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ATTORNEYS & NOTARIES

The Al-Bashir Judgment and the Rule of Law

Introduction

Earlier this month, the High Court in Pretoria ordered the arrest of Sudanese President Omar Al-Bashir. President Al-Bashir visited South Africa to attend the African Union (AU) Summit on Saturday, 13 June 2015. On Sunday, 14 June 2015, the court heard an urgent application brought by the South African Litigation Centre (SALC) in which the South African government was required to arrest him because it is a party to the Rome Statute.

A warrant for President Al-Bashir's arrest, issued by the International Criminal Court (ICC) in March 2009, was for various crimes against humanity involving pillaging, murder, extermination, forcible transfer, torture and rape against thousands of civilians in Darfur. Thereafter a second warrant for his arrest was issued by the ICC for the crime of genocide.

The State opposed the urgent application but expressed that it was not ready to argue the matter. Judge Hans Fabricius allowed the matter to be postponed to the following day to allow the State to prepare and file their answering affidavit.

To ensure that President Al-Bashir did not leave until the court made a finding, the SALC obtained an order that all points of entry and exit in South Africa prohibit his departure. However, while the matter was being heard the next day, President Al-Bashir managed to leave the country.

The Rome Statute of the International Criminal Court

South Africa is a signatory to the Rome Statute that established the ICC. The Rome Statute obliges South Africa to accept the jurisdiction of the ICC in respect of crimes against humanity, war crimes and genocide.¹ These obligations were codified in our law in terms of the Implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002 (the “Implementation Act”).

In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*,² the SCA explained that the Rome Statute’s structures are based on the principle of complementarity or reciprocity, in which the Rome Statute devises a system where the primary responsibility for the investigation and prosecution of the people most responsible for serious violations of international law rests with domestic jurisdictions.

Article 86 of the Rome Statute provides that the ICC requires full cooperation with State Parties in acting against crimes within the ICC’s jurisdiction.

The Rule of Law

In terms of the Rule of Law theory, law is elevated above politics and judges are independent and impartial arbiters protecting citizens’ rights and guarding against tyranny and arbitrariness in government. The courts function as an impartial overseer over the other arms of government, especially the executive branch. The courts therefore keep the State and its officials within the bounds of their powers and protect citizens from excesses of power.³

***The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*⁴ (the “judgment”)**

At the core of Mlambo JP’s judgment lies section 231 of the Constitution, which states that the negotiating and signing of all international agreements is the responsibility of the national executive; which bind the Republic after being approved by resolution in

¹ Article 12(1) of the Rome Statute of the International Criminal Court

² *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA)

³ Cora Hoexter, *Administrative Law in South Africa* 2 ed (2012) at page 139-140

⁴ *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others* case number 27740/2015 (GNP) (24 June 2015)

the National Assembly and the National Council of Provinces, unless it is an agreement of a technical, administrative or executive nature. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Section 231(5) goes on to state that the Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

The State specified that in order to host the AU Summit, the South African government was required to enter into a host agreement with the Commission of the AU, which purported to grant certain privileges and immunities against arrest or detention for representatives of member states in terms of the General Convention on the Privileges and Immunities of the Organisation of African Unity (the "OAU Convention"). The State raised Article V of the OAU Convention, which states that representatives of Member States to the principal and subsidiary institutions, as well as to the Specialized Commission of the Organization of African Unity (the African Union), and to conferences convened by the Organization, shall, while exercising their functions and during their travel to and from the place of meetings, be accorded immunity from arrest and other privileges. This, the State argued, prevented it from arresting President Al-Bashir for the duration of the AU Summit and for two days afterward.

To this effect, the government published a notice in the Government Gazette in terms of section 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001 to grant foreign heads of state immunity during the AU Summit.

The Court found that the reliance on such documents by the State was ill-advised and ill-founded, as the agreement did not form part of our law. It could not trump the Rome Statute and the Implementation Act which enjoys legislative authority, having been passed in Parliament. Furthermore, section 5(3) of the Diplomatic Immunities and Privileges Act conferred immunity and privileges specifically upon an organisation, not a head of state.

The Court therefore found that the departure of President Al-Bashir before the finalisation of the application demonstrated explicit non-compliance with the court order, as the State would have clear knowledge of his departure but did not take the

necessary steps to prevent it. In the judgment, the Court has invited the National Director of Public Prosecutions to consider whether criminal proceedings are appropriate. Criminal prosecution for contempt of a court order would be warranted in this instance.

Mlambo JP powerfully concludes in paragraph 37.2 of the judgment that:

“[a] democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by Court orders. A Court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by Court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.”

Mlambo JP continues by asserting that the Constitutional Court has confirmed that principles of the rule of law are indispensable cornerstones of our constitutional democracy⁵ and has placed emphasis on the term “indispensable” in this regard.

“Where the rule of law is undermined by Government it is often done gradually and surreptitiously. Where this occurs in Court proceedings, the Court must fearlessly address this through its judgments, and not hesitate to keep the executive within the law, failing which it would not have complied with its constitutional obligations to administer justice to all persons alike without fear, favour or prejudice.”

Pragmatically, some critics could contend that it might not have been in the country’s best interests to arrest the president of another African country on our soil anyway – but surely this debacle could have been avoided entirely by the South African government cautioning the Sudan president of its obligations under the Rome Statute and its subjection to the Rule of Law before his arrival? It is interesting to note that President Al-Bashir was invited to President Zuma’s inauguration in 2009, but declined on the grounds that South African officials confirmed they would be forced to arrest President Al-Bashir should he arrive in South Africa.

It is alarming that the State could so easily discount the supremacy of the Constitution. While this event has exposed the difficulty with government’s

⁵ *Justice Alliance of South Africa v The President of the Republic of South Africa* 2011 (5) SA 388 at para 40

obedience to the Rule of Law on one hand and regional, strategic positioning on the other, this judgment is a welcome warning against the executive overstepping its boundaries and encouragement to the courts to uphold the Rule of Law and keep the separation of powers intact and effective.

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