IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

19/11/2012

CASE NUMBER: 52268/12

(1) REPORTABLE: YES ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19/11/12
DATE

SIGNATURE

In the matter between:

| | |
|---|---|
| JOSEPH ALFRED RAKOTO | 1ST APPLICANT |
| HENRINIAINA LYDIA RAVELOARISON | 2ND APPLICANT |
| ETIENNE RANDRIAMAHEFARISOA | 3RD APPLICANT |
| BONA JEAN PIERRE RAFAMANDIMBY | 4TH APPLICANT |
| MARIE CLAUDINE RAHOLIARISOA | 5TH APPLICANT |
| JUSTINIEN LAURENT RAZAFINNELO | 6TH APPLICANT |
| EVELYNE RANDRIANARISOA | 7TH APPLICANT |
| JEANNE HENDRIETTE ELENORE RALALANIRINA | 8TH APPLICANT |

and

| | |
|---|---|
| THE HEAD: DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION | 1ST RESPONDENT |
| THE HEAD OF PRIORITY CRIMES LITIGATION UNIT | 2ND RESPONDENT |
| MARC RAVALOMANANA SOUTH AFRICAN CIVIL AVIATION AUTHORITY | 3RD RESPONDENT |

## JUDGMENT

**MABENA AJ:**

[1] On the 7th of September 2012 the Applicants approached this Court on an urgent basis seeking the following orders *ex parte*:

1.1 An order directing the Third Respondent to show cause, on a date to be determined by this Honourable Court, why an order should not be granted in the following terms:

1.1.1 Interdicting and restraining the Third Respondent from leaving the city limits of the City of Tshwane until such time as the First and/or Second Respondents have completed their investigations concerning the Applicants complaints that form the subject-matter of the present application, such investigation to proceed on an expedited basis.

1.1.2 Directing Third Respondent to surrender his passport to the Chief Registrar of this Honourable Court within 6 hours of being served with a copy of the order.

1.2 Directing that the relief set out in sub-paragraph 1.1.1 and 1.1.2 above operate as an interim interdict and order, pending the return day.

1.3 Directing that Third Respondent may anticipate the return day on two Court days' notice to Applicants.

[2] The Third Respondent, an entrepreneur and former President of the Republic of Madagascar, was deposed in a *coup d'etat* in 2009. He is presently in the Republic of South Africa previously on political asylum and was since granted a permanent residency status by the South African Government in 2009.

[3] The purpose of this application is to seek an interdict prohibiting the Third Respondent from leaving the Republic of South Africa, pending a decision by the First and Second Respondent as to whether or not to take steps to preserve and enforce the jurisdiction of the South African Courts on him pursuant to alleged crimes against humanity committed by him in Madagascar in 2008/2009.

[4] The aforesaid relief sought by the Applicants is allegedly prompted by the following allegations made in the Applicants founding affidavit. The allegations are that:-

(a) Firstly, that the Second Respondent has decided to initiate an investigation of and prosecution of crimes against humanity allegedly aforesaid committed by the Third Respondent. A request in that regard was submitted by the Applicants to the National Director of Public Prosecutions and the First Respondent as early as April 2012.

(b) Secondly, that the Third Respondent, whilst within the territory of the Republic of South Africa, allegedly orchestrated a plot to assassinate the Head of the High Transitional Authority ("HTA")in Madagascar, Mr Andry Nirina Rajoelina and other high-ranking Military Officials.

(c) Crimes against humanity is defined as follows in the Implementation of the Rome Statute of International Criminal Court Act 27 of 2002 ("the ICC Act") :-

"A crime against humanity" means any conduct referred to in part 2 of Schedule 1 of the ICC Act. In the present context of this application, it refers to murder and torture committed as part of a widespread or systematic attack directed at a civilian population, with knowledge of the attack.

[5] Following the aforesaid, the deponent further makes an averment that a Malagasy newspaper dated 4 September 2012,

advertised the imminent departure of the Third Respondent from South Africa for Madagascar.

[6] The Applicants aver that the First and Second Respondents have already decided to investigate the commission of the alleged crimes against humanity, in respect of the Third Respondent. The investigations have been initiated in terms of section 4(3)(c) of the ICC Act.

[7] The Applicants state that the First and Second Respondents have reached a conclusion that there is a reasonable basis to believe that an international crime has been committed by the Third Respondent. Consequently the Applicants contend that the relief sought in this application, will bring about preservation of the enforcement of the jurisdiction of the South African courts on the Third Respondent.

[8] The Applicants founding affidavit sets out the following:- That if the Third Respondent were to be permitted to leave the territory of the Republic of South Africa permanently, there are prospects of him not returning to South Africa when he is requested to do so or in the event the investigations establishes a *prima facie* case against him.

[9] The Applicants state that the reasons for approaching this Court ex parte was due to the alleged gravity of the allegations made

against the Third Respondent and that notice of this application would have defeated the purpose. They allege that they fear that the allegations as well as the prospect of being prosecuted for the alleged crimes in South Africa may expedite his flight from South Africa.

[10] Over and above the abovementioned averments, and in amplification, the following is also stated:

10.1 He states that the copy of the aforementioned request submitted to the NPA, if so required, will be made available to the court on the hearing of the matter.

10.2 That the Applicants, however chose not to attach copies of the documents to the founding affidavit as this may jeopardize the pending investigations should they proceed against the Third Respondent.

10.3 He further states that the initial request submitted to the National Director of Public Prosecutions ("NDPP") and the First Respondent was focused on the mass killing of 7 February 2009 at Madagascar's capital – Antanarivo. However the request of the 5 April 2012 was amplified twice as and when the evidence came to hand.

10.4 He points out that the request submitted on 10 May 2012 consists of eight further affidavits pertaining to the 7 February 2009 massacre. The affidavits, he so avers, were from the people previously injured in the massacre. It is also stated that the affidavits, if so required could be made available to the court at the hearing of this matter.

10.5 Another second supplement by the Applicants which consisted of a judgment of the Madagascar court, handed down in 2010, in terms of which the Third Respondent was convicted of complicity in ambush murder and sentenced to life imprisonment in absentia (this, it is averred, pertains to massacre of the 7th of February 2009) was submitted.

10.6 The Sixth Applicant also submitted an affidavit. Included was, again a warrant of arrest of the Third Respondent following the aforesaid conviction and a legal opinion outlining South Africa's legal international obligations under the ICC Act.

[11] It is also averred in the founding affidavit:

(i) That there existed *prima facie* evidence that the Third Respondent had allegedly committed crimes against humanity.

(ii) That a document described as the "April Memorandum" outlines the evidence of crime against humanity allegedly committed by the Third Respondent. Copies of the request also included affidavits from various witnesses.

(iii) That the "April Memorandum" also contained reports from organisations such as The Human Rights Watch and Amnesty International, detailing the nature and extent of the alleged human rights abuses.

[12] It is further stated, *inter alia* that given the urgency of the matter, the deponent had to rely on hearsay evidence. Lastly, the deponent averred that he reserved his right to supplement his founding papers, if necessary, for purposes of the return day of the *rule nisi*.

[13] In pursuit of the preservation of presence of the Third Respondent as aforesaid, the Applicants approached this court ex parte and on an urgent basis on the 7th of September 2012 to seek the relief set out in paragraph 1.1.1 and 1.1.2 above (ie the "interim order").

[14] Based on the above mentioned averments, my Sister, the Honourable Madam Justice Pretorius granted an interim order and same was made returnable on the 10th of November 2012. The Third Respondent had anticipated the interim order and the

matter was set down for the 20th of September 2012, for the discharge thereof.

[15] It is appropriate at this stage to mention that the deponent to the founding affidavit is the Applicants attorney of record, Mr David Patrick Erleigh ("Mr Erleigh"). He describes his status as follows:

(i) He is the Applicants attorney of record;

(ii) He states that he is duly authorized to depose to the founding affidavit on behalf of the Applicants;

(iii) He further states that, in making the averments in the founding affidavit, he relied on the information conveyed to him by the Applicants, which information he verily believe is true and correct.

[16] On the 20th of September 2012 and due to the nature of the relief sought, counsel addressed this Court on both the issues of urgency and the merits respectively. No heads of argument were delivered by either party at that stage.

[17] Mr Weinkove SC assisted by Ms Ferreire appeared for the Applicants. They presented argument to this court based on *inter alia* , the contentions contained in the founding affidavit.

[18] Mr Kuny SC, who appeared on behalf of the Third Respondent, challenged and submitted that the Applicants application is fundamentally defective both in fact and in law in the following respect:-

18.1 That the Applicants founding affidavit contains material that is hearsay and there is no direct or first hand evidence in respect of those facts that could have entitled the Applicants to seek relief granted provisionally on the 7th of September 2012 or even to obtain a confirmation of the provisional order at this state.

18.2 That the Applicants sought a final relief and yet proceeded by way of motion, in circumstances where a dispute of fact was readily and easily foreseeable. That the Applicants would have known precisely what the Third Respondent's answers would be to these allegations as the former had already instituted provisional sentence proceedings against the Third Respondent.

18.3 That the founding papers were solely based on the affidavit of Mr Erleigh insofar as the alleged "facts" upon which Applicants case is premised and same was not verified by even a single affidavit from any of the Applicants or from

any other person who might have been able to verify the hearsay evidence.

18.4 He also made averments to the effect that the Applicants counsel had, in their possession, documentation compiled and collected during the course of Mr Erleigh consultation in Madagascar. They found it "startling and clearly improper" that the Applicants moved for an *ex parte* order without giving the Third Respondent's notice of the application or revealing the nature and extent and/or identity or contents of the documents.

18.5 Lastly it was raised, *ex abudante cautela* that the Applicants failed to establish the following:

18.5.1 It was submitted on behalf of the Third Respondent that the Applicants lack *locus standi.* That the powers of attorney annexed to both the founding affidavit and replying affidavit of Mr Erleigh, was of a general nature and not in respect of this application. The powers of attorney duly signed and furnished to Mr Erleigh in March/April 2012 neither "verify" any of the allegations contained in the founding affidavit nor provide a *nexus* between

the signatories to the powers of attorney and the relief sought.

18.5.2 That the Applicants failed to establish any basis in law and/or fact which would entitle this court to establish jurisdiction over the Third Respondent. That neither the "Rome Statute" nor the "Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("the ICC Act") furnish the domestic courts of the Republic of South Africa with the power to make an order in conflict with Section 21 of Chapter 2 of the Bill of Rights of the Constitution of the Republic. (The "constitution").

18.5.3 That insofar as the "Rome Statute" is of application in the Republic, any procedure carried out pursuant thereto, he submitted, must be laid down by domestic law and rights of persons as contemplated in Chapter 2 of the Constitution.

18.5.4 That the allegations of an orchestration of a plot to assassinate Rajoelina is based on

hearsay as there is no statement from Brigadier General Richard Ravalomanana himself of what he knew first hand. Therefore, it was submitted, there is a "huge question mark" over the credibility and/or or reliability of the enforcement.

18.5.5 That since the Applicants application is premised on hearsay evidence and same should be disregarded. In support of this he contended that there are no confirmatory affidavits filed by the Applicants.

[19] Apart from the procedural issues, it was raised on behalf of the Third Respondent that the Third Respondent's restrictions of travel both domestic and abroad will interfere with his political ambitions to participate in the 2013 elections in Madagascar where he intends to become a candidate in the presidential elections.

[20] Furthermore, that, as allegedly evidenced by an extract from the Summit record ( Annexure MR4 to the Answering affidavit), provides ( in essence) for the unconditional return of the Third Respondent to Madagascar.

[21] After both Counsel had concluded their arguments the Third Respondent's counsel, Mr Kuny SC applied for leave to file heads of argument in order to deal with the "new and complex" issues of International Law raised in the Applicants replying affidavit for the first time. I enquired as to when can I expect to receive the heads of argument. Kuny SC could not give any indication. I nevertheless, granted leave to both counsel to file heads of argument. I accordingly adjourned the proceedings to consider my judgment.

[22] On the 25th of September 2012 the Third Respondent filed his heads of argument. On the 28th of September 2012 the Applicants filed their heads of argument. This was followed by the Third Respondent's supplementary heads on the 5th of October 2012. Consequently the Applicants filed and delivered their supplementary heads of argument.

[23] No doubt the parties filed their heads of argument at will. This is a very unusual application for which there is no direct precedence. To eliminate prejudice to the litigants, I accepted both parties sets of heads of argument. I may as well point out that their respective heads of argument extended way beyond the issues of International Law, for which leave to file heads was requested.

[24] I pause to mention that prior to the presentation of oral argument in this Court on the 20th of September 2012, I enquired from the Respondents as to whether or not they had considered the proposed relaxation of the conditions of the terms of the interim order as advanced by the Applicants in a correspondence dated 19 September 2012. These conditions briefly entails the following: That the Third Respondent be:-

(i) Permitted to travel unrestricted within the borders of South Africa for as long as his passport remains in the possession of the First Respondent's investigating officer;

(ii) Permitted to travel to any foreign jurisdiction outside South Africa for purposes of attending SADC meetings, provided he is able to produce a prior written invitation from SADC to the First Respondent's investigator. That if the Third Respondent produces a formal SADC invitation, the First Respondent must return his passport for purposes of such travel;

(iii) Permitted to travel to Madagascar in accordance with any SADC recommendation as contemplated in paragraph 5.2.1.6(iv) of the SADC decision of 18 August 2012. Once SADC has made such recommendation(s), the Department of Home Affairs be authorised to issue travel documents by

the Third Respondent authorising his exit from South Africa for travel to Madagascar;

(iv) In the event of his return to South Africa from any foreign jurisdiction, the Third Respondent must within 72 hours of such return deliver his passport to the relevant First Respondent's investigating officer.

[25] Kuny SC, in response to these relaxation measures pointed out that the proposals were unacceptable. He submitted that the Third Respondent, just like any other individual, is entitled to travel both inside and outside the territory of the Republic of South Africa if he wishes to do so. That, there exists no basis, upon which his movement should be restricted.

[26] I found that response perplexing, as same is contrary to what the Third Respondent alludes to in his answering affidavit. He makes averments that the protocol courtesies and services extended to him by the Honourable Minister of International Relations and Co-operations, Minister Maite Nkoana – Mashabane. The following protocol courtesies and services extended to him and his wife are contained in a letter dated the 11th of August 2011 (Annexure "MR8" to the Third Respondent's answering affidavit) :- They are the following:-

(i) That the Minister of Home Affairs has granted the Third Respondent and his wife the rights of permanent residency in the Republic of South Africa in terms of the Immigration Act, 2002;

(ii) The protocol courtesies and services to include accommodation, transport and VIP protection;

(iii) The VIP protection extended to travel and movements both in South Africa and abroad.

[27] The extent of the aforesaid protocol courtesies and services do not differ substantially with the proposed relaxations of the interim order as contained in the aforementioned correspondence dated the 19th of September 2012. Apparently the Third Respondent accepted. I will refer to this later in my judgment.

**EVALUATION OF SUBMISSIONS**

[28] **LACK OF AUTHORITY**

It is contended on behalf of the Third Respondent that Mr Erleigh lack the requisite authority to bring this application on behalf of the Applicants. They make averments that Mr Erleigh has never consulted with the Applicant; that the Applicants are not even aware of this application; that the Applicants are

merely a front for the "illegal coup regime" in Madagascar. This argument was premised on the deponents letter dated the 22nd of August 2012, in which he sought to explain the Applicants delay in filing replying affidavits in the provisional sentence proceedings.

If the Third Respondent was aware of the existence of the provisional sentence proceedings, one wonders how would one by any stretch of imagination appreciate that Mr Erleigh would not have consulted with and/or met the Applicants. This submission cannot stand.

[29] I am satisfied with the Applicant's evidence:

(i) That Mr Erleigh in the aforesaid letter was merely trying to explain the fact that the Applicants reside in Madagascar and consequently difficulties were encountered in the process of filing the replying papers in the provisional sentence proceedings.

(ii) That Mr Erleigh consulted in Madagascar on two occasions namely, in May 2012, August 2012 and 3 September 2012.

(iii) He was furnished with powers of attorney duly executed at the South African Embassy in Antananarivo, Madagascar as required by the Uniform Rule 63 of the Rules of this

Court. That same were accompanied by sworn translations as required under the this Rule 60 of the aforesaid Rules. (Replying affidavit 245 – 268 Annexures DE20 – "DE28").

(iv) Furthermore when this matter came before me on the 20th of September 2012, a facsimile of an affidavit by Rija Nirina Rakoto Malala (Mr Malala) was handed up. Mr Malala, a duly admitted attorney stated under oath in the affidavit dated the 2nd of September 2012 that he attended a meeting of about two hours, convened by both Mr Erleigh and the Applicants. Therefore this confirms that the Applicants indeed had consultations with Mr Erleigh.

(v) I cannot understand why the Third Respondent doubts the "existence" of the Applicants in the first place. In any event, there was no objection by way of notice in terms of the Uniform Rule 7(1) regarding Mr Erleigh's authority to execute this application on behalf of the Applicants. **(Eskom v Soweto City Council 1992(2) SA 703 (W)).**

(vi) I accordingly accept the version of the Applicants in this regard. I am satisfied that Mr Erleigh had proper authority, in the light of the above, to bring this application on behalf of the Applicants.

[30] **GOOD FAITH IN EX PARTE PROCEEDINGS:**

The Third Respondent, submits that the Applicants ought not to have approached this Court on an *ex parte* basis:

30.1 This was premised on the allegations that Mr Erleigh has never met or consulted with the Applicants. That the Applicants are not even aware of this application.

This issue is fully canvassed in the contentions relating to lack of authority of Mr Erleigh to bring this application. My findings in that regard apply similarly in this issue. I do not need to deal with this issue any more that I have already done.

30.2 He contends that the interim order stands to be discharged for failure to disclose material facts. He bases this argument on the duty of good faith in *ex parte* applications. Also that the Applicants failed to disclose that they have instituted provisional sentence proceedings against Third Respondent.

30.3 It is trite that in principle, the Court may dismiss an application solely on the basis of failure to disclose material facts, whether wilfully or negligently. However, **Trakman N.O v Liwshitz 1995(1) SA 282 (A)** is instructive. Material

non-disclosure, *mala fide* and the like, in motion proceedings can be visited with an adverse or punitive cost order, but cannot serve to deny a litigant substantive relief to which he would otherwise be entitled to.

30.4 Taking into account the gravity of the allegations against the Third Respondent, any contention that Mr Erleigh wilfully suppressed the aforementioned information (the pending provisional sentence proceedings) needs to be considered, taking into account all the relevant facts.

30.5 I have considered the fact that the Applicants are vulnerable under the circumstances. I have also taken into account the gravity of the allegations made against the Third Respondent and I am persuaded that proper disclosure could not have influenced the decision of my Sister Pretorius J in granting the interim order *ex parte*. **(Phillips v National Director of Prosecutions 2003 (6) SA 477 (SCA) at 455 B – C).**

30.6 **Schelsinger v Schelsinger 1979 (4) SA 342 (W)** gives a birds eye-view of the law regarding good faith in *ex parte* applications. The following summary is pertinent :

"(i) in *ex parte* applications, all material facts must be disclosed which might influence a Court in coming to a decision;

(ii) The non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission; and

(iii) The Court, apprised of the full facts, has a discretion to set aside the former order or to preserve it.

30.7 In **Herbstein and Van Winsen (2nd ed at 94),** the following is stated :

*"Although, on the one hand, the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other hand make full disclosure of all material facts, which might affect the granting or otherwise of an ex parte order".*

30.8 Therefore, on the sole basis of Applicants failure to disclose the fact that some of Applicants have instituted provisional sentence proceedings, I cannot accept that this non-disclosure influenced the Honourable Pretorius J to grant the interim order. The Learned Judge apprised of the full

facts to exercise her discretion. I accept the Applicant's contention in this regard.

[31] **LOCUS STANDI:**

On behalf of the Third Respondent it was argued that all the Applicants lack the requisite *locus standi* to bring this application for the following reasons :

(1) That none of the Applicants filed a supporting or verifying affidavit;

(2) That no evidence is placed before this Court to establish any *nexus* between any of the Applicants and the Third Respondent which would have provided this Court with the jurisdiction to grant the relief they are seeking.

(3) That the Applicants failed to establish any basis in law and/or fact which would entitle this Court to establish jurisdiction over the Third Respondent in order to grant the relief sought.

(4) That the Applicants purported to derive the right to bring this application in terms of the "Rome Statute" and/or in terms of the ICC Act. The Applicants contended that neither of these two statutes furnish the domestic courts of the Republic of South Africa with the power to make an

order in conflict with Section 21 in Chapter 2 of the Bill of Rights of the Constitution of the Republic of South Africa.

(5) That the Applicants have not shown the existence of any domestic law which, in the absence of the issue of a lawful warrant of arrest, that would entitle this court or any other body or person, to restrict or interfere with the Third Respondent's right to leave the Republic. It is submitted that such an act would constitute a contravention of Section 21 of the Constitution of the Republic of South Africa Act 106 of 1996.

(6) It was submitted on behalf of the Applicants that:-

(i) During April 2012 Applicants submitted documentation to the First and Second Respondents in terms of the ICC Act. This documentation relates to the alleged crimes against humanity committed by the Third Respondent in Madagascar. It was contended that under those circumstances, the Appellants are complainants in the criminal investigation in terms of the ICC Act and thus they have a prima facie right to or interest in a properly protected criminal process. That they are accordingly complainants

(ii) It was further submitted that the Applicants bring this application in their own interest as contemplated in Section 38(a) of the Constitution, 1996.

(iii) That the purposes of the ICC Act, is to ensure that South Africa has jurisdiction over Third Respondent in pursuance to South Africa's obligations to investigate and prosecute crimes under international law as contemplated in the Rome Statute of the International Criminal Court ("Rome Statute") and the ICC Act.

(iv) That it is not a requirement of the ICC Act that only the victims of the relevant crimes against humanity may submit evidence to First and Second Respondents or even request that the First and Second Respondents initiate an investigation under section 4(3)(c) of the ICC Act. The Applicants content further that the Third Respondent in his answering affidavit admits that the investigations aforesaid has been initiated.

(v) The First Respondent in his letter dated the 13th of August 2012 admits that the First Respondent had evaluated the material provided by the Applicants. It is also admitted that he also considered that the basis for initiating the investigation is a fact that the subject of

the investigation is present in South Africa, that should the subject permanently leave South Africa the Third Respondent would no longer be legally entitled to conduct an investigation against him.

(7) It was submitted that South Africa is obliged under the ICC Act to conduct investigations relating to offences *inter alia* of crimes against humanity and conspiracy committed against individuals beyond the borders of South Africa. There is merit in this argument.

(8) In **Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others (77150/09) [2012] ZAGPPHC 61 (8 May 2012)** (unreported), the question of *locus standi* was raised by the Respondents on the basis that the Applicants did not have any written mandate or powers of attorney by any of the alleged victims of the alleged crimes against humanity, mandating either of the Applicants to request an investigation for prosecution in terms of the ICC Act.

(9) My brother Fabricius J, in the abovementioned case, rejected these contentions and for the following reasons I agree with him.

(10) The Applicants in casu, demonstrated that they have *locus standi* as it can be said that they are acting in the public interest as provided for under Section 38(d) of the Constitution, 1996. Section 38(d), introduces a broadened public interest action. The following is stated in **Ferreira v Levine N.O and Others 1996(1) SA 984**: *(CC) at paragraph 230 states that "Section 38 has created new and different grounds of locus standi, that the approach to legal standing when dealing with Constitutional issues must be broader than the traditional approach under the common law".* And at paragraph 226 it goes on to state that: *"A person may have an interest in the infringement or threatened of the right of another, which would afford such person the standing to seek constitutional relief".*

(11) Section 38(d) introduced a fundamental and revolutionary principle of universal jurisdiction created *sui generis* by the "Rome Statute" as incorporated in the ICC Act. The ICC Act empowers South Africa as a party to the Rome Statute to exercise jurisdiction over international crimes committed by any person outside of South Africa if that person after the conviction of the crime is present in the territory of South Africa.

(12) The Applicants in casu, demonstrated that they have *locus standi* as it can be said that they are acting in the public interest as provided for under Section 38(d) of the Constitution, 1996. Section 38(d), introduces a broadened public interest action. The following is stated in **Ferreira v Levine N.O and Others 1996(1) SA 984**: *(CC) at paragraph 230 states that "Section 38 has created new and different grounds of locus standi, that the approach to legal standing when dealing with Constitutional issues must be broader than the traditional approach under the common law".* And at paragraph 226 it goes on to state that: *"A person may have an interest in the infringement or threatened of the right of another, which would afford such person the standing to seek constitutional relief".*

(13) Section 38(d) introduced a fundamental and revolutionary principle of universal jurisdiction created *sui generis* by the "Rome Statute" as incorporated in the ICC Act. The ICC Act empowers South Africa as a party to the Rome Statute to exercise jurisdiction over international crimes committed by any person outside of South Africa if that person after the conviction of the crime is present in the territory of South Africa.

[32] The Third Respondent is accused of allegedly committed crimes against humanity in Madagascar in 2008/2009.

[33] That he, whilst in the Republic of South Africa, orchestrated the assassination plot of Rajoelina. Surely the ICC Act empowers South Africa as a party to the "Rome Statute" to exercise jurisdiction on the Third Respondent.

[34] **HEARSAY EVIDENCE:**

On behalf of the Third Respondent it was submitted that the Applicants application is based on hearsay. It was contended that no admissible evidence is placed before this Court to establish a *nexus* between the Applicants and the Third Respondent to provide this Court with jurisdiction. The basis thereof it is alleged that the Applicants have not filed the confirmatory affidavit.

[35] Furthermore, that the evidence of the alleged assassination plot against Mr Rajoelina, constituted hearsay evidence.

[36] The Applicants submissions in this regard cannot stand in the light of the fact evidence that they have previously consulted with Mr Erleigh in May 2012 in Madagascar. This issue is addressed in the preceding paragraphs and I need not repeat same.

[37] On the issue of hearsay regarding the assassination plot, the Third Respondent bases his objection on lack of personal knowledge of the massacre of the 7th February 2009 massacre.

[38] It was submitted on behalf of the Applicants that the admission of evidence is governed by Section 3 of the Law of Evidence Amendment Act, 45 of 1998. (The Law of Evidence Amendment Act).

[39] On behalf of the Applicant's, it was further submitted that the purpose for which Mr Erleigh's accounts of the massacres of the 7th of February 2009 was merely designed to map out the nature and scope of the material furnished to the First and Second Respondent with a view to arriving at the conclusion that "a reasonable basis exist[ed] for conducting an investigation" under the ICC Act.

[40] Surely I am satisfied that the material so supplied by Mr Erleigh is nothing beyond but an indication of the basis whereupon the First and Second Respondent came to the conclusion that there indeed existed a reasonable basis that gave them reason to initiate investigations against the Third Respondent.

[41] On the plot to assassinate Mr Rajoelina,the Applicants in this regard submit that Mr Erleigh whilst in Madagascar had little time to obtain documentary evidence pertaining to the assassination plot of Mr Rajoelina.

The report was only obtained for the first time on the 5th September 2012. The only "best evidence" was the report confirmed under oath by an attorney in Madagascar, namely Rija Nirina Rakotomalala who further confirmed that under Article 389 of the Malagasy Code of Criminal Procedure, the report has value as evidence when it is regular in form and when it's author, acting in the performance of his duties, reports that he has personally seen or heard concerning a subject within his competence.

[42] It was submitted that due to the urgency of the matter, the author of the report being Brigadier General Richard Ravalomanana could not be accessed by Mr Erleigh due to time constraints. However, attached to the affidavit of Mr Rakotomalala, is an affidavit by Brigadier General Richard Ravalomanana confirming that the report is based on investigations conducted by a body known as Gendarmerie Unit under his command.

Based on the gravity of the aforesaid allegations and the urgency of the matter, I exercise my discretion to admit this evidence under **Section 3 (1)(c) of the Law of Evidence Amendment Act, 45 of 1988.**

**SADC ROADMAP**

[43] The Third Respondent makes reference to the so-called "Roadmap for ending the crises in Madagascar".

[44] The Roadmap referred to by Third Respondent, is a SADC Draft document intended to ending the then continued crisis in Madagascar to which 10 of the 11 Malagasy political stakeholders are signatories.

It seeks to bring the country back to constitutional normality. Instrumental thereto, were efforts of the SADC Mediation team, led by former President of Mozambique H E Chissano and SADC Organ Troika in Madagascar.

Final implementation thereof would have created and enabled an environment conducive for the safe return of Malagasy citizens in exile for political reasons, including the Third Respondent.

Central to Third Respondent's reference to Annexure "MR4" of his answering affidavit, the only glaring understanding of

paragraph 5.2.1.6 of the Maputo SADC "Resolution" of 17 – 18 August 2012 relates to "the period within which risk assessments and implementation process of the safe return of the Third Respondent to Madagascar should be endeavoured" and not for his actual return to Madagascar.

[45] Therefore, it cannot be found that the Applicants application frustrated a SADC determination.

[ 46] Any procedure followed In terms of the Rome Statute must be laid down by domestic law and rights. The Republic of South Africa has the following structures in place:

(46.1) The purpose of the ICC Act is to bring those who commit atrocities such as crimes against humanity to justice, pursuant to the Republic of South Africa's international obligations under the Rome Statute. This may be done via prosecution in South African Courts in terms of domestic law, where possible. In the event of the National Prosecution Authority (the "NPA), declining or being unable to do so, to co-operate with the International Criminal Court the "ICC), in line with the principles of complementarity. Such co-operation includes the surrender to the ICC of persons accused of having committed crimes referred to in the Rome

Statute, enabling the ICC to sit in South Africa, and thus enforce any sentence or order made by the ICC.

(46.2) Any South African Court hearing any matter arising from the application of the ICC Act must consider and, where appropriate, may, in addition to the Constitution and domestic law, apply conventional international law, customary international law and comparative foreign law.

(46.3) Chapter 2 of the Constitution provides for the jurisdiction of South African courts and institution of prosecutions in South African courts in respect of a crime. Section 4(1) states that any person who commits a crime is guilty of an offence and is liable to certain punishment. Section 4(3) provides the following:

"In order to secure the jurisdiction of a South African court for purposes of this chapter, any person who commits a crime contemplated in ss (1) outside the territory of the Republic, is **deemed** to have committed that crime in the territory of the Republic if : -

a. that person is a South African citizen; or

b. that person is not a South African citizen but is ordinarily resident in the Republic; or

c. that person, after the omission of the crime, is present in the territory of the Republic; or that person has committed the said crime against a South African citizen or against a person who is ordinarily in the Republic.

(46.4) In order that South Africa's obligations under the ICC Act may be fulfilled, a Priority Crimes Litigation Unit ( The Second Respondent) was established within the NPA and is headed by a Special Director of Public Prosecutions, appointed in terms of s 13(1)(c) of the National Prosecution Authority Act. The proclamation appoints the Second Respondent to "manage and direct" the investigation and prosecution of crimes contemplated in the implementation of the Rome Statute of the International Criminal Court Act, and serious national and international crimes amongst others.

(46.5) The Directorate of Priority Crimes Investigation (the First Respondent) in turn, was established within the

South African Police Services, and the crimes under the ICC Act fall within its purview for investigation.

[47] In *casu*, both the First and Second Respondents have considered the evidence submitted to them by the Applicants and have decided in terms of section 4(3)(c) of the ICC Act to initiate an investigation. These decisions are of significance, inasmuch as they signal that First and Second Respondents concluded that there is a reasonable basis to believe that an international crime has been committed.

[48] Section 205(3) of the Constitution provides for the following objects of the police service:
"[T]o prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law".

[49] As to the prosecuting authority, section 179(2) of the Constitution provides that:

"The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings".

[50] Accordingly, in deciding to initiate an investigation under section 4(3)(c) of the ICC Act, both the First Respondent and the Second Respondent concluded that the material submitted

by the Applicants provided a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed.

[51] In the **Cote d'Ivoire Authorisation " A decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire" (ICC – 02/11 – 14) (3 October 2011)**, the ICC Pre-Trial Chamber considered the meaning of the "reasonable basis" standard, holding that:

> *"This test of 'reasonable basis to believe' is the lowest evidential standard provided by the Statute. Thus, the information available to the Prosecutor is not expected to be 'comprehensive' or 'conclusive', which contrasts with the position once the evidence has been gathered during the investigation. In evaluating the information provided by the Prosecutor and the victims, the Chamber must be satisfied that a sensible or reasonable justification exists for the belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'".*

[52] In **Southern African Litigation Centre and Others v National Director of Public Prosecutions (Case No. (Case No.: 77150/09) *("SALC v A/DP")***, a Court in this Division was called upon to review the failure by the SAPS and the PCLU to institute an investigation into crimes against humanity for torture committed in Zimbabwe in accordance with South Africa's international obligations under the Rome Statute and the ICC Act.

[52.1] The Honourable Fabricius J adopted the threshold for initiating investigations provided for under the Rome Statute, *viz.* "a reasonable basis to believe" that crimes against humanity have been committed.

[53] It was submitted that in light of the decisions of the First Respondent and the Second Respondent to institute investigations under section 4(3)(C) of the ICC Act, it is not for this Court to second-guess their conclusions on the evidentially material placed before them by the Applicants.

[53.1] Certainly, the ambit, context and continued investigations undertaken by First Respondent and/or Second Respondent do not fall to be a subject for determination by this court.

[54] The submission (correctly made) on behalf of the Third Respondent is that, a restriction of his movement infringes upon his constitutional right to freedom of movement as enshrined in Section 21 of the Constitution.

[55] This submission is not the only determination to be made in the circumstances, as sight should not be lost that the Constitution does equally provide for the limitation of constitutionally infringed right(s) in terms of Section 36(1) of the Constitution having regard to the following:

(i) The nature of the right;

(ii) The importance and purpose of the right;

(iii) The nature and extent of the limitation;

(iv) The relation between the limitation and its purpose; and

(v) Less restrictive means to achieve the purpose.

[56] The above considerations together with other relevant factors, are applicable to the extent that the limitation(s) is reasonable and justifiable, in an open and democratic society based on human dignity, equality and freedom.

[57] On the other hand it was submitted on behalf of the Applicants that upon a proper construction of Section 40(k) of the Criminal Procedure Act 51 of 1977, a warrant of arrest may be authorised against the Third Respondent. Without further ado, this would be to drastic a measure even to consider at this point in time. I intend not to dwell further in this regard.

[58] It is absolutely imperative in the unique nature of this matter that there are competing interests that must be put into the scale for consideration, which are:

(a) The Third Respondent's right of freedom of movement;

*issue put before it". ("The court could therefore hold the scales of justice also where laws are to be applied and not only, despite the well-ringing phrase in* **Ex parte Millsite Investment Co (Pty) Ltd 1965 (2) SA 582 (T),** *' where no specific law provides directly ' )".*

[61] The Honourable Moseneke DCJ correctly, in my view, adopted a less stringent task regarding the justification of the limitations of rights in the context of Section 173 and proceeded as follows:

**Ex parte Millsite Investment Co (Pty) Ltd 1965 (2) SA 582 (T)**

*"The right of the media or public to attend, receive and in part workings of a court room may be attenuated by a court where it exercises its inherent power to regulate its own process under Section 173 of the Constitution. If in so doing it "impinges upon rights entrenched in chapter 2 of the Constitution, (it must ensure that ) the extent of the impairment of right is proportional to the purpose the court seeks to achieve".* **(Independent Newspapers (Pty) Ltd v Minister of Intelligence Services : In re Masetlha v President of the Republic of South 2008 (5) SA 31 (CC))**

[62] This court, therefore has inherent power, in view of the circumstances of this case, to impinge upon the rights entrenched in Chapter 2 of the Constitution in the pursuit of

attaining the balancing of competing interests as set out in the preceeding paragraphs.

[63] In view of the aforegoing, I am inclined to giving due consideration to the following

i) The South African Government, acting in conformity with a SADC decision, extended essential protocol courtesies and services to the Third Respondent, which Third Responded accepted.

ii) Proposals by the Applicants of the relaxation of conditions contained in the Interim Order in paragraph 27 of this judgment.

[64] That the *rule nisi* granted on the 7th September 2012 is confirmed as amended by the aforesaid proposals.

[65] That the *interim* order is amended to incorporate the relaxation measures contained in paragraph 24 above.

**I therefore make the following order:**

1. That the Third Respondent be permitted to travel unrestricted within the borders of South Africa for as long as his passport

remains in the possession of the First Respondent's investigating officer;

2. That the Third Respondent be permitted to travel to any foreign jurisdiction outside South Africa for purposes of attending SADC meetings, provided he is able to produce a prior written invitation from SADC to the DPCI investigator. If the Third Respondent produces a formal SADC invitation, the First Respondent must return the Third Respondent's passport for purposes of such travel;

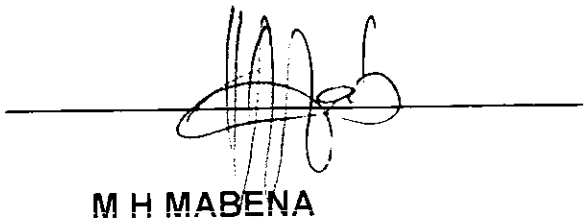
3. That the Third Respondent be permitted to travel to Madagascar in accordance with any SADC recommendation as contemplated in paragraph 5.2.1.6(iv) of the SADC decision of 18 August 2012. Once SADC has made such recommendations, the Department of Home Affairs be authorised to issue travel documents to the Third Respondent, authorising his exit from South Africa for travel to Madagascar;

4. In the event of his return to South Africa from any foreign jurisdiction, that the Third Respondent must within 72 hours of such return deliver his passport to the relevant First Respondent's investigating officer.

5. That the investigations be conducted and concluded expeditiously.

6. That, after investigations have been completed, the Third Respondent be accordingly informed without undue delay.

7. That each party pay it's own costs.



**M H MABENA**
**ACTING JUDGE**
**NORTH GAUTENG HIGH COURT**
**PRETORIA**

**Delivered** on 19 NOVEMBER 2012

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