

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 20382/15

In the application to be admitted as *amicus curiae*:

SOUTHERN AFRICA LITIGATION CENTRE

Applicant

In the matter between:

THE LAW SOCIETY OF SOUTH AFRICA

Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

THE MINISTER OF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

Second Respondent

THE MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

FOUNDING AFFIDAVIT IN APPLICATION FOR ADMISSION AS *AMICUS CURIAE*

I, the undersigned,

KAAJAL RAMJATHAN-KEOGH

state under oath as follows:

INTRODUCTION


1. I am the Executive Director of the Southern Africa Litigation Centre (SALC), which has its office at 2nd Floor, West Wing, President Place, 1 Hood Avenue, Rosebank, Johannesburg 2196.
2. I am duly authorised to bring this application on behalf of SALC. In this regard I annex a letter from the chairperson of the board of SALC marked "KRK 1".
3. The facts contained herein are to the best of my knowledge true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.
4. The purpose of this affidavit is to seek admission as *amicus curiae* in the main application under the above case number.

THE SCHEME OF THIS AFFIDAVIT

5. The scheme of this affidavit is as follows:
 - 5.1. I describe the aims and objectives of SALC;
 - 5.2. I set out SALC's interest and the position it intends adopting in this matter; and
 - 5.3. I provide a summary of the submissions to be advanced by SALC.

SALC'S INTEREST AND POSITION

4



6. SALC is a regional non-governmental organisation (NGO) that seeks to promote and advance human rights and the rule of law in Southern Africa through strategic litigation, research, capacity building, training and advocacy within the following thematic areas: women's land and property rights; freedom of expression; health rights; international criminal justice; prisoners' rights; sexual minority rights; disability rights and regional advocacy.
7. Since its establishment in 2005, SALC has successfully intervened in a number of high profile human rights related cases in South Africa, Namibia, Botswana, Lesotho, Swaziland, Zimbabwe, Zambia and Malawi.
8. In accordance with the parameters of SALC's stated objectives, SALC has sought and been granted leave to be admitted as an *amicus* in a number of human rights cases in the region including at the South African Constitutional Court and the Lesotho Court of Appeal.
9. SALC works closely with several law societies and bar associations throughout Southern Africa and several human rights defence institutions in the region.
10. SALC monitors relevant laws and practices in Southern Africa, in the light of international human rights standards, including the development of national case law which, as here, can contribute to the development of international human rights protection.
11. SALC obtained Observer Status at the African Commission for Human and People's Rights in 2011. At this level SALC has actively engaged with the Commissioners and drafted important resolutions on human rights issues, including a resolution on the involuntary sterilisation of women living with HIV.

12. SALC sits on the executive committee of the Coalition for an Effective African Court where it promotes the rule of law and justice in Africa and encourages adherence to international law standards.

13. As part of its regional advocacy work, SALC has been closely monitoring developments around the SADC Tribunal and engaging with various stakeholders about the work and future of the Tribunal. SALC has conducted high level advocacy in support of the SADC Tribunal and previously sought an advisory opinion from the African Court on Human and Peoples' Rights regarding the decision made by the SADC Summit of Heads of State and Government to suspend the SADC Tribunal.

14. SALC's objectives, as set out in its Deed of Trust, include:

14.1. To offer rapid response support relating to human rights, constitutional and public interest cases;

14.2. To support and act as a catalyst to lawyers on prospective cases for the timeous preparation and resolution of human rights cases;

14.3. To promote awareness of human rights litigation frontiers and capacity building and to stimulate advocacy for law reform, human rights and constitutionalism.

15. A copy of SALC's Deed of Trust is attached as Annexure KRK 2

16. SALC's mandate recognises the role that domestic recognition, observance and application of international law can play in providing content to national obligations to respect, protect and promote human rights within a variety of contexts.

17. SALC's international criminal justice programme monitors international justice and its development in Southern Africa. SALC's objective is to ensure that Southern African states are fully aware of their legal obligations, and through litigation, research and advocacy encourages Southern African states to give effect to these obligations. SALC's international criminal justice litigation is in keeping with a widely-shared acceptance that the primary realisation of international criminal justice will be in domestic forums through complementary initiatives. The litigation assists in upholding and strengthening domestic legal systems to the advantage not only of international criminal justice but rule of law.

SALC'S INTEREST IN THESE PROCEEDINGS

18. The relief sought in the main application arises from the President's signing of the 2014 Protocol on the Tribunal of the Southern African Development Community ("The 2014 Protocol"), which in Article 33, limits the material jurisdiction of the Tribunal to disputes between member states. This in effect removes the jurisdiction of the Tribunal (previously granted under the 2000 SADC Tribunal Protocol) which allowed individuals to bring their grievances before the Tribunal if these remained unresolved once the individual had exhausted internal remedies. The applicant in the main matter asserts that the President's signing of the 2014 Protocol was unconstitutional as it infringes on South African citizens' right of access to courts.

19. The main application therefore raises, at its core, important issues involving the application of regional and international law. It also raises centrally the extent to which South Africa

has complied with its international law obligations in relation to realising the right of individuals of access to courts as well as the promotion and protection of the rule of law at a regional and international level.

20. If admitted as *amicus*, SALC intends submitting written and oral submissions regarding the application of regional and international law to the interpretation of the constitutionally guaranteed right of access to courts as entrenched in section 34 of the Constitution.

SUBMISSIONS TO BE ADVANCED BY SALC

21. If admitted as an *amicus* in this matter, SALC intends advancing the following contentions:

21.1. The constitutional issue raised by the applicant in the main matter pertains to a violation of section 34 of the South African constitution which states that, "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

21.2. However, the right of access to court is also recognized under regional and international law. In this regard:

21.2.1. Access to justice is recognised as a fundamental human right in domestic constitutions and regional and international instruments. Underlying the concept of access to justice are notions of equality, fairness and the right to have one's case heard. Access to justice for individuals is the

manifestation of equality before the law. The two principles cannot be divided.

- 21.2.2. The creation of strong, independent regional courts that operate transparently, enable access by citizens and act in accordance with the rule of law is key to stability in any nation. States have an obligation to establish the most effective and procedurally fair judicial bodies capable of allowing access for individuals at the domestic, regional and international level.
- 21.2.3. The right of access to courts is also an intrinsic component of the right to an effective remedy. Both are key aspects of the rule of law. These rights are enshrined in the legal systems of SADC member states and inscribed in countless international and regional human rights instruments. The SADC Tribunal under the 2000 Protocol used to fall in this category.
- 21.2.4. Regional courts are designed to provide the right of access to justice for those individuals who have exhausted the domestic options or who have found that the domestic context offers no such access (or does so inadequately). Regional courts are designed to ameliorate the deficiencies of the domestic system.
- 21.2.5. Denying individual's access to the Tribunal (which is the conduct which is under scrutiny in the main application) is contrary to international and regional law. Not only does it seriously compromise people living in SADC and their right of access to justice but it also negatively affects South

Africa's position as member of the international community that aims to promote justice.

22. The stance to be adopted by SALC is that South Africa's conduct in supporting the development of a SADC tribunal that will only hear inter-state disputes is a violation of the South African Constitution and a violation of the SA's commitment to protect and uphold the rule of law. Citizens and people living in SADC are entitled to access justice on the domestic, regional and international level.

NOVELTY OF THE SUBMISSIONS

23. I submit that the submissions set out above are different from those that will be advanced by the applicant. In addition, these submissions will be of use to the Court in deciding a potentially complex issue which will draw heavily on regional and international law.

24. Furthermore, I am advised that the respondents have to date not filed any answering affidavits in this matter. It is therefore foreseeable that, once the answering affidavits are filed, further constitutional issues will be raised which will require adjudication by this Court. SALC has specific expertise on the applicable regional and international law and will be of assistance to this Court in assessing the submissions by the applicant and the respondent.

STEPS TAKEN TO COMPLY WITH RULE 16A

25. SALC's attorneys of record have, in terms of rule 16A(2) of the uniform rules of Court, requested the written consent of all the parties for SALC's admission as an *amicus curiae*.

26. On 13 May 2015, letters were sent to all of the parties. SALC requested the parties to respond to its request by 18 May 2015 at 10h00. A copy of this letter is annexed hereto marked KRK 3.

27. The applicants and the respondents responded on 19 May 2015 consenting to SALC's admission as *amicus curiae*. Copies of both letters are annexed hereto marked **KRK 4** and **KRK 5** respectively.

CONDONATION

28. SALC's attorneys of record have, in terms of rule 16A(2) requested the written consent of all the parties cited in the application for SALC's admission as *amicus curiae*. This request was filed shortly after SALC became aware of the constitutional issues raised in the application. This is the reason why SALC has been unable to comply with the 20-day period for obtaining consent of the other parties.

29. To the extent that this application is out of time, SALC humbly seeks the condonation for the late filing thereof.

No prejudice

30. I submit that no party will be prejudiced if condonation is granted since the respondents have not as yet filed their answering affidavits.

31. I submit further that should the condonation not be granted the amicus applicant will be severely prejudiced. The mandate of the applicant is to ensure the State's compliance with its international law obligations in order to protect the rule of law. Making submissions before this Honourable court is one such opportunity to ensure compliance. In addition, due to SALC's regional mandate wider prejudice will be suffered should condonation be denied as the matter at hand is of great relevance to the all citizens of SADC.

CONCLUSION

32. I submit that SALC's submissions will assist the Court in determining the issues before it and, accordingly, request that SALC be admitted as an amicus curiae.



KAAJAL RAMJATHAN-KEOGH

I certify that the above affidavit was signed and sworn to at **ROSEBANK** before me on this the **20th** day of **MAY 2015** by the deponent after she declared that she knew and understood the contents of this affidavit, that she had no objection to taking the prescribed oath which she regarded as binding on her conscience, and after she uttered the words: "I swear that the contents of this affidavit are true, so help me God".



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