

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 75/16

In the matter between

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT & OTHERS**

Applicants

and

SOUTHERN AFRICAN LITIGATION CENTRE

Respondent

and

**JOHN DUGARD AND
GUÉNAËL METTRAUX**

First Amici Curiae



PRACTICE NOTE FOR THE FIRST AMICI CURIAE

THE NATURE OF THE PROCEEDINGS

This is an application for leave to appeal against a decision of the Supreme Court of Appeal. It concerns the lawfulness of the government's failure to arrest President Al-Bashir of Sudan and to surrender him to the International Criminal Court (ICC) while he was in South Africa.

ISSUES TO BE ARGUED BY THE FIRST AMICI

- The status of head of state immunities under customary international law in cases involving international crimes.

- The relationship between South Africa's customary international law obligation to respect immunities and its obligations to cooperate with the ICC under the Rome Statute of the ICC.

PORTIONS OF THE RECORD NECESSARY FOR DETERMINATION OF MATTER

Given the limited ambit of the argument to be advanced, it is not envisaged that the argument by Professors Dugard and Mettraux will make reference to the record.

ESTIMATED DURATION OF ORAL ARGUMENT

One day for the entire case.

SUMMARY OF ARGUMENT

At present, customary international law does not provide for a blanket international crimes exception to head of state immunities in all contexts.

There is indeed a tension in this case between South Africa's customary international law obligation to respect immunities and its obligations to cooperate with the International Criminal Court (ICC) under the Rome Statute of the ICC.

The Supreme Court of Appeal (SCA) was correct to find that the solution to this tension is to be found in South Africa's domestic law, interpreted in accordance with South Africa's international obligations.

AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED

Case Concerning the Arrest Warrant of 11 April, 2000 (Democratic Republic of the Congo v Belgium), 2002 ICJ Reports 3

Prosecutor v Charles Taylor, Decision on Immunity from Jurisdiction, 31 May 2004 (Appeals Chamber)

STEVEN BUDLENDER

CHRIS MCCONNACHIE

Counsel for Professors Dugard and Mettraux

13 October 2016

Chambers, Sandton