

**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**SCA Case No: 1173.2025**  
**GSJ Case No: SS70/2021**

In the application of:

**HELEN SUZMAN FOUNDATION**

Applicant for leave  
to intervene as  
*amicus curiae*

In the matter between:

**CHRISTIAAN SIEBERT RORIGH**

Appellant

and

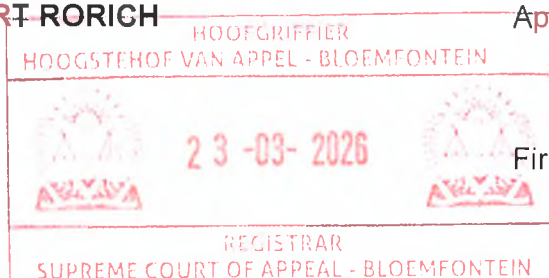
**THE STATE**

First Respondent

and

**TLHOMEDI EPHRAIM MFALAPITSA**

Second  
Respondent



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**NOTICE OF MOTION:**

**APPLICATION TO BE ADMITTED AS *AMICUS CURIAE***

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**KINDLY TAKE NOTICE THAT** the applicant for admission as *amicus curiae* hereby makes application to the Supreme Court of Appeal for an order in the following terms:

- 1 The applicant is admitted as *amicus curiae* in these proceedings, in terms of Rule 16 of the Supreme Court of Appeal Rules.
- 2 As *amicus curiae*, the applicant is granted:
  - 2.1 The right to rely on the submissions set out in its founding affidavit;

2.2 The right to lodge written argument in this matter; and

2.3 The right to present oral argument at the hearing of this matter,

provided that such argument does not repeat matters set forth in the arguments of the other parties, and raises new contentions which may be useful to the court.

3 Further and/or alternative relief.

**TAKE FURTHER NOTICE THAT** the accompanying affidavit of **NASEEMA FAKIR** will be used in support of the application.

**TAKE FURTHER NOTICE THAT** the applicant will accept service of all documents and proceedings in this matter at the address of its attorneys of record as set out below. The applicant will accept service by email.

Dated at Sandton on this the 23 day of **March 2026**.



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**TO:**  
**THE REGISTRAR OF THE SUPREME COURT OF APPEAL**  
Bloemfontein  
*By Hand*

**AND TO:**  
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SCA Case No: 1173/2025  
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First Respondent

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Respondent

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FOUNDING AFFIDAVIT

APPLICATION TO BE ADMITTED AS *AMICUS CURIAE*

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I, the undersigned,

NASEEMA FAKIR

do hereby make oath and say that:

- 1 I am the Executive Director of the Helen Suzman Foundation (HSF), the applicant for admission as *amicus curiae*. I confirm that I am duly authorised to depose to this affidavit on behalf of HSF for leave to intervene as *amicus curiae*.

R YI

2 The facts contained in this affidavit are within my personal knowledge, save where the contrary appears from the context or it is otherwise stated, and are to the best of my belief true and correct.

3 Where I deal with questions of law, I do so on the advice of HSF's legal representatives.

#### PARTIES

4 The applicant is HSF, a non-governmental organisation situated at North Block, La Val Office Park, 45 Jan Smuts Avenue, Westcliff, Gauteng. A resolution by HSF will be filed with the Court on request.

5 The appellant is Christiaan Siebert Rorich (**Rorich**), who was accused 2 in the Johannesburg High Court under case number SS70/2021, on charges of: (i) kidnapping; (ii) three counts of the crime against humanity of murder; and (iii) the crime against humanity of apartheid.

6 The first respondent is the State.

7 The second respondent is Thhomed Ephraim Mfalapitsa (**Mfalapitsa**), who was accused 1 in the Johannesburg High Court under case number SS70/2021, on charges of: (i) kidnapping; (ii) three counts of the crime against humanity of murder; and (iii) the crime against humanity of apartheid.

## OVERVIEW AND TIMING

8 This is an application in terms of Rule 16(4) of the *Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, 1998* (the **SCA Rules**), for the admission of HSF as *amicus curiae* in this appeal. HSF submits that it is able to provide relevant, useful and novel submissions that will assist the Court in the appeal and wishes to intervene as *amicus curiae* to do so. It therefore seeks this Court's authorisation to make both written and oral submissions to the Court on the issues set out below.

### *Timing of this application*

9 I am advised that, in terms of Rule 16(1), (2) and (5) of the SCA Rules, an applicant for admission as *amicus curiae* must request consent from the parties to be admitted within one month of the appeal record being lodged with the Registrar of this Court and if successful in securing such consent, must file its application within 10 days of receipt of the consent.

10 I understand that in this matter, an appeal record was filed on 23 February 2026.

11 On 24 February 2026, HSF directed a request for consent to intervene as *amicus curiae* to the parties to this appeal, this being within the one-month time frame provided for by Rule 16(5). They were also requested to provide their consent or objection to HSF's intervention by 6 March 2026. I attach a copy of this correspondence as "NF1".

12 On 6 March 2026, the attorneys acting for the appellant responded, indicating that they do not object to HSF applying to this Court for admission as *amicus curiae*. I attach their correspondence as "NF2".

13 As at the date of deposing to this affidavit, HSF's attorneys are yet to receive any reply from the respondents.

14 I am advised that, if consent is not secured, an applicant must make an application to the court for admission within one month of the appeal record being lodged with the Registrar of this Court, in terms of Rule 16(4) and (5). The Court retains the discretion to determine whether an applicant fulfils the requirements for admission, regardless of whether consent is received. It is accordingly necessary for HSF to bring this application for its admission as *amicus curiae*.

15 In what follows, I canvass:

15.1 HSF's *locus standi* and interest in this matter;

15.2 An overview of HSF's submissions; and

15.3 The relief sought.

#### **HSF'S INTEREST IN THIS MATTER**

16 HSF is an independent, not-for-profit research institute in South Africa dedicated to promoting democratic values, human rights, and the rule of law. HSF engages in various activities, including research, publications, litigation, and submissions to the South African Parliament. It advocates

for policies that translate the aspirations of the South African Constitution into reality for all citizens, emphasising good governance, transparency, and accountability.

- 17 HSF is not aligned with any political party but actively participates in public debates to uphold constitutional values.
- 18 HSF regularly participates in public interest litigation both as a party as well as *amicus curiae*. In this regard, some of the recent matters in which HSF has participated include:
  - 18.1 *Scalabrini Centre of Cape Town v Minister of Home Affairs and Others* [2025] ZAWCHC 202 where the HSF acted as *amicus curiae* in the litigation concerning the constitutionality and validity of certain subsections of section 4, section 21(1B) of the *Refugees Act, 1998* and Regulation 8 of the *Refugees Regulations, 2019*, which came into effect at the beginning of 2020. In particular, the HSF made detailed submissions on the rights of the child under Constitutional and International law. These submissions were extensively referred to by the Court with approval. This matter was heard before the Constitutional Court on 12 February 2026, where the HSF made written submissions.
  - 18.2 *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 490, involving the withdrawal of the Zimbabwe Exemption Permit. The HSF successfully litigated this matter as co-applicant through to the Constitutional Court.

- 18.3 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28 where HSF intervened as *amicus curiae* regarding, *inter alia*, the public's right to the truth and the importance of the establishment of a commission of inquiry as part of the remedy of reparations for serious human rights violations.
- 19 *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8, concerning the disclosure of the record of deliberations by the JSC. HSF successfully litigated this matter in multiple fora, including the Constitutional Court, highlighting important principles of truth and accountability.
- 20 *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, where HSF acted as *amicus curiae* in the litigation concerning Mr Nxasana's removal as Director of the National Director of Public Prosecutions.
- 21 *McBride v Minister of Police and Another* [2016] ZACC 30, where HSF acted as *amicus curiae* in proceedings concerning the independence of the Independent Police Investigative Directorate.
- 22 *Minister of Justice and Constitutional Development and others v Southern African Litigation Centre* [2016] 2 All SA 365 (SCA), where HSF acted as *amicus curiae* in the litigation before this Court concerning Mr Al Bashir's safe passage in and out of the country despite being the subject of warrants of arrest issued by the International Criminal Court.

- 23 HSF frequently acts in defence of constitutional and human rights and the rule of law. In accordance with its mandate, it has focused on the need to foster deliberative, reasoned decision-making by government and institutions in South Africa. The appeal impacts all these issues and underpins HSF's interest in the matter.
- 24 The HSF has been deeply involved in the unfinished business of the Truth and Reconciliation Commission (TRC). It seeks to intervene in the appeal in order to highlight the importance of completing the work of the TRC and to demonstrate that this is necessary to give effect to South Africa's domestic and international law obligations.
- 25 Pursuant to its consideration of the papers filed to date, HSF is of the view that it can present a relevant but different perspective to that of the parties in the application and thereby can assist the Court in the determination of the appeal.
- 26 In what follows, I show that HSF has met the requirements for admission as an *amicus curiae*.

#### **OVERVIEW OF HSF'S PROPOSED SUBMISSIONS**

- 27 HSF wishes to advance the following focused submissions, against which it will submit the issues in the appeal fall to be determined. As will be clear from these submissions, they are relevant, useful and novel and will, it is submitted, be of assistance to this Court.

- 27.1 *First*, the prohibition of crimes against humanity, including the crime of apartheid, constitutes a peremptory norm (*jus cogens*) of international law, obliging all States (including South Africa) to prosecute such crimes domestically.
- 27.2 *Second*, the courts are required to adopt an interpretation of legislation that is consistent with international law over those that are not. South Africa's international law obligations do not permit an interpretation of section 18(1)(g) of the *Criminal Procedure Act, 1977 (CPA)* which would prevent the prosecution of the crime of apartheid committed before the enactment of the *Rome Statute of the International Criminal Court Act, 2002 (ICC Act)*. This would be inconsistent with the international law duty to prosecute, and is accordingly not a constitutionally compliant interpretation.
- 27.3 *Third*, the state bears a constitutional obligation, flowing from section 7(2) of the Constitution, to prosecute those who have committed crimes against humanity. This is relevant because courts are required to favour a reasonable interpretation of legislation that is consistent with the Constitution over one that is inconsistent with it.
- 27.4 *Fourth*, the State is obliged to honour its international law commitments, and not to allow itself to become a safe haven for those who have committed crimes against humanity simply due to the date on which those crimes were committed.
- 28 I expand on these submissions below.

**The international law duty to prosecute crimes against humanity, including the crime of apartheid domestically**

29 In respect of international law crimes and crimes against humanity (which include apartheid), there is a heightened international law obligation on the State to prosecute such crimes.

30 The International Law Commission has identified the prohibition of crimes against humanity, including the crime of apartheid, as having the status of a peremptory norm (*jus cogens*) of international law.<sup>1</sup> Peremptory norms refer to a category of norms that govern customary international law. They are mandatory and are recognised as norms by the international community of States from which no derogation is permitted. All states are under a duty to recognise and respect a peremptory norm.<sup>2</sup>

31 Flowing from, and because of this, there is a heightened international law obligation on the State to take the necessary steps to prosecute international crimes, including the crime of apartheid, domestically.

32 This principle was firmly established by the Constitutional Court in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30 (***National Commissioner***), where the Constitutional Court set out the following guiding principles:

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<sup>1</sup> Conclusion 23, and Annex, to the International Law Commission's Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).

<sup>2</sup> Vienna Convention on the Law of Treaties (1969), article 53.

32.1 In respect of international crimes prohibited by a peremptory norm of international law, "a state's duty to prevent impunity" by not exempting offenders from punishment is "particularly pronounced" because if they were left unpunished, this would engender "feelings of lawlessness, disempower ordinary citizens and offend against the human conscience." (para 4, footnote 2); and

32.2 International crimes against humanity and the international crime of apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because "all states have an interest as they violate values that constitute the foundation of the world public order." (para 37).

32.3 Moreover,

*"The purpose of the power to prosecute international crimes in South Africa is to ensure that the perpetrators of such crimes do not go unpunished. In order to achieve that purpose, it is necessary for the [State] to have the power not only to prosecute perpetrators before our Courts, but, to that end, to bring them before our Courts."* (para 95)

33 This obligation derives from both customary international law<sup>3</sup> and treaty law. Apartheid is codified in the Rome Statute as a crime against humanity. This formal codification serves as strong evidence that the prohibition of

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<sup>3</sup> See *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC at para 37 "Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm."

apartheid has customary law status.<sup>4</sup> There is also academic consensus supporting the proposition of apartheid's customary law status, international condemnation through United Nations resolutions of South Africa's apartheid policies supports this notion.<sup>5</sup>

34 The adoption of international treaties is further evidence of the international condemnation of apartheid and its criminalisation.

34.1 For instance, the Convention on the Elimination of All Forms of Racial Discrimination, 1965 states that "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." (article 3).

34.2 Notably, the Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (**Apartheid Convention**) declares that apartheid is a crime against humanity and that "*inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination*" are international crimes" (article I(1)). The Apartheid Convention provides that States are required to "adopt

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<sup>4</sup> Gerhard Kemp, Windell Nortje. Prosecuting the Crime against Humanity of Apartheid: The Historic First Indictment in South Africa and the Application of Customary International Law, *Journal of International Criminal Justice*, Volume 21, Issue 2, May 2023, Pages 405–430, available at <https://doi.org/10.1093/jicj/mgad023>, pp 418.

<sup>5</sup> Ibid. See also footnote 73 which outlines the UN resolutions condemning the apartheid policies: General Assembly Resolution 2775, 26 UN GAOR, Supp (No 29) 39, UN Doc A/8429 (1971); General Assembly Resolution 3411, 30 UN GAOR, Supp (No 34) 35, UN Doc A/10034 (1975). The UN also adopted resolutions declaring apartheid to be a crime against humanity, for instance: General Assembly Res 2189; GA Res 2202; GA Res 39/72A; General Assembly Resolution 2074. The Security Council in several resolutions referred to apartheid as a 'crime against the conscience and dignity of mankind'. See UNSC Res 392, 19 June 1976, and subsequently, UNSC Res 418 (1977); UNSC Res 473 (1980); UNSC Res 591 (1986).

*legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention...*" (article IV(b)).

35 Accordingly, the prohibition on apartheid is widely considered to form part of customary international law and apartheid constitutes a "[f]lagrant violation of the purposes and principles of the [UN] Charter."<sup>6</sup>

36 It is of signal importance that apartheid is a crime prohibited by customary international law and a violation of a *jus cogens* norm.

37 Customary international law forms part of South African law. Section 232 of the Constitution states that customary international law *is law* in South Africa.

38 It follows that section 232 of the Constitution therefore provides a standalone legal basis for the State to fulfil its obligations under international law to prosecute international crimes (including those committed prior to 1994). Therefore, HSF will submit that prosecution must be accomplished at the domestic level. In the present context, an appropriate remedy would require the Court to permit the State to prosecute the appellant (Rorich) and the second respondent (Mfalapitsa), both of whom have committed a serious breach of one of the fundamental

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<sup>6</sup> International Humanitarian Law Databases (ICRC), Rule 88; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep, § 131.

norms of international law – the prohibition of apartheid.<sup>7</sup> Such prosecutions would serve to ensure full reparation for all the harm caused by apartheid's wrongful conduct, as the TRC recognised in relation to apartheid in South Africa.<sup>8</sup>

**The proper interpretation of section 18(1) of the *Criminal Procedure Act, 1977***

*Consistency with international law*

39 The HSF contends that section 18(1)(g) of the CPA cannot be interpreted, as the appellant contends, to mean that crimes against humanity committed prior to the enactment of the ICC Act are subject to the 20-year lapsing provision.

40 Section 233 of the Constitution mandates courts to adopt an interpretation of legislation that is consistent with international law (over any alternative interpretation inconsistent with it), provided only that the interpretation is reasonable. In other words, the reasonable interpretation of legislation that is *consistent* with South Africa's international law obligations (particularly those flowing from *jus cogens* norms) *must* be preferred over any other interpretation (even other interpretations that, while reasonable, are inconsistent with international law obligations).

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<sup>7</sup> For a discussion of prosecution as a form of satisfaction, see Christina Hoss, "Satisfaction", *Max Planck Encyclopedia of Public International Law* (2011), paras. 18-19. In South Africa, see in particular Catherine Jenkins, "After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa" *South African Journal on Human Rights* (15), 3, pp 415-485.

<sup>8</sup> Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report* (29 October 1998), Volume 5, p. 309.

41 The Constitutional Court confirmed this approach in *S v Okah* (CCT 315/16; CCT 193/17) [2018] ZACC 3, where it held, in relation to a similar international obligation to prosecute terrorists, that: "*The specific duty to prosecute or extradite provides a yet stronger imperative to overturn that interpretation. Even if one were to assume that the interpretation were reasonable, which a textual analysis shows it is not, section 233 of the Constitution requires this Court to interpret the Act in line with international law. Here, there is a clear obligation that South Africa prosecute or extradite persons like Mr Okah. The interpretation in this judgment gives effect to that obligation, whereas the Supreme Court of Appeal's interpretation does not.*" (para 38).

42 The appellant argues that crimes against humanity committed before the commencement of the ICC Act do not fall within the exception contained in section 18(1)(g) of the CPA and accordingly the charges against him have prescribed. Even if that interpretation were *reasonable* (and the HSF does not make this concession), it is *inconsistent* with international law, simply because it is inconsistent with the State's international law obligations to prosecute crimes against humanity, including the crime of apartheid (as explained above).

43 In contrast, the interpretation advanced by the State, and supported by the HSF, is consistent with international law, and is moreover the only interpretation of section 18(1)(g) that is consistent with international law. This is because it fulfils the State's *jus cogens* obligation to prosecute crimes against humanity to their fullest extent.

- 44 The imprescriptible nature of the core international crimes of genocide, crimes against humanity and war crimes is recognised by the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1970* (the **Statutory Limitations Convention**), which provides that no statutory limitation shall apply to crimes against humanity, regardless of the date of their commission (article 1). HSF submits that although South Africa is not a signatory to the Statutory Limitations Convention, it remains a persuasive source of international law and is reflective of customary international law.
- 45 An interpretation of section 18(1)(g) that would restrict the prosecution of crimes against humanity to those perpetrated after the enactment of the ICC Act is not consistent with our international law obligations and the peremptory status of the prohibition on apartheid and must therefore be rejected. Likewise, any interpretation of section 18(1)(g) that would subject the prosecution of crimes against humanity to a statute of limitation is inconsistent with the international law duty to prosecute such crimes, and is accordingly not a constitutionally compliant interpretation, even if it is a reasonable interpretation.
- 46 Therefore, HSF submits that the only reasonable interpretation of section 18(1)(g) of the CPA that is consistent with South Africa's international law obligations to prosecute crimes against humanity (inclusive of the crime of apartheid) is one that allows for the prosecution of the appellant and second respondent for the crime against humanity of apartheid, even where those crimes were committed before the enactment of the ICC Act.

47 The HSF contends that its interpretation is reasonable: by referring to the ICC Act, section 18(1)(g) of the CPA plainly seeks only to provide a statutory definition of “crimes against humanity” as set out in that Act.<sup>9</sup> The subsection does *not* say that it applies only to crimes against humanity committed after the ICC Act came into force. Therefore, reasonably interpreted, section 18(1)(g) applies to all crimes against humanity, as defined in the ICC Act (which includes the crime of apartheid),<sup>10</sup> irrespective of when they were committed, and the ICC Act is simply a codification of the *jus cogens* norms pertaining to crimes against humanity. In summary, the HSF’s interpretation is the only interpretation that is both reasonable *and* consistent with international law. Therefore, it is the only constitutionally compliant interpretation. This is further confirmed by the positive *constitutional* obligation on the State to prosecute crimes against humanity pursuant to section 7(2), as discussed below.

*The State’s section 7(2) obligation requires prosecution*

48 The Constitutional Court held in *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6 (para 189) and subsequent cases (see *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* [2020] ZACC 26 para 70) that the requirement in section 39(1)(b) of the Constitution, that courts must consider international law

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<sup>9</sup> In this regard, the ICC Act defines ‘crimes against humanity’ extensively (Part 2 of Schedule 1 to the Act), but for present purposes includes “any of the following conduct when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Murder ... the crime of apartheid ...”.

<sup>10</sup> See above footnote.

when interpreting the Bill of Rights, means that section 7(2) of the Constitution's obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights includes a positive obligation on the State (including the legislature and the executive) to act in accordance with international law obligations, when rights are implicated.

49 The commission of the crime of apartheid and the obligation to prosecute such crime, implicates rights in the Bill of Rights, including the rights to equality (section 9), life (section 11) and dignity (section 10).

50 As the Constitutional Court emphasised in *National Commissioner*, the reasons the state's duty to prevent impunity by prosecuting international crimes is "*particularly pronounced*" is because if they were left unpunished, this would engender "*feelings of lawlessness, disempower ordinary citizens and offend against the human conscience.*"<sup>11</sup>

51 The HSF submits that in the circumstances, an interpretation of section 18 of the CPA which would prevent the prosecution of the crime of apartheid committed before the enactment of the ICC Act, would be not only inconsistent with South Africa's international law obligations, but violate the state's constitutional obligation under section 7(2) to respect, protect, promote, and fulfil the rights in the Bill of Rights. Therefore, this Court is required to reject any such interpretation, since it must favour reasonable interpretations of legislation that accord with the Constitution,<sup>12</sup> and

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<sup>11</sup> *National Commissioner* para 2, footnote 4.

<sup>12</sup> *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) at para [103]; *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) at para [65]; *Bertie van Zyl*

interpret legislation so as to “promote the spirit, purport and objects of the Bill of Rights.”<sup>13</sup>

- 52 The Constitutional Court has repeatedly highlighted that “[t]he Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values.”<sup>14</sup> The courts “must give preference to interpretations that fall within constitutional bounds.”<sup>15</sup>

### **The State's obligation to honour its international law commitments**

- 53 In *National Commissioner*, in relation to the crime of torture and crimes against humanity generally, the Constitutional Court stated that “[o]ur country's international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity.”

- 54 Moreover, as the Constitutional Court has reminded us, international law “does enjoy well-deserved prominence in the architecture of our constitutional order”, precisely “because we relied heavily on a wide range

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*(Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at paras [20] - [23].

<sup>13</sup> Section 39(2) of the Constitution.

<sup>14</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 22.

<sup>15</sup> *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) para 117.

*of international legal instruments to expose the barbarity and inhumanity of the apartheid system of governance in our push for its eradication.*"<sup>16</sup>

55 Therefore, HSF submits that post-apartheid South Africa — a constitutional democracy built on respect for human rights that gives international law pride of place in its constitutional architecture — must not be allowed to be a safe haven for those who committed crimes against humanity under the apartheid regime. To find otherwise would abrogate our constitutional and international law commitments.

#### CONCLUSION

56 Accordingly, HSF submits that it has satisfied the requirements for admission as *amicus curiae*.

57 I pray for the orders set out in the notice of motion to which this affidavit is attached.

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<sup>16</sup> *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51 para 4.



NASEEMA FAKIR

I certify that the deponent has acknowledged that she knows and understands the contents of this declaration and informed me that she does not have any objection to taking the oath and that she considers it to be binding on her conscience and that the deponent uttered the following words "I swear that the contents of this declaration are true, so help me God". I certify further that the provisions of Regulation R1258 of the 21st July 1972 (as amended) have been complied with.

Signed and sworn to before me at Westcliff on this the 28<sup>rd</sup> day of March 2026.



COMMISSIONER OF OATHS

**YANN NGAMENI**  
Practicing Attorney  
45 Jan Smuts Avenue  
Johannesburg 2193  
Commissioner of Oaths  
Tel: 011 486 0242



activities, including research, publications, litigation, and submissions to the South African Parliament. It advocates for policies that translate the aspirations of the South African Constitution into reality for all citizens, emphasising good governance, transparency, and accountability.

- 2.2 The HSF is not aligned with any political party but actively participates in public debates to uphold constitutional values.
- 2.3 The HSF regularly participates in public interest litigation both as a party and as an *amicus curiae*. In this regard some of the recent matters in which the HSF has participated include:
- (1) *Scalabrini Centre of Cape Town v Minister of Home Affairs and Others* [2025] ZAWCHC 202 where the HSF acted as amicus in the litigation concerning the constitutionality and validity of certain subsections of section 4, section 21(1B) of the *Refugees Act, 1998* and Regulation 8 of the *Refugees Regulations, 2019*, which came into effect at the beginning of 2020. In particular, the HSF made detailed submissions on the rights of the child under Constitutional and International law. These submissions were extensively referred to by the Court with approval. This matter was heard before the Constitutional Court on 12 February 2026 where the HSF made written submissions.
  - (2) *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 490, involving the withdrawal of the Zimbabwe Exemption Permit. The HSF successfully litigated this matter as co-applicant through to the Constitutional Court.
  - (3) *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28 where the HSF intervened as *amicus curiae* regarding, *inter alia*, the public's right to the truth and the importance of the establishment of a commission of inquiry as part of the remedy of reparations for serious human rights violations.
  - (4) *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8, concerning the disclosure of the record of deliberations by the JSC. The HSF successfully litigated this matter in multiple *fora*, including the Constitutional Court highlighting important principles of truth and accountability.
  - (5) *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23 where the HSF acted as *amicus curiae* in the litigation concerning Mr Nxasana's removal as Director of the NDPP.
  - (6) *McBride v Minister of Police and Another* [2016] ZACC 30 where the HSF acted as amicus in proceedings concerning the independence of IPID.
  - (7) *Minister of Justice and Constitutional Development and others v Southern African Litigation Centre* [2016] 2 All SA 365 (SCA) where the HSF acted as *amicus curiae* in the litigation concerning Mr Al Bashir's safe passage in and out of the country despite being the subject of warrants of arrest issued by the International Criminal Court.

2.4 The HSF's participation in the above matters demonstrates that it has sufficient capacity and experience to contribute meaningfully and to assist the Court in the determination of issues in the appeal, and that it is able to do so in the public interest.

### 3 The Helen Suzman Foundation's interest

- 3.1 The HSF frequently acts in defence of constitutional and human rights, and the rule of law. In accordance with its mandate, it has focused on the need to foster deliberative, reasoned decision making by government and institutions in South Africa. The appeal impacts upon all of these issues and underpins HSF's interest in the matter.
- 3.2 The HSF has been deeply involved in the unfinished business of the Truth and Reconciliation Commission (TRC). It seeks to intervene in the appeal in order to highlight the importance of completing the work of the TRC and to demonstrate that this is necessary to give effect to South Africa's international law obligations.

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3.3 If admitted, the HSF intends to advance the following focused submissions:

(1) The international law duty to prosecute Crimes Against Humanity, including Apartheid:

- (a) The prohibition of Crimes Against Humanity, including the crime of apartheid, is a peremptory norm (*jus cogens*) of international law.<sup>1</sup> Flowing from, and because of this, all States are under an international law obligation to take the necessary steps to prosecute international crimes, including the crime of apartheid, domestically.
- (b) In *National Commissioner*,<sup>2</sup> the Constitutional Court recognised that in respect of international crimes prohibited by a peremptory norm (*jus cogens*) of international law “a state’s duty to prevent impunity” by not exempting offenders from punishment was “particularly pronounced” because if they were left unpunished this would engender “feelings of lawlessness, disempower ordinary citizens and offend against the human conscience.”<sup>3</sup>
- (c) This obligation derives from both customary international law<sup>4</sup> and treaty law. Particularly, the *International Convention on the Suppression and Punishment of the Crime of Apartheid (the Apartheid Convention)*, which South Africa is a State Party to, and bound by, provides that states are required to “adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention...”<sup>5</sup>
- (d) This approach is underpinned by section 232 of the Constitution which states that customary international law is law in South Africa.

(2) The proper interpretation of section 18 of the Criminal Procedure Act, 1977 (CPA):

- (a) First, the HSF intends to submit that section 233 of the Constitution mandates courts to adopt an interpretation of legislation that is consistent with international law (over any alternative inconsistent with it), provided only that the interpretation is reasonable.<sup>6</sup> In other words, the reasonable interpretation of legislation that is consistent with South Africa’s international law obligations (particularly those flowing from *jus cogens* norms) must be preferred over any other interpretation (even other interpretations that, while reasonable, are inconsistent with international law obligations).<sup>7</sup>
- (b) The only reasonable interpretation of section 18(1)(g) of the CPA that is consistent with South Africa’s international law obligations to prosecute crimes against humanity (inclusive of the crime of apartheid) is one that allows for the prosecution of crimes, even where those were committed before the enactment of the *Implementation of the Rome Statute of the International Criminal Court Act, 2002 (ICC Act)*.
- (c) An interpretation of section 18(1)(g) that would restrict the prosecution of Crimes Against Humanity to those perpetrated after the enactment of the ICC Act is not consistent with our international law obligations and the peremptory status of the prohibition on apartheid, and must therefore be rejected. Likewise, any interpretation of section 18 that would subject the prosecution of Crimes Against Humanity to a statute of limitation is inconsistent with the international law duty to prosecute, and is accordingly not a constitutionally compliant interpretation, even if it is a reasonable interpretation.

<sup>1</sup> Conclusion 23, and Annex, to the International Law Commission’s Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)

<sup>2</sup> *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30 (‘*National Commissioner*’)

<sup>3</sup> *Ibid* at para 4, fn 2

<sup>4</sup> See *National Commissioner* at para 37 “Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.

<sup>5</sup> Article IV(b).

<sup>6</sup> See *S v Okah* (CCT 315/16; CCT 193/17) [2016] ZACC 3 at para 38.

<sup>7</sup> *S v Okah* *ibid* para 38

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*JY*

24 February 2026

NORTON ROSE FULBRIGHT

- (d) Second, the HSF will submit that the Constitutional Court has held that the requirement in section 39(1)(b) of the Constitution, that courts must consider international law when interpreting the Bill of Rights, means that the section 7(2) obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights includes an obligation on the state (including the legislature and the executive) to act in accordance with international law obligations, when rights are implicated.<sup>8</sup>
- (e) The commission of the crime of apartheid and the obligation to prosecute such crime, implicates rights in the Bill of Rights, including the rights to life (section 11) and dignity (section 10). The HSF intends to submit that in the circumstances, an interpretation of section 18 of the CPA which would prevent the prosecution of the crime of apartheid committed before the enactment of the ICC Act, would be not only inconsistent with South Africa's international law obligations, but would be inconsistent with the Constitution itself – violating the state's section 7(2) obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights.
- (3) The State's obligation to honour international law commitments:
- (a) In *National Commissioner*,<sup>9</sup> in relation to torture and crimes against humanity generally, the Constitutional Court stated that "[o]ur country's international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity."
- (b) So too, post-democratic South Africa cannot be seen as a safe haven for those who have committed Crimes Against Humanity under the apartheid regime, irrespective of when those crimes were committed. To find otherwise would abrogate our international law commitments.

3.4 The HSF confirms that it does not intend to introduce new evidence in the matter.

#### 4 Conclusion

- 4.1 Should you or your clients consent to the HSF's admission as an *amicus curiae*, the HSF will ensure that its application for admission is delivered without delay and by no later than 2 April 2026.
- 4.2 If admitted, the HSF intends to make brief written submissions and will deliver these according to the timetable set by the Supreme Court of Appeal and with due deference to the parties and make short oral submissions at the hearing of the matter.
- 4.3 Kindly confirm by no later than 6 March 2026 that your respective clients consent to the HSF being admitted as *amicus curiae*.

Yours faithfully

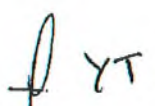


Jason Whyte, Director  
Chuma Bubu, Associate  
Norton Rose Fulbright South Africa Inc

<sup>8</sup> *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6 para 189; *Sonke Gender Justice NFC v President of the Republic of South Africa and Others* [2020] ZACC 26 para 70.

<sup>9</sup> *National Commissioner*, para 80, emphasis added.

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Your Ref:	Our Ref: K Muller KM 137	Date: 06 March 2026
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By e-mail: [Moray@lrc.org.za](mailto:Moray@lrc.org.za)

Dear Sirs

ADMISSION / INTERVENTION AS *AMICUS CURIAE* IN SCA case nr 1173/2025

We have received your requests to be admitted as *Amicus Curiae* in the Appeal Proceedings of case SCA 1173 / 2025, RORICH vs THE STATE

We are of the opinion that only Court can admit a party to join proceedings as *Amicus Curiae*, and can therefor not agree that you join the proceedings.

We will however not object or oppose any actions that you have to take to seek the Court's permission.

Yours sincerely

*CJJ Muller*

DU PLOOY INC  
Per CJJ Muller

**ATTORNEYS | NOTARIES | CONVEYANCERS**

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## Chuma Bubu

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**Subject:** Christiaan Rorich // The State and Others (SCA case no. 1173/2025) (PBO3063) [IMAN-CPT\_MATTERS.FID2231245]  
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Good day

We refer to the above matter in which our client, the Helen Suzman Foundation (HSF) brings an application to be admitted as *amicus curiae*

Please find **attached** for electronic service HSF's application.

Kindly acknowledge receipt

Kind regards

**Chuma Bubu** | Associate  
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