HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Reportable/Not of interest to other Judges

CASE NO: 83145/2016

In the matter between:

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
SOUTH AFRICAN LITIGATION CENTRE	Sixth Respondent
PROFESSOR JOHN DUGARD AND PROFESSOR GUENAEL METTRAUX	Seventh Respondent
AMNESTY INTERNATIONAL LIMITED	Eighth Respondent
PEACE AND JUSTICE INITIATIVE AND CENTRE FOR HUMAN RIGHTS	Ninth Respondent
HELEN SUZMAN FOUNDATION	Tenth Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Intervening Party

Heard: 5 and 6 December 2016

Delivered: 22 February 2017

Coram: Mojapelo DJP, Makgoka and Mothle JJ

Summary: International treaty – Rome Statute of the International Criminal Court – notice of withdrawal in terms of article 127(1) – Section 231 of the Constitution of the Republic of South Africa – whether the power of the national executive to negotiate and sign an international treaty includes the power to withdraw from such treaty without prior parliamentary approval – whether parliamentary approval may be sought after notice of withdrawal had been delivered to the United Nations.

ORDER

Mojapelo DJP, Makgoka and Mothle JJ (sitting as a Full Bench and court of first instance):

1. The notice of withdrawal from the Rome Statute of the International Criminal Court, signed by the first respondent, the Minister of International Relations and Cooperation on 19 October 2016, without prior parliamentary approval, is unconstitutional and invalid;

2. The cabinet decision to deliver the notice of withdrawal to the United Nations Secretary-General without prior parliamentary approval, is unconstitutional and invalid;

3. The first, second and third respondents – the Minister of International Relations and Cooperation, the Minister of Justice and Correctional Services and the President of the Republic of South Africa, are ordered to forthwith revoke the notice of withdrawal referred in paragraph 1 above;

4. The first, second and third respondents are ordered to pay the applicant's costs, including costs consequent upon employment of two counsel;

5. There is no costs order as between the intervening applicant, the first, second, third, sixth, ninth and tenth respondents.

J U D G M E N T

THE COURT

[1] This case turns on the separation of powers between the national executive and parliament in international relations and treaty-making. It calls for a proper interpretation of s 231 of the Constitution of the Republic of South Africa, 1996 (the Constitution). The primary question is whether the national executive's power to conclude international treaties, also includes the power to give notice of withdrawal from international treaties without parliamentary approval. Related to that is an ancillary question whether it is constitutionally permissible for the national executive to deliver a notice of withdrawal from an international treaty without first repealing the domestic law giving effect to such treaty. At the heart of the dispute is the withdrawal of South Africa from the Rome Statute of the International Criminal Court (the ICC).

[2] The litigation history over the ICC has its genesis in the refusal by the South African government to arrest and surrender to the ICC, Omar Hassan Ahmad al-Bashir (President al-Bashir) the President of Sudan, when he visited the country in June 2015 for an African Union (AU) summit. President al-Bashir stands accused of serious international crimes, and two warrants have been issued by the pre-trials chamber of the ICC for his arrest. They all are for war crimes, crimes against humanity and genocide, all related to events in the Darfur region of Sudan. The warrants have been forwarded to member states, including South Africa, requesting them to cooperate under the Rome Statute and cause President al-Bashir to be arrested and surrendered to the ICC.

[3] Government's failure in this regard led to an urgent application in this court by South African Litigation Centre (SALC), in which it sought orders declaring the government's failure to be in breach of the Constitution, and to compel the government to cause President al-Bashir to be arrested and surrendered to the ICC. Government's stance was that President al-Bashir enjoyed immunity in terms of international customary law. A Full Bench of this court eventually granted an order declaring the government's failure to have President al-Bashir arrested and surrendered to the ICC to be inconsistent with the Constitution and unlawful.[1] The appeal by the government to the Supreme Court of Appeal was unsuccessful,[2] after which an application for leave to appeal was made to the Constitutional Court.[3] That application, which was scheduled to be heard by the Constitutional Court on 22 November 2016, has been withdrawn by government.

Background facts

[4] On 19 October 2016, the national executive took a decision to withdraw from the Rome Statute. Pursuant thereto and on the same day, the Minister of International Relations signed a notice of withdrawal to give effect to that decision and deposited it with the Secretary-General of the United Nations. This triggered the process for South Africa's withdrawal. In terms of article 127(1) of the Rome Statute, the withdrawal of a party state from the Rome Statute takes effect 12 months after the depositing of a notice to that effect. Thus, South Africa would cease to be state party to the statute in October 2017. Attached to the explanatory statement is a lengthy explanation in which the reasons for the withdrawal are set out. In part, the statement reads:

> 'In 2015, South Africa found itself in the unenviable position where it was faced with conflicting international law obligations which had to be interpreted within the realm of hard diplomatic realities and overlapping mandates when South Africa hosted the 30th Ordinary Session of the Permanent Representatives Committee, the 27th

[1] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP); 2015 (2) SA 1 (GP).
[2] *Minister of Justice and Constitutional Development & others v The Southern Africa Litigation Centre* [2016] 2 All SA 365 (SCA); 2016 (4) BCLR 487 (SCA); 2016 (3) SA 317 (SCA).
[3] *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* (CCT 75/16).

> Ordinary Session of the Executive Council and the 25th Ordinary Session of the Assembly of the African Union ("the AU Summit"), from 7 to 15 June 2015. South Africa was faced with the conflicting obligation to arrest President Al Bashir under the Rome Statute, the obligation to the AU to grant immunity in terms of the Host Agreement, and the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965 as well as the obligation under customary international law which recognises the immunity of sitting heads of state.
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> This Act and the Rome Statute of the International Criminal Court compel South Africa to arrest persons who may enjoy diplomatic immunity under customary international law but who are wanted by the International Criminal Court for genocide, crimes against humanity and war crimes and to surrender such persons to the International Criminal Court. South Africa has to do so, even under circumstances where we are actively involved in promoting peace, stability and dialogue in those countries.'

[5] On 20 and 21 October 2016 respectively, the Minister of Justice wrote identical letters to both the Speaker of the National Assembly (the fourth respondent) and the Chairperson of the National Council of Provinces (the fifth respondent) advising them of cabinet's decision to withdraw from the Rome Statute, and the reasons therefor. In those letters, the Minister also stated his intention to table in parliament, a bill repealing the Implementation of the Rome of Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act) which is the domestic law giving effect to the Rome Statute in South Africa.

[6] On 24 October 2016 the applicant launched an application for direct access to the Constitutional Court seeking to challenge the executive's decisions referred to above. It also launched a substantively identical application in this court, in the alternative, in the event of the Constitutional Court not granting direct access to it. On 11 November 2016 the Constitutional Court refused the application for direct access on the basis that it was not in the interest of justice to hear the matter at this stage. As a result the applicant fell back on its application in this court. It seeks orders declaring unconstitutional and invalid: the notice of withdrawal and the underlying cabinet decision to withdraw from the Rome Statute and to deliver the

notice to the Secretary-General of the United Nations, initiating the withdrawal. Consequentially, the applicant seeks an order that the first, second and third respondents be directed to revoke the notice of withdrawal and to take reasonable steps to terminate the process of withdrawal under article 127(1) of the Rome Statute.

The parties

[7] The applicant, the Democratic Alliance (the DA) is a political party registered in terms of s 15 of the Electoral Commission Act 51 of 1996, and the largest minority party in parliament. It is supported in the relief it seeks by four non-governmental civil rights organisations, namely: the applicant to intervene, Council for the Advancement of the South African Constitution (CASAC); the sixth respondent, South African Litigation Centre (SALC); the joint ninth respondent, Centre for Human Rights (CHR)[4] and the tenth respondent, the Helen Suzman Foundation (HSF) (the supporting respondents). The seventh and eighth respondents, Professor John Dugard and Professor Guenael Mettraux, and Amnesty International Limited, have each filed a notice to abide, and consequently take no part in these proceedings.

[8] The first respondent, the Minister of International Relations and Cooperation (the Minister of International Relations) is the member of the national executive responsible for signing and delivering the impugned notice. The second respondent, the Minister of Justice and Correctional Services (the Minister of Justice) is the member of the national executive responsible for the administration of the national legislation that domesticated the Rome Statute. The third respondent, the President of the Republic of South Africa (the President) is the head of the national executive, which, in terms of s 231(1) of the Constitution, is responsible for negotiating and signing all international agreements. For the sake of convenience, we shall refer to these respondents collectively as 'government respondents'. Where the context dictates, we shall refer to the individual government respondents as designated above. The government respondents oppose the relief sought by the DA. The fourth

[4] CHR, together with the Peace and Justice Initiative (PJI), are jointly cited at the ninth respondent. PJI has elected not to participate in this application.

and fifth respondents, respectively the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, have filed notices to abide and are not part of these proceedings.

The Rome Statute: adoption, signature, ratification and domestication

[9] The Rome Statute was adopted and signed on 17 July 1998 by a majority of states attending the Rome Conference, including South Africa. This paved the way for the establishment of the ICC. South Africa ratified the Rome Statute on 27 November 2000. It was the obligation of states parties, which signed and ratified the Rome Statute, to domesticate the provisions of the statute into their national law to ensure that domestic law was compatible with the statute. South Africa accordingly passed the Implementation Act on 16 August 2002. The preamble of the Act reads:

> 'The Republic of South Africa is committed to bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligation to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute.'

[10] Schedule 1 of the Implementation Act creates a structure for the national prosecution of the international crimes of genocide, war crimes, and crimes against humanity, which includes the crime of apartheid. The overall purpose of the Implementation Act is to bring the perpetrators of serious international crimes to justice, in domestic courts or in the ICC. The Implementation Act also creates the domestic legal framework for South Africa's cooperation with the ICC. Section 3(a) of the Implementation Act provides for the creation of a framework to ensure that the Rome Statute is effectively implemented in the country.

Preliminary issues

[11] There are four preliminary issues to be disposed of. They are: urgency and ripeness; CASAC's application to intervene; SALC and CHR respective applications for condonation; and the DA's joinder of the supporting respondents. They are considered in turn.

Urgency and ripeness

[12] The application was issued on 24 October 2016 on an urgent basis, set down for 22 November 2016. On 17 November 2016 the Deputy Judge President issued directions with regard to time-frames for filing of further affidavits, CASAC's intervention application and written submissions. The application was thereafter allocated as a special motion to be heard by a Full Bench of this division on 5 and 6 December 2016. That is how we came to be seized of the matter. Counsel for government respondents did not seriously press for a finding that the matter is not urgent. Instead, he argued that the application is not ripe for judicial intervention. For these considerations, the debate as to the urgency of the matter became somewhat diminished, and of secondary importance. It should therefore not detain us further. Suffice it to state that we are satisfied that the matter is urgent in the sense that the notice period for withdrawal from the Rome State has commenced and is running. The alleged unconstitutional and unlawful act has been committed and will remain legally effective. Unless the matter is determined now, the applicant would not obtain an effective remedy at any time later, if the application has merits. What remains of the issue of urgency is linked to ripeness and will be dealt with next.

[13] The related issue - the ripeness of the application - was advanced on behalf of government respondents. The contention was that the application was brought prematurely and should be dismissed on the basis that it is not ripe for judicial intervention, because: there is imminent consideration of the matter by parliament; there are on-going diplomatic and curial engagement of the ICC; and the effective date of the notice of withdrawal is only in October 2017, and is capable of deferral; and the notice itself is susceptible to revocation before it takes effect. Accordingly, so was the argument, unlawfulness has not yet manifested in a form which cannot be corrected. It was also argued that the national executive, had, through the Minister of

Justice, given assurance that the notice of withdrawal will be withdrawn or its date of effectiveness deferred, should parliament not approve the notice of withdrawal before the termination in terms of the notice takes effect in October 2017. It was also argued that any judicial intervention where a parliamentary process is underway, would infringe the doctrine of separation of powers.

[14] In our view, the issues of ripeness and separation of powers cannot be considered in isolation. They are directly linked to, and intertwined with, the constitutionality of delivering the notice of withdrawal without prior parliamentary approval. As a result, whether the matter is ripe depends on the constitutionality of the notice of withdrawal. If the notice of withdrawal is unconstitutional, that is the end of the matter, as this court must declare it unlawful, as enjoined by s 172 of the Constitution. Ngcobo J explained in *Doctors For Life*:[5]

> '[69] The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or "settled practice". Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.' (footnote omitted.)

[15] In the present case, we are not concerned with what parliament might or might not do in future about the bill repealing the Implementation Act. The contention is that another arm of government, the executive, has already breached the separation of powers, and thus acted unconstitutionally, by deciding and giving notice of withdrawal in the manner it has. On that basis alone, this court is entitled, and indeed constitutionally enjoined, to enquire into the conduct of the executive to

[5] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

determine whether it is constitutionally compliant. We are therefore entitled to consider the application.

[16] What is more, it is not permissible for government respondents to seek to oust the jurisdiction of the court based on the contention that the notice of withdrawal is capable of being withdrawn or deferred. As long as it has not been withdrawn or deferred, the matter is properly before this court. The same applies to possible diplomatic resolution, which the government argues it may achieve, before expiry of the 12 months period. The court cannot shirk its responsibility just because the executive may find another resolution.

CASAC's intervention application

[17] CASAC applied for leave to intervene as the second applicant. Rule 12 of the Uniform Rules of Court provides:

> 'Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.'

[18] In terms of its constitution, CASAC is a voluntary association and a juristic entity operating as a non-governmental organisation, established specifically to advance the Constitution by participating in litigation and advocacy in and on behalf of the public interest, among others. It has previously engaged in public interest and constitutional litigation.[6]

[19] CASAC's application to intervene is opposed by government respondents, primarily on the basis of: the lateness of the application; CASAC's supposed election not to intervene when it proceeded only before the Constitutional Court for direct access; inconvenience in terms of further overburdening the already

[6] See for example *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC); *CASAC v President of the Republic of South Africa* (CCT 83/13).

voluminous papers in an urgent application.

[20] The test for the intervention of parties in constitutional matters, such as the present, was stated as follows by the Constitutional Court in *Independent Newspapers:*[7]

> '[18] In *Gory v Kolver NO and Others (Starke and Others Intervening)* this court held that in a case involving the validity of a statute an application to intervene would succeed only if the applicant had a direct and substantial interest in the subject matter of the litigation, which in that case was the validity or otherwise of the statute and if, in addition, it was in the interests of justice for the application to be granted. On that occasion we explained that, whilst a direct and substantial interest is a necessary condition for intervention as a party, it is not always sufficient ground for granting leave to intervene. The ultimate test is whether, in a particular case, it is in the interests of justice to join or be joined as a party to pending litigation.' (footnotes omitted.)

[21] There is no doubt that CASAC has a direct and substantial interest in the subject matter of this litigation. The issues raised in the application fall comfortably within CASAC's areas of interest: the interpretation of the Constitution; separation of powers; international human rights; and the rule of law. CASAC also has standing in respect of the subject matter in terms of s 38(a) and (e) of the Constitution.[8]

[22] Regard should also be given to the fact that CASAC is not entirely an outsider in the current litigation – it having filed an application for direct access

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[7] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC).

[8] Section 38 provides:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

on the same day as the DA in the Constitutional Court. Apart from the intervention application it has not placed any new facts before this court. The legal challenges it raises are broadly, similar to those raised by the DA. And, given the intervention by the Deputy Judge President referred to earlier, all the parties have had adequate opportunity to file their papers. CASAC's contention that there is no risk of ambushing any party by raising a new issue or seeking new relief that the parties might not have had a fair opportunity to consider and comment upon, is a sound one. On a consideration of factors mentioned above, CASAC not only has a direct and substantial interest in the subject of the present application, but overall, it is in the interests of justice to grant leave to it to intervene as the second applicant. Accordingly, such leave is granted.

SALC and CHR's respective applications for condonation

[23] Both SALC and CHR applied for condonation for the late filing of their respective responding affidavits. In terms of the notice of motion, the respondents (including SALC and CHR) were to file their answering affidavits, if any, by 8 November 2016. Their applications were opposed by government respondents on the basis of prejudice. Government respondents' prejudice is supposedly as a consequence of the further truncating of time limits for them to deliver their supplementary answering affidavit, among others, in response to the responding affidavits filed by SALC and CHR.

[24] SALC served its affidavit on 10 November 2016, two days after the time-frame stipulated in the notice of motion. Its explanation for the two-day delay is that it had mistakenly believed that its affidavit was only required to be filed on 15 November 2016. Indeed, in its notice to abide served on 28 October 2016, it is mentioned that its affidavit setting out its position would be filed on 15 November 2016. CHR filed its responding affidavit on 15 November 2016, five court days after the time period stipulated in the notice of motion. CHR's explanation for the delay is that it had awaited the outcome of the DA's application for direct access to the Constitutional Court. It says that the order of the Constitutional Court dismissing the DA's

application, made on 11 November 2016, only came to the attention of its attorneys on 14 November 2016.

[25] The explanations furnished respectively by SALC and CHR are not entirely satisfactory. Government respondents have correctly pointed out to the paucity of information for the delays. Ordinarily, this should lead to the refusal of their applications for condonation. However, what weighs heavily in favour of granting condonation is the nature of the constitutional issues implicated in this application, on which both parties have advanced helpful submissions. The novelty and importance of the issues in the case, as well as the public interest evoked by the case, are all factors which gravitate towards granting condonation.

[26] Besides, the prejudice complained of by government respondents was rendered largely moot by the intervention of the Deputy Judge President on 17 November 2016, when he issued directions for the further conduct of the matter. As a result, the matter was set down two weeks later than the date reflected in the notice of motion, and government respondents were given the opportunity to file further affidavits in response to the supporting respondents' responding affidavits. Indeed, they responded in detail to the substance of the responding affidavits by SALC and CHR. As a result, they have clearly not suffered any prejudice as they have been afforded an opportunity to exercise their right of reply. It also seems common cause that the responding affidavits by SALC and CHR are almost identical to those which they filed in the application for direct access to the Constitutional Court. As such, government respondents had been aware of their submissions well in advance of the delivery of their responding affidavits in the present application. Given these considerations, the inclination is to the conclusion that it is in the interests of justice to grant SALC and CHR condonation for the late filing of their responding affidavits.

Have the supporting respondents been improperly joined in the application?

[27] Government respondents objected to the DA's joining of the supporting respondents. Initially, the DA stated that this had been done on the basis that they

were the respondent (SALC) and *amici curiae* (the rest of the supporting respondents) in the application for leave in the Constitutional Court against the judgment of the Supreme Court of Appeal in the matter involving President al-Bashir. Government respondents argued that it was wrong of the DA to 'convert' *amici* in another matter into parties before this court. Only this court, they contended, can determine whether *amici* should be permitted in separate proceedings.

[28] The short answer to that complaint is this: It admits of no debate that all the supporting respondents have an indubitable direct and material interest in the subject matter of this application, given that SALC, HSF and CHR were involved in the President al-Bashir case. SALC initiated the application in this court and was the respondent on appeal in the Supreme Court of Appeal. HSF was admitted as an *amicus* in that appeal. CHR and four others applied for admission as *amici* in that appeal. Although they were refused admission as *amici* in that court, they were nevertheless admitted as such by the Constitutional Court in the application for leave to appeal against the judgment of the Supreme Court of Appeal. As stated earlier, that application was withdrawn. CHR and PJI are thus, in addition, cited as interested parties as a result of their admission as *amici* in the withdrawn application.

[29] Thus, it can safely be assumed that had the DA not cited the supporting respondents, there would have been applications by them to be admitted as *amici curiae*. Alternatively, they could have brought similar and parallel applications. Thus, either way, this court would have grappled with the participation of the supporting respondents. We therefore take a view the DA was prudent in citing the supporting respondents. Therefore, government respondents' argument of misjoinder has no merit.

<u>The substantive application and the grounds therefor</u>

[30] We now turn to the merits of the application. The DA's constitutional challenge, is predicated on the following four grounds:

(a) prior parliamentary approval was required before the notice of withdrawal was delivered to the United Nations;

(b) prior repeal of the Implementation Act was required before the notice of withdrawal was delivered to the United Nations;

(c) the delivery of the notice of withdrawal without prior consultation with parliament was procedurally irrational; and

(d) the withdrawal from the Rome Statute breaches the state's obligations in terms of s 7(2) of the Constitution.

The issues

[31] CASAC and each of the supporting respondents supported the DA's arguments on s 231 and on irrationality, although each approached the argument from different perspectives. From the DA's grounds of challenge, taken together with those of CASAC and the supporting respondents, the following issues can be distilled and summarised for determination:

(a) whether prior parliamentary approval and the repeal of the Implementation Act were required before a notice of withdrawal was given (the s 231 argument);

(b) whether a process of public participation in parliament should have preceded the lodging of the notice of withdrawal;

(c) whether the withdrawal was procedurally rational;

(d) if parliamentary approval is required for the delivery of the notice of withdrawal, whether such approval may be sought after the notice of withdrawal had been delivered;

(e) whether, if the process-based grounds succeed, the substantive grounds should nevertheless be considered; If one issue is dispositive of the matter, should other issues be considered?

(f) whether the withdrawal was substantively rational;

(g) whether the state's obligations in terms of s 7(2) of the Constitution precludes the withdrawal from the Rome Statute altogether;

(h) if the application succeeds on any of the grounds, the just and equitable remedy to be granted;

(i) Costs.

Prior parliamentary approval and repeal of the Implementation Act: s 231 of the Constitution

[32] The question here is whether the national executive is entitled to decide on the withdrawal and execute its decision without the involvement of the legislature and thereafter seek legislative approval, as it seeks to do. Secondly, whether it may execute its decision without the repeal of the Implementation Act. In answering the above questions the point of departure must inevitably be s 231 of the Constitution and the proper construction to be placed on it. The section governs the manner in which international agreements are concluded, made binding on South Africa, and domesticated into our national law. It reads:

> '(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
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> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) 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.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

[33] The structure and effect of s 231 was lucidly explained by the majority of the Constitutional Court in *Glenister II*:[9]

> '[181] In our view the main force of s 231(2) is directed at the Republic's legal obligations under international law, rather than transforming the rights and obligations contained in international agreements into home-grown constitutional rights and obligations. Even though the section provides that the agreement 'binds the Republic', and Parliament exercises the Republic's legislative power, which it must do in accordance with and within the limits of the Constitution, the provision must be read in conjunction with the other provisions within s 231. Here, s 231(4) is of particular significance. It provides that an international agreement 'becomes law in the Republic when it is enacted into law by national legislation'. The fact that s 231(4) expressly creates a path for the domestication of international agreements may be an indication that s 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them. It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations.'

[34] Ngcobo CJ, writing for the minority in the same case, neatly summarised the scheme of s 231 as follows:

> '[89] The constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements. But an international agreement signed by the executive does not automatically bind the Republic unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament.
>
> [90] The approval of an agreement by Parliament does not, however, make it law in the Republic unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval unless it is

[9] *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347; 2011 (7) BCLR 651 (CC) (*Glenister II*).

> inconsistent with the Constitution or an Act of Parliament. Otherwise, and third, an "international agreement becomes law in the Republic when it is enacted into law by national legislation." (footnotes omitted.)

[35] From the exposition of s 231, there is no question that the power to conduct international relations and to conclude treaties has been constitutionally conferred upon the national executive in terms of s 231(1). But that power is fettered by s 231(2) and (4), which enjoins the national executive to engage parliament. The section therefore clearly delineates the powers between the national executive and parliament. The only power the national executive has to bind the country to international agreements without parliamentary involvement is in s 231(3), with which we are not concerned here. Any other international agreement must be approved by parliament in terms of s 231(2) to be binding on the country. Thus, once parliament approves the agreement, internationally the country becomes bound by that agreement. Domestically, the process is completed by parliament enacting such international agreement as national law in terms of s 231(4).

The contentions of the parties on the effect of s 231

[36] There is no debate about the scheme of s 231 as far as treaty-making is concerned. The dispute is about the reverse process, when the country has to withdraw from an international agreement. The DA, CASAC and the supporting respondents argued that since in terms of s 231(2) it is parliament which must approve an international agreement before it may bind South Africa, it follows that it must be parliament which decides whether an international agreement ceases to bind the country before the executive may deliver a notice of withdrawal.

[37] Unsurprisingly, government respondents took the opposite view. Their stance was that prior parliamentary approval is not required for the notice of withdrawal to be given because s 231 contains no such provision. But, they contended, in any event, in this case, parliamentary approval is being obtained. The over-arching argument advanced on behalf of government respondents on prior parliamentary

approval was that because there is no express provision in s 231 for such, the reading-in is unwarranted. This argument is premised on four distinct grounds.

[38] First, that because it is the national executive's primary role in international relations to conclude treaties, and not that of parliament, the legal requirement (prior approval by parliament) not being explicit in the Constitution, should not be lightly implied or read-in into the Constitution. To construe parliament as the primary decision-maker when it comes to treaty-making is contrary to s 231 as interpreted by the Constitutional Court. Counsel for government respondents was at pains to emphasise the fact that treaty-making is the exclusive competency in the heartland of the national executive. Therefore, counsel argued, the read-in function for parliament which the DA seeks to read in is not what the Constitution contemplates.

[39] Second, and related to the first ground, was that since the original function of concluding treaties is not that of parliament, but of the national executive, parliamentary approval is only required in order for a concluded treaty to become binding. The conclusion of that treaty remains the function of the national executive. The expression of this approval is done through ratification, which in this context, means formal confirmation of consensus expressed by the national executive. Undoing it is therefore also for the national executive to do, which does not need parliamentary approval. Parliamentary approval relates to the binding effect of a concluded treaty. Much as concluding a treaty is a core function of foreign relations within the competence of the national executive, 'un-concluding' a treaty is also within the constitutional competence of the executive. It was argued further that since treaties are not concluded by parliament but the executive, parliament cannot exit from a treaty, and a decision whether to withdraw from a treaty is not that of parliament. Consequently, the argument went, parliamentary approval is not required.

[40] Third, that in international law, a notice of withdrawal from an international agreement does not require approval. In this regard, counsel pointed out that article 56 of the Vienna Convention on the Law of Treaties, 1969, on which article 127 of

the Rome Statute is based, contemplates only a notice of withdrawal signed by the head of state, head of government or minister of foreign affairs or other representative of the state concerned, with no parliamentary approval, ratification or confirmation required. According to government respondents, the DA contends for a construction of the Constitution which departs from international law, and this result is sought to be achieved by reading-in a requirement which the Constitution does not contain. Accordingly, so was the argument, the reading-in would be inconsistent with international law and necessarily at odds with the constitutional requirement to interpret the Constitution and the South African law to comply with international law.

[41] Fourth, that parliamentary approval is only required for an international agreement. A withdrawal being a unilateral act, it does not qualify as an 'international agreement'. Because s 231 specifically mentions 'an international agreement' by necessary implication this excludes withdrawal, with the application of the maxim *expressio unius est exclusio alterius*.[10] The reading-in is therefore inconsistent with the legal nature of withdrawal and the express wording of the constitutional text itself.

[42] Finally, government respondents submitted that the question whether parliamentary approval is required before notice of withdrawal is given, 'does not arise' on the facts of this case because parliamentary approval is being obtained for the withdrawal. Accordingly, we were urged not determine this question as it does not arise squarely for determination, as per the injunction of the Constitutional Court in its jurisprudence on this issue.[11]

Analysis and discussion

[43] We have no difficulty in accepting, as a general proposition, that under our constitutional scheme, it is the responsibility of the national executive to develop and

[10] A maxim of interpretation meaning that the express mention of one thing is the exclusion of the other.

[11] See *S v Mhlungu* 1995 (3) SA 867 (CC) para 59; *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) paras 2-5; *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) para 199; *S v Bequinot* 1997 (2) SA 887 (CC) paras 12 -13; *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416; 2006 (12) BCLR 1399 paras 41 and 71.

implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. As Ngcobo J explained in *Kaunda*:[12]

> '[172] The conduct of foreign relations is a matter which is within the domain of the executive. The exercise of diplomatic protection has an impact on foreign relations. Comity compels states to respect the sovereignty of one another; no state wants to interfere in the domestic affairs of another. The exercise of diplomatic protection is therefore a sensitive area where both the timing and the manner in which the intervention is made are crucial. The state must be left to assess foreign policy considerations and it is a better judge of whether, when and how to intervene. It is therefore generally accepted that this is a province of the executive, the state should generally be afforded a wide discretion in deciding whether and in what manner to grant protection in each case and the judiciary must generally keep away from this area. That is not to say the judiciary has no role in the matter.'

[44] It is now axiomatic that the exercise of all public power, including the conducting of international relations, must accord with the Constitution.[13] As stated already, South Africa has, in terms of s 231 of the Constitution, both ratified the Rome Statute and domesticated it through the Implementation Act. While the notice of withdrawal was signed and delivered in the conduct of international relations and treaty-making as an executive act, it still remained an exercise in public power, which must comply with the principle of legality and is subject to constitutional control.[14]

[45] Equally, it is the responsibility of parliament to make laws. When making laws parliament will exercise its judgment as to the appropriate policy to address the situation.[15] The formulation of policy to withdraw from the Rome Statute therefore no doubt falls exclusively within the national executive's province. In the present case,

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[12] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC).
[13] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 20.
[14] *Kaunda and others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) paras 78-80,178,191 and 228; *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC) para 69; *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 64.
[15] *Glenister II* para 66.

the declaratory statement which accompanied the notice of withdrawal, reflects the national executive's policy position.

[46] We consider these submissions through the prism of these constitutional guidelines. Broadly, we do not agree with the general tenor of interpretation placed on s 231 by government respondents. The argument is effectively this: in terms of s 231(1) and (2) of the Constitution the national executive first negotiates and signs an international agreement. Parliament thereafter approves the agreement to bind the country. The process of withdrawal should follow the same route with the national executive first taking the decision, followed by parliamentary approval. On this argument, the notice of withdrawal is an act in terms of s 231(1), and is the equivalent of, and akin to, the conclusion and signature during the making of an international treaty, which does not require prior parliament approval, but can be subsequently ratified.

[47] We disagree. A notice of withdrawal, on a proper construction of s 231, is the equivalent of ratification, which requires prior parliamentary approval in terms of s 231(2). As correctly argued on behalf of the DA, the act of signing a treaty and the act of delivering a notice of withdrawal are different in their effect. The former has no direct legal consequences, while by contrast, the delivery of a notice of withdrawal has concrete legal effects in international law, as it terminates treaty obligations, albeit on a deferred basis in the present case. Also, this argument overlooks the explicit provisions of article 127(1) of the Rome Statute, which provide that a state may withdraw 'by written notification addressed to the Secretary-General of the United Nations'. The notice of withdrawal deposited by the Minister of International Relations is the written notification envisaged in the article. Although the withdrawal does not take effect until a year, that notice constitutes, at international level, a binding, unconditional and final decision of withdrawal from the Rome Statute.

[48] We further disagree with the government respondent's contention that the participation of parliament in the decision-making concerning the purported

withdrawal from the ICC, will be inconsistent with international law since the withdrawal letter has to be signed by a senior state official. Article 127 of the Rome Statute, which the government respondents contend is based on Article 56 of the Vienna Convention of the Law of Treaties, 1969, simply requires that the letter of withdrawal be signed by the head of state, head of government, or minister of foreign affairs or other representative of the state concerned. On a proper construction, this implies that the letter must be signed by a senior state official who is duly authorized, so as to assure the Secretary General and the ICC that the letter communicated is authentic. The article does not seek to dictate to the member states as to how and by whom the decision to withdraw must be taken.

[49] In summary, that provision has nothing to do with who has the authority to make a decision to withdraw. It is concerned with the designated government official who signs and delivers the notice to the United Nations, after a competent authority (either the national executive or the legislature) had taken a decision to withdraw. The article therefore has no bearing on the decision-making itself. Thus the need for the participation of parliament in the consideration of the conclusion of treaties and by analogy, the question whether to withdraw from the Rome Statute is part of our law and cannot be construed to be inconsistent with international law.

[50] It is indeed correct that in international law, a notice of withdrawal from an international agreement does not require parliamentary approval.[16] However the question of which between the national executive and parliament has to decide on withdrawal must be settled according to domestic law. It is a domestic issue in which international law does not and cannot prescribe.

[51] It should also be borne in mind that prior parliamentary approval is required before instruments of ratification may be deposited with the United Nations. From that perspective, there is a glaring difficulty in accepting that the reverse process of

[16] See section 127 of Rome Statute, and its predecessor, article 56 of the Vienna Convention on the Law of Treatise.

withdrawal should not be subject to the same parliamentary process. The necessary inference, on a proper construction of s 231, is that parliament retains the power to determine whether to remain bound to an international treaty. This is necessary to give expression to the clear separation of powers between the national executive and the legislature embodied in the section. If it is parliament which determines whether an international agreement binds the country, it is constitutionally untenable that the national executive can unilaterally terminate such an agreement.

[52] As the Constitutional Court explained in *Glenister II* para 96, a resolution by parliament in terms of s 231(2) to approve an international agreement is 'a positive statement … to the signatories of that agreement that parliament, subject to the provisions of the Constitution, will act in accordance with the ratified agreement.' Therefore, the approval of an international agreement in terms of s 231(2) creates a social contract between the people of South Africa, through their elected representatives in the legislature, and the national executive. That social contract gives rise to the rights and obligations expressed in such international agreement. The anomaly that the national executive can, without first seeking the approval of the people of South Africa, terminate those rights and obligations, is self-evident and manifest.

[53] What is more, it is trite that where a constitutional or statutory provision confers a power to do something, that provision necessarily confers the power to undo it as well.[17] In the context of this case, the power to bind the country to the Rome Statute is expressly conferred on parliament. It must therefore, perforce, be parliament which has the power to decide whether an international agreement ceases to bind the country. The conclusion is therefore that, on a textual construction of s 231(2), South Africa can withdraw from the Rome Statute only on approval of parliament and after the repeal of the Implementation Act. This interpretation of the section is the most constitutionally compliant, giving effect to the doctrine of separation of powers so clearly delineated in s 231. The fact that s 231 does not expressly say that only parliament has the power to decide the withdrawal from the Rome Statute, is no bar to this interpretation.

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[17] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) para 68.

A different perspective

[54] Before we conclude on this topic, we look at the matter from another perspective. The matter was argued largely on the basis that there is no provision in the Constitution or in any other legislation for withdrawal from international treaties. This may be considered to be an omission or *lacuna*. However, it appears to us that there is probably a good reason why the Constitution provides for the power of the executive to negotiate and conclude international agreements but is silent on the power to terminate them. The reason is this: As the executing arm of the state, the national executive needs authority to act. That authority will flow from the Constitution or from an act of parliament. The national executive can exercise only those powers and perform those functions conferred upon it by the Constitution, or by law which is consistent with the Constitution.[18] This is a basic requirement of the principle of legality and the rule of law. The absence of a provision in the Constitution or any other legislation of a power for the executive to terminate international agreements is therefore confirmation of the fact that such power does not exist unless and until parliament legislates for it. It is not a *lacuna* or omission.

[55] With regard to the conclusion of international agreements, it is not for parliament to engage in negotiating such agreements. It is for this reason that the Constitution gave that power to the national executive. It is thus provided for in the scheme of section 231 (1), for the executive to do what is in effect exploratory work: negotiate and conclude an agreement but not bind the country. As stated already, the executive does not have the power to bind South Africa to such agreement. The binding power comes only once parliament has approved the agreement on behalf of the people of South Africa as their elected representative. It appears that it is a deliberate constitutional scheme that the executive must ordinarily go to parliament (the representative of the people) to get authority to do that which the executive does not already have authority to do.

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[18] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at paras 56-56; *President of RSA v SARFU* 2000(1) SA 1 (CC) at para 148; *Mansigh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) at para 25.

[56] It would have been unwise if the Constitution had given power to the executive to terminate international agreements, and thus terminate existing rights and obligations, without first obtaining the authority of parliament. That would have conferred legislative powers on the executive: a clear breach of the separation of powers and the rule of law. On this basis, too, the national executive thus does not have and was never intended to have the power to terminate existing international agreements without prior approval of parliament.

Summary of conclusions on s 231

[57] In sum, since on the structure of s 231, the national executive requires prior parliamentary approval to bind South Africa to an international agreement, there is no cogent reason why the withdrawal from such agreement should be different. The national executive did not have the power to deliver the notice of withdrawal without obtaining prior parliamentary approval. The inescapable conclusion must therefore be that the notice of withdrawal requires the imprimatur of parliament before it is delivered to the United Nations. Thus, the national executive's decision to deliver the notice of withdrawal without obtaining prior parliamentary approval violated s 231(2) of the Constitution, and breached the separation of powers doctrine enshrined in that section.

Ex post facto approval?

[58] Government respondents' seemingly alternative argument was that if parliamentary approval is indeed required, the national executive has complied with that requirement since parliament is still vested with such a decision, by virtue of the fact that the request to approve the notice of withdrawal and the repeal of the Implementation Act, are pending before parliament. Government respondents therefore contended for subsequent ratification. This raises the question whether retrospective approval by parliament would cure any defects in the process followed for the notice of withdrawal.

[59] Put differently, given that the national executive has sought parliamentary approval for the notice of withdrawal and the repeal of the Implementation Act,

has this question not become academic? It is not, for two reasons - one constitutional and another, practical. Constitutionally, an important constitutional principle of doctrine of separation of powers is implicated. Because the national executive had purported to exercise power it constitutionally does not have, its conduct is invalid and has no effect in law.[19] Whatever parliament does about the subsequent request to it by the national executive to approve the notice of withdrawal, would not cure its invalidity. As Hoexter[20] states '[a]n invalid act, being a nullity, cannot be ratified, 'validated' or amended.'

[60] Practically, although the notice of withdrawal does not take effect immediately, this does not mean its delivery has no consequences until the effective date. The ICC and member states to the Rome Statute must begin preparing for existence without South Africa. Elaborate transitional arrangements must be put in place. This, in part, should explain why article 127(1) of the Rome Statute contains a deferred effective date. As the notice of withdrawal has been delivered prematurely, the effective date is earlier than would be, than had parliamentary approval been sought prior to the delivery of that notice. In other words, had parliamentary approval been sought first, and obtained, the process would have taken much longer for the notice of withdrawal to be validly delivered. This obviously would have pushed the date of withdrawal much further than October 2017. As explained more fully below, the process of law-making is inherently elaborate and of necessity, takes long. To sum up on this point, and for the reasons stated above, parliamentary approval after the notice of withdrawal had been delivered, has no effect. Parliament is not empowered to cure the invalidity of the notice of withdrawal. However, it must be emphasised that this conclusion does not affect the validity of the Minister of Justice's tabling of the repeal bill before parliament. That process is legitimately and properly before parliament.

Public participation

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[19] *Kruger v President of the Republic of South Africa and others* 2009 (1) SA 417 (CC) para 52.
[20] *Administrative Law in South Africa* 2nd ed (2012) at 547. See also *S v Cebekulu* 1963 (1) SA 482 (T) at 483; *Montshioa and Another v Motshegare* 2001 (8) BCLR 833 (B) para 24.

[61] The argument by the DA and the supporting respondents was that public participation had been circumvented by the national executive's delivery of the notice of withdrawal without prior parliamentary approval. In *Doctors for Life*, the Constitutional Court explained the importance of public participation in law-making thus:

> '[115] The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.'

[62] Public participation is a parliamentary process in legislation-making. Parliament has a broad discretion in this regard, so long as it acts reasonably in terms of the prescripts of the Constitution. In respect of the repeal bill, which is already before it, parliament will determine how best to handle it, including whether it is necessary to hold public hearings or call for written submissions from the public. The finding that parliamentary approval of the notice of withdrawal and the repeal of the Implementation Act are required before a notice of withdrawal is delivered to the United Nations, renders it unnecessary to consider in any detail, whether public participation has been frustrated. This is so because, properly construed, the complaint that public participation has been hamstrung or circumvented by not seeking prior parliamentary approval, is premised on this court finding that the national executive's had validly delivered the notice of withdrawal.

[63] It has been found to have been invalidly delivered, as result of which it has to be revoked. As stated earlier, the parliamentary process to repeal the

Implementation Act should take its course. None of the parties has suggested that that process (to consider the repeal bill) is tainted. What has been tainted is the request by the national executive to approve the notice of withdrawal. In other words, one should separate the notice of withdrawal (which is invalid) from the repeal bill (against which there is no complaint). For these reasons, and in deference to parliament, no more should be said on this aspect.

Procedural irrationality

[64] The above conclusion leads to the question of procedural rationality of the notice of withdrawal. The requirement for rationality is that government action must be rationally connected to a legitimate government purpose.[21] The principle of legality requires that both the process by which the decision is made and the decision itself must be rational. In *Democratic Alliance v President of the Republic of South Africa*[22] the Constitutional Court explained that to determine procedural irrationality is to look at the process as a whole and determine whether steps in the process were rationally related to the end sought to be achieved. If not, whether the absence of a connection between a particular step is so unrelated to the end as to taint the whole process with irrationality. In the present case, the procedural irrationality lies in the finding that the national executive did not consult parliament, as it was obliged to, before delivering the notice of withdrawal.

[65] The primary reason advanced by the national executive for delivering the notice of withdrawal is that the Rome Statute impedes its role in diplomatic and peace-keeping efforts on the continent, as it is required to arrest, on its soil, sitting heads of state against whom the ICC has issued warrants of arrest. By withdrawing from the Rome Statute, so was the argument, government would be free to pursue its peacemaker role on the continent without the obligation to arrest the indicted heads of state. It would be free to give immunity to such leaders. But this ignores the effect of the Implementation Act. It is domestic legislation which creates peremptory

[21] *Pharmaceutical Manufacturers Association of SA and another: In re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) para 85.
[22] *Democratic Alliance v President of the Republic of South Africa and others* 2012 (12) BCLR 1297; 2013 (1) SA 248 (CC) para 37.

obligations which bind the State on their own terms, independent of its international obligations. In other words, South Africa's international law obligations are thus not dependent on the Rome Statute and *vice versa*.

[66] As a result, while internationally the ICC would give effect to the notice of withdrawal, domestically, government would be obliged, among others, to arrest and surrender the indicted leaders, as long as the Implementation Act is in force. It would not be permissible to grant the immunity it envisages. This would result in a state of affairs where the state incurs obligations domestically but not be party to the Rome Statute internationally. Government respondents argued that nothing turns on this aspect, because of the fact that the notice of withdrawal does not take effect until October 2017, and by that time, the Implementation Act would have been repealed.

[67] This was stated almost as a matter of fact. Indeed, the Minister of Justice stated that he had requested parliament to urgently consider the repeal bill (ostensibly so that by October 2017, the Implementation Act would have been repealed.) In other words, the national executive is ordering the legislature to finalise its process of considering the repeal bill before the effective date of 18 October 2017. This in itself is impermissible, as it has the potential to undermine the process of parliament. Section 57(1)(a) of the Constitution provides that the National Assembly may determine and control its internal arrangements, proceedings and procedures. Section 70(1)(a) gives similar powers to the National Council of Provinces. Parliament is therefore the master of its own processes, and the national executive is not entitled to dictate time frames to it within which to consider any bill before it. As explained in *Doctors for Life* at para 38, parliament has a very special role to play in our constitutional democracy – it is the principal legislative organ of the state. With due regard to that role, it must be free to carry out its functions without interference. Parliament should therefore not be dictated to by the national executive to rush through the repeal bill in order to meet the national executive-created deadlines.

[68] The fate of the repeal bill is far from being clear, bearing in mind the constitutionally entrenched, and elaborate legislative process set out in ss 73 to 82 of the Constitution. That legislative process, broadly speaking, commences with the introduction of a bill in the National Assembly (which has already been done in this case); consideration and passing of the bill by the National Assembly; consideration and passing of the bill by the National Council of Provinces; and consideration and signing of the bill by the President. One must also bear in mind the President's role in law-making. In terms of s 79(1) of the Constitution, he or she may refer the bill back to parliament for reconsideration if he or she has reservations about its constitutionality. If still not satisfied after reconsideration by parliament, the President must, in terms of s 79(4)(b) of the Constitution, refer the bill to the Constitutional Court for a decision on its constitutionality.

[69] After all, parliament may, after its due processes, decide against the notice of withdrawal and the repeal bill. But even if parliament approves of the withdrawal, and enacts the repeal bill into law, that might not be the end of the matter, because a constitutional challenge against that legislation can still be mounted on the basis that the repeal act itself is unconstitutional. That is not an unreasonable forecast, due to the importance of the matter to the country, both nationally and internationally, given the issues it raises. Indeed, such a challenge is already foreshadowed in this application. In each of the above scenarios, either the withdrawal would be deferred (because the repeal bill had not been passed by the effective date of the withdrawal) or be withdrawn (because parliament had voted against the repeal bill or it had judicially been declared unconstitutional.)

[70] Either way, there would be clumsy piece-meal processes, with undesirable and embarrassing outcomes for South Africa. It would have given different and confusing signals concerning its withdrawal from the Rome Statute. The United Nations, the ICC and member states to the Rome Statute, as well as the broader international community, deserve a united, final and determinative voice from South Africa on this aspect. That can only be achieved through our country's normal legislative processes. The question should be: what is so pressing for the national executive about the withdrawal from the Rome Statute which cannot wait for our

legislative processes (and possibly judicial pronouncements) to take their course? Government respondents have not provided any explanation for this seemingly urgent need to withdraw from the Rome Statute. All these, in our view, point to one conclusion: the prematurity and procedural irrationality of the lodging of the notice of withdrawal by the national executive without first consulting parliament. This unexplained haste, in our view, itself constitutes procedural irrationality.

Summary of the findings on the process-based challenges

[71] We find, on a construction of s 231 of the Constitution, that prior parliamentary approval and the repeal of the Implementation Act are required before the notice of withdrawal from the Rome Statute is delivered by the national executive to the United Nations. Also, that the delivery of the notice of withdrawal was procedurally irrational. These are process-based grounds, as they relate to the procedure by which the notice of withdrawal was prepared and handled. The rest of the grounds (substantive irrationality and s 7(2) obligations) concern the substantive merits of the withdrawal. In other words, whether it is at all constitutionally permissible for South Africa to withdraw from the Rome Statute.

Should we consider the substantive grounds of challenge?

[72] In light of the above findings, is it necessary to consider the substantive grounds of review, namely, substantive irrationality and the violation of the state's obligations under s 7(2) of the Constitution? The DA's argument was that the notice of withdrawal constitutes a retrogressive measure in international relations which deprives South Africans of the protection afforded by the ICC, and that it undermines the protection afforded to victims of international crimes in other countries. This, the DA argued, is in breach of the state's obligations under s 7(2) of the Constitution which imposes obligations to respect, protect, promote and fulfill constitutional rights. CASAC based its attack on substantive irregularity, advancing three reasons therefor. First that the decision does not accord with section 7(2) of the Constitution. Second, that the obligations under the Rome Statute that South Africa seeks to escape by withdrawing from it are provided for in the Constitution,

read with international customary and treaty law. Lastly, that the decision serves no legitimate government purpose.

[73] SALC assailed the decision on several grounds, among others, that it was irrational and/or taken in bad faith; and the effect of withdrawing was not properly considered, especially in respect of ongoing investigations and the impact on victims. CHR aligned itself with these grounds. It also argued that the withdrawal was irrational as there is no substitute for the ICC. In addition, it submitted that the African Union Constitutive Act and the African Charter do not contemplate a choice between membership of the Rome Statute and promoting peace and security. It was submitted that those two goals are intertwined because, ultimately, peace and security on the continent depended on there being real consequences for international crimes. That, so was the argument, is the basis for the existence of the ICC which the African Commission endorses. In brief, it was argued that the national executive's position is at odds with that adopted by the AU in relation to the ICC.

[74] During argument, counsel for the DA accepted the proposition that should we find in its favour on the process-based arguments, it would not be necessary to consider the substantive grounds. Counsel for SALC, CHR and HSF, on the other hand, pressed on with the argument that we should also decide the substantive grounds referred to above, irrespective of any findings on the procedural grounds. Counsel for CHR argued thus: given the position adopted by the national executive it is likely that, should its decision be set aside for procedural reasons, it would simply achieve the same goal (of withdrawal from the Rome Statute) after following the proper procedure. If this court does not decide the substantive grounds of review now, it is probable it will have to do so again in fresh legislation brought after the proper processes are followed. As the matter has been fully argued now, it was appropriate to decide all the challenges at this stage. Counsel based this argument on the dictum in *S v Jordan and others*[23] where the Constitutional Court said:

[23] *S v Jordan and others (Sexual Workers Education and Task Force as Amicus Curiae)* 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC). In *City of Cape Town v Premier of the Western Cape and others* 2008 (6) SA 345 (C) paras 167-8 it was held that similar considerations apply to attacks on conduct.

> '[21] [W]here the constitutionality of a provision is challenged on a number of grounds and the court upholds one such ground it is desirable that it should also express its opinion on the other challenges. This is necessary in the event of this Court declining to confirm on the ground upheld by the High Court. In the absence of the judgment of the High Court on the other grounds, the proper course to follow may be to refer the matter back to the trial court so that it could deal with the other challenges to the impugned provision. Thus failure by the High Court to consider other challenges could result in unnecessary delay in the disposal of a case.'

[75] In our view, the above dictum is not apposite to the present case. What distinguishes this case from other cases of constitutional challenge, is mainly that here, there is a parliamentary process pending to consider the repeal bill. If the national executive follows proper processes, and parliament passes the repeal bill, no fault would be attributable to the national executive. If the complaint be that the legislation repealing the Implementation Act is unconstitutional on any ground, including all the substantive grounds advanced in this application, then such complaint would not be against the executive, but parliament.

[76] The same goes for the DA's argument that parliamentary processes 'after-the-fact' present withdrawal as *fait accompli.* This proposition is based on the presumption that parliament will fail to perform its constitutional functions rigorously. This is a wrong premise. Since there is a parliamentary process pending, it must be assumed that parliament will comply with its constitutional obligation in this regard, for example, to facilitate public participation, which is its own process, and not of the executive. Any legislation which has potential impact on the bill of rights passed without such participation could be susceptible to a constitutional challenge against parliament. That challenge will not lie to this court, as the Constitutional Court has the exclusive jurisdiction to determine a constitutional challenge based on alleged failure by the legislature to facilitate public involvement in its legislative and other processes as envisaged in s 59(1)(a) of the Constitution.[24] Therefore, as observed by Langa CJ in *Glenister*, it would be institutionally inappropriate for a court to intervene in the process of law-

[24] *Doctors for Life* para 21; *Glenister II* para 23.

making on the assumption that parliament would not observe its constitutional obligations.[25] For these reasons this court refrains from expressing any view on the substantive grounds.

Summary

[77] In summary, the following conclusions are reached on the issues in dispute. Procedurally, the decision by the national executive to deliver the notice of withdrawal of South Africa from the Rome Statute of the ICC without prior parliamentary approval is unconstitutional and invalid. So is that decision, without it being preceded by the repeal of the Implementation Act. This court declines the invitation to pronounce on the substantive merits of South Africa's withdrawal from the Rome Statute of the ICC. That decision is policy-laden, and one residing in the heartland of the national executive in the exercise of foreign policy, international relations and treaty-making, subject, of course, to the Constitution.

Remedy

[78] Section 172(1) of the Constitution provides that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when deciding a constitutional matter within its power, a court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending the declaration of invalidity for any period to allow the competent authority to correct the defect. In the present case, that an order of suspension is not appropriate, nor is an order limiting the retrospectivity of the effect of the declaration of invalidity, given the inherent urgency of the matter. In any event, government respondents did not make out a case for such an order, although counsel on their behalf faintly suggested that we should consider suspension. As a result, the order of invalidity is with retrospective effect and no order of suspension would be made.

[25] *Glenister v President of the Republic of South Africa and others* 2009 (1) SA 287; 2009 (2) BCLR 136 (CC) para 56.

[79] As a natural and logical outcome of the case and to ensure that the applicant is granted effective relief following a finding of constitutional invalidity, as directed by the Constitutional Court in *Fose v Minister of Safety and Security*[26] consideration should be given to the proper order to make under the circumstances. Having found that the notice of withdrawal is invalid for the reasons discussed in this judgment, a declaratory order to that effect must be made. But, to constitute an effective remedy, that declaration should be accompanied by an order directing government respondents to revoke the notice of withdrawal.

[80] The DA has also sought that government respondents be ordered 'to take all reasonable steps to terminate the process of withdrawal.' Such an order would be too widely stated, and is likely to result in unnecessary interpretational issues. For example, the pending parliamentary process to consider the repeal bill is 'a process of withdrawal'. The order sought by the DA would have the effect of terminating such process. At the risk of repetition, there has not been a challenge to the Minister of Justice's referral of the repeal bill to parliament, and that process is not affected by the invalid delivery of the notice of withdrawal to the United Nations.

[81] Given that this court has refrained from expressing a view on the substantive policy decision by the national executive to withdraw from the Rome Statute, it follows that it would be inappropriate to declare that decision unconstitutional as a stand-alone decision. There is nothing patently unconstitutional, at least at this stage, about the national executive's policy decision to withdraw from the Rome Statute, because it is within its powers and competence to make such a decision. What is unconstitutional and invalid, is the implementation of that decision (the delivery of the notice of withdrawal) without prior parliamentary approval. As a result, a declaration of invalidity of the notice of withdrawal, coupled with an order for the withdrawal of such notice, should suffice as an effective, just and equitable remedy.

Costs

[26] *Fose v Minister of Safety and Security* 1997 (3) 786 (CC) para 69 and *Gory v Kolver N.O. and Others (Starke and Others Intervening*) 2007 (4) SA 97 (CC) para 40.

[82] The general principles with regard to costs in constitutional litigation were laid down by the Constitutional Court in *Affordable Medicines*[27] and *Biowatch.*[28] Relevant to the present case is that in constitutional litigation between a private party and the state, if the private party is successful, it should have its costs paid by the state, while if unsuccessful each party should pay its own costs. The DA has been successful. It is entitled to its costs from government respondents. However, costs of three counsel are not warranted. Costs of two should suffice.

[83] With regard to CASAC, we are of the view that it is not entitled to costs. It waited until late to file its application for intervention. Unlike the DA, it elected to file an application for direct access in the Constitutional Court only, and not in this court. When that application was dismissed, it found itself not being party to this application, resulting in an application for intervention on an urgent basis. With regard to the supporting respondents - SALC, CHR and HSF - they are ordinarily, as respondents, not entitled to costs from other respondents (in this regard government respondents.) Therefore, no order of costs as between the supporting respondents and government respondents should be made.

[84] In the result the following order is made:

1. The notice of withdrawal from the Rome Statute of the International Criminal Court, signed by the first respondent, the Minister of International Relations and Cooperation on 19 October 2016, without prior parliamentary approval, is unconstitutional and invalid;

2. The cabinet decision to deliver the notice of withdrawal to the United Nations Secretary-General without prior parliamentary approval, is unconstitutional and invalid;

3. The first, second and third respondents – the Minister of International Relations and Cooperation, the Minister of Justice and Correctional

[27] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).
[28] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

Services and the President of the Republic of South Africa, are ordered to forthwith revoke the notice of withdrawal referred in paragraph 1 above.

4. The first, second and third respondents are ordered to pay the applicant's costs, including costs consequent upon employment of two counsel;

5. There is no costs order as between the intervening applicant, the first, second, third, sixth, ninth and tenth respondents.

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PM Mojapelo
Deputy Judge President of the High Court,
Gauteng Division

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TM Makgoka
Judge of the High Court, Gauteng Division

_____

SP Mothle
Judge of the High Court, Gauteng Division

APPEARANCES:

For the Applicant:	S Budlender (with him C McConnachie and L Zikalala) Instructed by: Minde Shapiro Smith Inc., Belville Klagsbrun Edelstein Bosman De Vries Inc., Pretoria
For the First to Third Respondents:	JJ Gauntlett SC (with him F Pelser, L Dzai and A Msimang) Instructed by: State Attorney, Pretoria
For the Fourth Respondent:	No appearance
For the Fifth Respondent:	No appearance
For the Sixth Respondent:	M Du Plessis (with him A Coutsoudis) Instructed by: Webber Wentzel, Johannesburg Bernard Van Der Hoven Attorneys, Pretoria
For the Seventh Respondent:	No appearance
For the Eighth Respondent:	No appearance
For the Ninth Respondent:	T Ngcukaitobi (with him M Bishop and MN Mothapo) Instructed by: Legal Resources Centre, Johannesburg
For the Tenth Respondent:	D Unterhalter SC (with him C Steinberg and K Premhid) Instructed by: Webber Wentzel, Johannesburg Hills Incorporated Attorneys, Pretoria

For the Intervening Party:	A Katz SC (with him D Simons, N Muvangua and NM Krige) Instructed by: Norton Rose Fullbright, Cape Town Jacques Van Der Merwe Attorneys, Pretoria