found in article 98(1). The court briefly confirmed its interpretation of that provision, namely that the International Criminal Court may not request a state party to arrest and surrender an individual from a non-state party without first obtaining a waiver of immunity from the state whose official is impugned. However, the court did not leave off here.

Next, it turned to what I regard as the crux of the debate and jurisprudence regarding Al-Bashir, South Africa and the International Criminal Court.

4 3 When the International Criminal Court's jurisdiction is triggered by a United Nations Security Council resolution

In the court's analysis of the effect of Resolution 1593, it referred to the legal authority of such resolution as a 'sui generis regime', in other words, a unique framework of legal authority separate from the Rome Statute. This was so, the court reasoned, because obligations in matters referred to it by the United Nations Security Council did not stem from state membership of the International Criminal Court, and thus ratification of the Rome Statute, but from membership of the United Nations in terms of its charter (par 83).

At the risk of stating the obvious, the jurisdiction of the International Criminal Court in the matter of Al-Bashir was triggered by a Security Council resolution taken in terms of that body's powers under Chapter VII of the United Nations Charter. Moreover, as pointed out earlier, that resolution followed on a number of previous resolutions as well as an extensive report in which the human rights abuses and violations of humanitarian law were reported to the Security Council. As also mentioned in the introductory parts of this contribution, Resolution 1593 marked the Security Council's first referral to the International Criminal Court. Prior to Resolution 1593, the closest the Security Council got to referral to the court for the purpose of restoring international peace and security was the establishment of ad-hoc international criminal tribunals. Apart from being unsuccessfully disputed in proceedings such as those before the International Criminal Tribunal for Rwanda (see eg *The Prosecutor v Joseph Kanyabasi* ICTR case 96-15-T par 9), the Security Council's power to take measures to restore international peace and security has never been seriously challenged. It was certainly not challenged in the *Al-Bashir* case.

So, the court pointed out, in lawfully triggering the International Criminal Court's jurisdiction as provided for in article 13 of the Rome Statute, the Security Council was fully aware that the 'legal framework' of the Rome Statute would apply from that point onwards. The process that would ensue was always to be undertaken in terms of the court's legal framework. Put differently, the court was to exercise its jurisdiction according to the provisions of its statute in its entirety (par 85).

Again, the obvious needs to be stated: The United Nations is a political body and not a court. Therefore, it previously set up ad-hoc criminal tribunals, by resolution, to deal with problems that only a court of law, and not a political body, was equipped to address. In fact, from the perspective of the United Nations acting on behalf of the international community, one of the very reasons why the International Criminal Court was established as a permanent court was the extreme costs associated with establishing ad-hoc tribunals every time the Security Council needed to seek and restore justice by holding the chief perpetrators who threatened peace and security accountable in a court

of law. In its judgment in *Al-Bashir* (par 86), the court confirmed this and came to the logical conclusion:

[I]n other words, the only legal regime in which this Court may exercise the triggered jurisdiction is the one which is generally applicable to it, its Statute *in primis*.

Also, in addition to triggering the jurisdiction of the International Criminal Court, the Security Council imposed an obligation on Sudan to cooperate with the court – an obligation it would ordinarily not have, being a non-member state. This the court's appeals chamber established in a matter similar to the *Al-Bashir* case, namely *Prosecutor v Saif Al-Islam and Abdullah Al-Senussi* (22 Nov 2013, ICC-01/11-01/11-480 par 18), countering South Africa's argument that the matter had not been conclusively decided by the court's appeals chamber, as alluded to in paragraph 3 1 above.

Therefore, the court unequivocally found that for the limited purposes of matters referred to it by the Security Council, non-states parties whose officials' conduct is the subject of the referral have 'rights and obligations analogous to those of States Parties to the Statute' (par 88). Although acknowledging that this finding constituted an expansion of the applicability of an international treaty so as to also have consequences for states that have not accepted such treaty, the court found that the United Nations Charter did permit the Security Council to impose obligations on states (par 89). Ironically, the court substantiated this extension by referring to an advisory opinion of the International Court of Justice in 1971 regarding South Africa's continued presence in Namibia despite Security Council Resolution 276 to withdraw from the territory.

A consequence of the court's interpretation and findings on the lawful obligations resulting from a referral to it by the Security Council was that article 27(2) of the Rome Statute, which excludes immunity, became fully operative in the court's interaction with Sudan (par 91). This had two implications: Firstly, Sudan could not claim immunity for Al-Bashir, and secondly, a state party could not divest itself of its obligation to cooperate with the court for the arrest and surrender of a serving head of state at the court's request. Bringing the argument the proverbial full circle, this further implied that article 98(1) of the Rome Statute did not find any application, meaning there was indeed no immunity to be waived, while article 27(2) did find application, meaning immunity was no defence (par 91-93).

4 4 Further elaboration on article 98

Despite the court's finding regarding the inapplicability of article 98(1) in the *Al-Bashir* matter, it still deemed it necessary to elaborate on the meaning of article 98 in light of presentations made by South Africa in the course of the proceedings. The court recognised that there might be perceived tension between a state party's duty to cooperate with the

court on the one hand, and the state's obligation to respect immunities under international law. Yet article 98 left it to the court, and not to the state party, to 'address the matter' (par 100).

To recap, article 98, in essence, provides that the court may not proceed with a request for surrender or assistance that would require a requested state to go against its obligations under international law

... with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of immunity.

The court emphasised that article 98 provided no rights to states parties to refuse cooperation, nor was it a source of substantive rights or 'additional duties' to states parties, as the article 'addresses the court' (par 99-100). Article 98, the court ruled, left it to the court, and not the state party, to resolve the matter.

The court found further confirmation of its interpretation of article 98 in the wording of rule 195 of its Rules of Procedure and Evidence, which in essence provides that all the requested state is required to do is to notify the court of any potential problem with the execution of the request, and then to provide the court with 'any information relevant to assist *the Court* [own emphasis added] in the application of article 98'.

With reference to the general duty to cooperate, the court pointed out specific explicit instances provided for in the Rome Statute where the obligation to cooperate could indeed be qualified or suspended. This could for example happen as provided for in article 89(2), which permits the state to postpone the execution of the cooperation request where the request is challenged before a national court on the principle of *ne bis in idem* (double jeopardy), until, in light thereof, the International Criminal Court makes a determination as to the admissibility of the case before it. Another example where a state may lawfully postpone execution is provided for in article 90 of the Rome Statute, namely where the requested state is confronted with competing requests for surrender by another state party and the court. Again, the requested state is allowed to postpone the execution of the court's request until the court decides on the admissibility of the case (par 103). Section 98, however, is construed in different terms, not affording the requested state the ability to refuse cooperation or postpone execution, nor the discretion to choose whether to cooperate or not to cooperate with the court (par 104).

Finally, the court spelled out that, as is evident from the stipulations of articles 98, 89 and 90, in each scenario where the drafters of the Rome Statute had foreseen potential problems with regard to the execution of a cooperation request, the phrasing made it abundantly clear that it was the court, and not the state party, that had the final say in the matter. The state party, the court emphasised, could not unilaterally refuse compliance with the court's request for arrest and surrender, as South Africa indeed had done (par 108).

Of course, we know that the South African government not only flouted its international obligations towards the International Criminal Court, but also the order of its national court in the matter – a sad indictment of its commitment to the rule of law. It is doubtful whether South Africa will appeal the *Al-Bashir* judgment.

5 General comments and conclusion

Apart from the clear instructions on the legal position regarding immunities and the full implications of a Security Council referral to the International Criminal Court emanating from the *Al-Bashir* judgment, two general observations also seem appropriate. The first relates to the reasons why the court was established, and the second to the Security Council's extension of its institutional mandate to preserve international peace and security.

The perpetration of horrific crimes against humanity did not cease with the prosecution of the World War II war criminals. In fact, those responsible for these atrocities have often gone unpunished due to the unwillingness of state courts to prosecute them (Seguin 'Denouncing the International Criminal Court: an examination of the U.S. objections to the Rome Statute' 2000 *Boston University International Law Journal* 86). Hence the International Criminal Court came about, the establishment of which took centuries to achieve (Cassese *International Criminal Law* (2003) 327). At a practical level, the reason for establishing a permanent court instead of ad-hoc tribunals was to secure a professional staff corps trained in criminal investigation and prosecution, who could respond swiftly to any new crisis before evidence could be destroyed (Kirsch and Holmes 'The Rome Conference on an International Criminal Court: The Negotiating Process' 1999 *American Journal of International Law (AJIL)* 8). In an increasingly unstable world, this is an institution to be respected and maintained.

Now turning to the United Nations, the body assumed a more active role in world affairs at the conclusion of the Cold War than during the war, when consensus could rarely be achieved because of the likelihood of a veto vote in the Security Council (Crawford 'The ILC adopts a statute for an international criminal court' 1995 *AJIL* 415). According to Akhavan ('The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' 1996 *AJIL* 501), increased institution-building of the United Nations regime following the Cold War was inevitable due to the countless incidences of human and humanitarian rights violations (also see Akhavan 'Beyond Impunity: can International Criminal Justice prevent future atrocities?' 2001 *AJIL* 27). Arguably the single most significant and valuable contribution to the development of international criminal justice by the United Nations was the establishment of the ad-hoc tribunals at the behest of the Security Council, acting in terms of its Chapter VII powers. This has settled the principle that the United Nations can lawfully intervene in matters that fall under a state's domestic jurisdiction (cf Tocker 'Intervention in the Yugoslav Civil War: the United

Nations' right to create an International Criminal Tribunal' 1994 *Dickinson Journal of International Law* 546). In *The Prosecutor v Joseph Kanyabashi* (ICTR case 96-15-T par 13), for example, the trial chamber addressed the matter of state sovereignty by stating that United Nations membership entailed certain limitations on member states' sovereignty because, pursuant to article 25 of the United Nations Charter, all member states had agreed to accept and carry out the decisions of the Security Council in accordance with the charter.

I specifically mention state sovereignty, as it would appear from the arguments raised by South Africa in *Al-Bashir* that government is unaccustomed to accepting the higher authority that membership of the United Nations and the International Criminal Court implies. And it is this serious misconception of the implications of both United Nations and International Criminal Court membership, I would argue, that has obscured South Africa's reasoning from the very beginning of the debacle concerning the Sudanese president.

It is hoped that the clear and well-reasoned judgment of the International Criminal Court in *Al-Bashir* has provided government and its advisors with a better understanding of international criminal law and justice, and appreciation for the fact that, in the words of Mlambo J, courts of law are the wrong forum 'for the ventilation of regional and international policy considerations' (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development supra* par 34).

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***Mhlongo v S; Nkosi v S* 2015 (2) SACR 323 (CC)**

The right to be discharged at the end of the prosecution's case in the context of possible co-accused incrimination

1 Introduction

The subject of this note is whether or not a co-accused person in criminal proceedings has a right to be discharged at the end of the state's case, where there is insufficient evidence on which a reasonable court might convict him or her; but there is a reasonable possibility that the other co-accused persons may incriminate him or her and hence supplement the state's case. This subject was recently argued before the Constitutional Court in *Mhlongo v S; Nkosi v S* 2015 (2) SACR 323 (CC); however, apparently because a decision in this regard was not deemed necessary, the Constitutional Court did not make a conclusive decision on the subject and left the door open (par 41). I suggest that this constitutes an

unfortunate missed opportunity that our country's apex court could have used to ensure the alignment of this aspect of our law with our country's commitment to human rights. This note is structured as follows: Part 2 describes the background of the Makuna murder trial from which *Mhlongo v S; Nkosi v S* arose; Part 3 describes the various appeals against the convictions in the Makuna murder trial and the relevant aspects of the Constitutional Court's judgement in *Mhlongo v S; Nkosi v S*; Part 4 critically analyses the current legal position regarding the subject of this note with illustrative reference to the conduct of the Makuna murder trial; Part 5 concludes this note with a critical assessment of the post-*Mhlongo v S; Nkosi v S* legal landscape.

2 The Makuna murder trial

On 3 August 2002, Warrant Officer Johannes Makuna was shot twice in front of his home in an apparent botched attempt to rob him of his bakkie. His daughter, who was present during the incident, saw two assailants, and a neighbour also saw two men running away from the scene following the shots. The assailants only managed to rob Warrant Officer Makuna's service pistol. Warrant Officer Makuna was rushed to hospital, but died of his injuries.

After police investigations failed to deliver any leads, a substantial monetary reward for information was published by the police. About two months after the murder on Warrant Officer Makuna, a certain Mr Thabo Matjeke, who has been incarcerated for another serious offence *subsequent* to the murder on Warrant Officer Makuna, saw the reward notice and contacted the investigating officer. Mr Matjeke promised information in return for the reward. Soon, he made two extra-curial confessions: One to a magistrate and one to a police officer during a pointing-out excursion. Although the storyline of these two confessions is similar, there are material differences between the two confession statements. Also, I suggest that the basic components of the storyline, namely that *eight* men crammed into *one* Toyota Cressida sedan and then ventured through the streets looking for a bakkie to rob, is inherently improbable. In these confessions, Mr Matjeke incriminated not only himself, but also seven other persons, who were subsequently all arrested. Three of the implicated persons also made extra-curial statements, ranging from partial corroboration of Mr Matjeke's version, to complete denials. Mr Matjeke and all seven the persons whom he incriminated were charged with the murder of Warrant Officer Makuna, the robbery of his firearm, and some lesser offences. They stood trial in the then Bophuthatswana High Court. As this case is unreported, I refer to it as the 'Makuna murder trial'.

The admissibility of the various extra-curial incriminating statements was challenged, and a trial-within-a-trial was conducted, during which all the co-accused who made incriminating statements disavowed the content thereof and averred that the police enticed or forced them to make the statements. At the conclusion of the trial-within-a-trial, the trial

judge decided to admit all the extra-curial statements into evidence against the makers thereof. These extra-curial statements essentially constituted the prosecution's entire case: no fingerprints, no DNA evidence, and no reliable eyewitness testimony as to the identity of the assailants could be presented. Despite this dearth of independent corroborative evidence, the trial court decided to admit the extra-curial statements as evidence against all the co-accused, purportedly (but erroneously) relying on the judgement of Supreme Court of Appeal (SCA) in *S v Ndhlovu* 2002 (2) SACR 325 (SCA). The *Ndhlovu* rule entailed that an extra-curial admission, but not a confession, by one co-accused is admissible as evidence against another co-accused if required by the interests of justice. The interests of justice in turn required inter alia 'strong corroboration in all the other evidence' of the incrimination of the co-accused (par 44). Most disturbingly, the trial court initially consistently referred to Mr Matjeke's extra-curial statement to the magistrate as a 'confession' (which it was), but later – in a transparent attempt to have this statement superficially fit the *Ndhlovu* mould – the trial court made a *volte face* and reclassified Mr Matjeke's 'confession' as an 'admission'.

Given the trial court's erroneous application of the *Ndhlovu* rule, and its consequent finding that the extra-curial statements are evidence against all the co-accused, none of the co-accused was discharged, and the trial proceeded against all the co-accused. In his testimony in the main trial, Mr Matjeke again disavowed his extra-curial statements and denied any involvement in the crime. However, later during the trial, he requested to *re-open* his defence, which request was granted. During his second testimony in the main trial, Mr Matjeke came up with a newfangled version of events that incriminated all his co-accused while attempting to underplay the involvement of himself and Mr Makhubela (Accused 3). Mr Makhubela testified directly after Mr Matjeke's second testimony in the main trial, and essentially rehashed Mr Matjeke's latest version of events, which differed materially from Mr Makhubela's own self-incriminatory extra-curial statement. The four co-accused persons who did *not* make extra-curial statements responded as follows: Mr Boswell Mhlongo (Accused 2), Mr Alfred Nkosi (Accused 4), and Mr Thembekile Molaudzi (Accused 5) testified in their own defence and insisted that they knew nothing about the crimes that were committed; Mr Leonard Motloung (Accused 6), who was released on bail, disappeared.

The trial court explicitly rejected Mr Matjeke's last version as per his second testimony and the corroboration thereof by Mr Makhubela as a last-minute concoction. However, relying on the extra-curial statements (by these very men whom the trial court declared liars) that were admitted into evidence against all the co-accused, the trial court convicted all seven remaining co-accused and sentenced them all to life imprisonment. In so doing, the trial court lent credence to the basic narrative of Mr Matjeke's extra-curial statements that is premised on an inherent improbability and ignored the material differences between Mr Matjeke's extra-curial statements, and the material differences between

Mr Matjeke's extra-curial statements and the other extra-curial statements. Moreover, the trial court ignored the complete void of independent corroborative evidence.

3 The appeals; the Constitutional Court's decision

After a prolonged struggle to get the transcripts of the trial court proceedings, all seven the co-convicted appealed to the full bench of the Northwest High Court. However, the full bench confirmed the trial court's decision and dismissed the appeal. All the co-convicted except Mr Matjeke and Mr Makhubela then petitioned the SCA, but without success. One of the co-convicted, Mr Molaudzi, then applied for leave to appeal to the Constitutional Court, but again without success (*Molaudzi v S* 2015 (2) SACR 341 (CC)). However, sensing that the tide may be turning after the SCA's denouncement of *Ndhlovu* in *Litako & others v S* [2014] 3 All SA 138 (SCA), Mr Mhlongo and Mr Nkosi approached the Constitutional Court, which decided to grant them a hearing. In *Litako*, the SCA held inter alia that the differentiation between confessions and admissions inherent in the *Ndhlovu* rule infringes on a co-accused persons right to equality, and restored the common law status quo ante *Ndhlovu*, namely that no extra-curial statements – whether confessions or admissions – by one co-accused can ever be used as evidence against his or her co-accused.

The gist of the applicants' argument in *Mhlongo v S; Nkosi v S* was that the *Ndhlovu* rule is unconstitutional; in the alternative, should the Constitutional Court find that the *Ndhlovu* rule is constitutional (contra *Litako*), it was argued that the courts below applied the *Ndhlovu* rule erroneously given the lack of independent corroborative evidence. Of particular relevance to the subject of this note, it was specifically argued on behalf of Mr Mhlongo and Mr Nkosi that the paucity of evidence presented by the prosecution against these co-accused – either based on the unconstitutionality of the *Ndhlovu* rule or on the erroneous application thereof – should have caused the trial court to mero moto discharge these men at the end of the prosecution's case.

In a unanimous judgement penned by Theron AJ, the Constitutional Court held that the *Ndhlovu* rule is unconstitutional and that the extra-curial statements by some of their co-accused should not have been admitted as evidence against Mr Mhlongo and Mr Nkosi. However, the Constitutional Court did not make a conclusive ruling on the question of whether Mr Mhlongo and Mr Nkosi should have been discharged at the end of the prosecution's case in the trial court, but left the door open. The Constitutional Court held as follows in *Mhlongo v S; Nkosi v S* (par 41, my emphasis):

The extra-curial statements being inadmissible, the question is now: what remains of the case against the applicants? At the close of the State's case, the only evidence against the applicants was the extra-curial statements of the co-accused. If the trial court had correctly declared the evidence inadmissible, the applicants *may have been entitled to be discharged* at that stage.

The reason why the Constitutional Court did not feel obliged to rule on the question of whether Mr Mhlongo and Mr Nkosi should have been discharged at the end of the prosecution's case in the trial court is explained in the subsequent sentence:

In any event, at the end of the trial, the evidence as a whole was insufficient to ground the applicants' convictions. Counsel for the State correctly conceded this.

Accordingly, the Constitutional Court vitiated the convictions and sentences of Mr Mhlongo and Mr Nkosi, but without deeming it necessary to consider the issue of discharge at the end of the prosecution's case, given the overall insufficiency of evidence against the applicants. In a ground-breaking judgement on the principle of *res judicata*, *Molaudzi v S* 2015 (2) SACR 341 (CC), the Constitutional Court also vitiated the conviction and sentence of Mr Molaudzi, who was similarly situated to the applicants in *Mhlongo v S; Nkosi v S*, but whose application for leave to appeal to the Constitutional Court was previously dismissed.

4 Critique on the current legal position

In *S v Shuping* 1983 (2) SA 119 (BSC) the Supreme Court of Bophuthatswana per Hiemstra CJ reviewed the case law history of discharge applications and formulated the test for discharge as follows (at 120):

At the close of the State case, when discharge is considered, the first question is: (i) is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.

Part (ii) of the *Shuping* test ('*Shuping* (ii)') was considered by the SCA in *S v Lubaxa* [2002] 2 All SA 107 (A). While rejecting *Shuping* (ii) in the context of possible *self-incrimination* based on an accused person's rights to dignity and freedom (parr 18–19), the SCA – albeit obiter – accepted *Shuping* (ii) in the context of possible *co-accused incrimination*. Regarding the latter context, the SCA reasoned as follows (parr 20–21):

The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial ...that need not always be the case.

Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the

proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances.

I suggest that this obiter dictum fails to convince. Why should an accused person's rights to dignity and freedom – and the consequent right to be discharged in the absence of a *prima facie* case – be of less import if the accused person happens to be prosecuted together with other persons? The decision to prosecute accused persons together or separately is the prerogative of the prosecution; as such, the prosecution must accept the consequences of its decision. (It should also be noted that the prosecution can of course apply for the separation of trials.) Accused persons should have equal protection and benefit of the law – irrespective of whether they are prosecuted on their own or with co-accused.

Furthermore, the premise on which the SCA built its argument in *Lubaxa*, namely that the 'prosecution is ordinarily entitled to rely upon the evidence of an accomplice' must be qualified. A corollary of the presumption of innocence is that the duty to prove the prosecution's case rests exclusively on the prosecution, and not on the defence. In the event that one co-accused incriminates another, the prosecution can rely on such incriminating testimony; however, this happenstance does not mean that the prosecution can shift its duty to any degree to the co-accused to prove the prosecution's case.

This interlinks closely with an accused person's right to a fair trial, and in particular the right to remain silent. Consider the following exchange between counsel for Mr Motloung (Accused 6) and the trial judge in the Makuna murder trial (Record of the trial before the Constitutional Court p284 lines 3–24):

COURT: Yes?

MR MOJUTO: Depending on the evidence of accused 1, we will testify.

COURT: No, do not come with that. It is either he will testify or he will not testify. You make a decision. The state's [case] is closed. Your case does not depend on accused 1. Where do you get this new concept? If accused 1, 2, 3 and 4 were not there, what were you going to say?

MR MOJUTO: M'Lady, the evidence against accused 6 solely depends on the statement made by accused 1.

COURT: Mr Mojuto, I am not here to play games.

MR MOJUTO: That is correct.

COURT: Yes, what do you decide?

MR MOJUTO: May I take instruction?

COURT: Yes. I do not know if also you understand the implication of the hearsay evidence that was just admitted, whether you do understand how it works.

MR MOJUTO: I do, M'Lady.

COURT: So, it was not necessary for you to even make a submission that it will depend on accused 1's evidence or accused 2's evidence. Yes?

MR MOJUTO: M'Lady, the accused will testify.

I suggest that the above is a vivid illustration of the negation of an accused person's right to a fair trial: An accused person can only properly exercise the right to remain silent if he or she *knows* what case he or she must meet; if the case that an accused must meet is not the prosecution's case (given that the prosecution failed to make a prima facie case) but rather the 'reasonable possibility' of incrimination by his or her co-accused – the nature and scope of which is entirely *unknown* – the accused person's right to remain silent is clearly violated.

Even before the onset of our new constitutional dispensation, *Shuping* (ii) was not followed in the context of possible co-accused incrimination by the Venda Supreme Court in *S v Phuravhatha & others* 1992 (2) SACR 544 (V) 551G–J. After the dawn of our constitutional dispensation, the Witwatersrand Local Division (WLD) – after a thorough human rights analysis – resoundingly rejected *Shuping* (ii) in the context of possible co-accused incrimination in *S v Mathebula & another* 1997 (1) SACR 10 (W) 31D. However, the SCA in *Lubaxa* merely mentioned *Mathebula* and *Phuravhatha*, but failed to consider the arguments presented in these cases. This constitutes the most conspicuous shortcoming of the *Lubaxa* judgement. Furthermore, as I have argued above, the SCA's own arguments in favour of keeping *Shuping* (ii) alive in the context of possible co-accused incrimination fail to convince. In the subsequent case of *Nkosi & another v S* 2011 (2) SACR 482 (SCA), the SCA had a second opportunity to properly analyse this issue, but missed the opportunity by uncritically relying on its prior *Lubaxa* obiter dictum.

5 Conclusion

In *Mhlongo v S; Nkosi v S* the Constitutional Court was invited to engage with the issue of an accused person's right to discharge at the end of the prosecution's case, but declined. I suggest that this omission may prevent the *Ndhlovu* rule to rest in peace and allow it to haunt our criminal justice system, as illustrated by the following possible argument based on *Shuping–Lubaxa–Nkosi*: Although the extra-curial statement by co-accused X is inadmissible against X's co-accused (because the *Ndhlovu* rule is valid no more), the existence of such an extra-curial statement that incriminates X's co-accused (as if the *Ndhlovu* rule is still quasi-valid) constitutes a 'reasonable possibility' that the prosecution's case might be supplemented by the testimony of X, should X decide to testify; in the premises X's co-accused are not entitled to discharge. Should any court be persuaded by this argument, the result may likely be a spectacle similar to the one seen in the Makuna murder trial: An unconstitutional fracas between co-accused who are all fighting in the darkness of not knowing what case they must meet. Absent a clear rejection of *Shuping–Lubaxa–Nkosi*, the ghost of the *Ndhlovu* rule may still wreak havoc.

At least, by holding that an accused person in the context of possible co-accused incrimination 'may' have the right to be discharged at the end

of the prosecution's case, the authoritativeness of the *Shuping-Lubaxa-Nkosi* judgements are now questionable. However, the Constitutional Court appears to be waiting for a specific constitutional challenge to these judgements before making a definite decision on the issue of the right of an accused person to be discharged at the end of the prosecution's case in the context of possible co-accused incrimination.

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