

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

Case Number: 2025-062902

**(1) REPORTABLE: NO.**

**(2) OF INTEREST TO OTHER JUDGES: NO.**

**(3) REVISED.**

**DATE 2025-06-06**

**SIGNATURE**

In the matter between:

**SOCIETY FOR THE PROTECTION OF OUR CONSTITUTION** Applicant

and

**GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA** First Respondent

**MINISTER OF DEFENCE** Second Respondent

**GOVERNMENT OF STATE OF ISRAEL** Third Respondent

**GOVERNMENT OF FEDERATIVE REPUBLIC OF BRAZIL** Fourth Respondent

**GOVERNMENT OF THE RUSSIAN FEDERATION** Fifth Respondent

**GOVERNMENT OF INDIA** Sixth Respondent

**GOVERNMENT OF PEOPLES REPUBLIC OF CHINA** Seventh Respondent

**GOVERNMENT OF KINGDOM OF NORWAY** Eighth Respondent

**GOVERNMENT OF FEDERAL COUNCIL OF SWITZERLAND** Ninth Respondent

**GOVERNMENT OF THE KINGDOM OF SWEDEN** Tenth Respondent

**GOVERNMENT OF DENMARK**

Eleventh Respondent

**GOVERNMENT OF UNITED KINGDOM OF GREAT  
BRITAIN & NORTHERN IRELAND**

Twelfth Respondent

**GOVERNMENT OF IRELAND**

Thirteenth Respondent

**GOVERNMENT OF THE REPUBLIC OF FRANCE**

Fourteenth Respondent

*This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 6 June 2025.*

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## **JUDGMENT**

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**POTTERILL J**

Background

[1] The applicant, the Society for the Protection of Our Constitution [the Society] is on an urgent basis seeking relief against the first respondent, the Government of the Republic of South Africa [the Government], the second respondent, the Minister of Defence [the Minister] and 12 sovereign states seeking an order that the Government be directed to declare the Government of the State of Israel an enemy of the South African State. Furthermore, to direct the Government to call upon the relevant organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate to suppress the State of Israel's infliction or acts of genocide upon the people of Palestine. This Court must also direct the Government to appeal to the fifth to fourteenth respondents to take reasonable measures, including using force, to enable the approximately 3000

trucks, containing food, medicine, water, vaccines and aid, currently stuck at the border between the Egypt and Gaza to gain entry into Gaza. Moreover, this Court must direct the Government to take measures to impose economic, cultural, sport and academic sanctions against the State of Israel. This Court must direct the Government to forthwith order the return of the third respondent's ambassador to his/her place of origin.

[2] The Government of the Kingdom of Denmark filed a notice in terms of Rule 6(5)(d)(iii) that the Society had not complied with the Foreign States Immunities Act and International Service requirements. The Society did not comply with s13(1) of the Foreign States Immunities Act 87 of 1981 [the Act] in that the service of legal process on a foreign state must occur through the Department of International Relations and Cooperation (DIRCO) for onward transmission to the foreign ministry of the State concerned. No direct receipt by the foreign ministry by service on an embassy or diplomatic mission is valid. Moreover, in terms of s13(2) a mandated 2 months' waiting period after proper service is required to safeguard foreign states from rushed proceedings.

[3] The Rule 6(5)(d)(iii) notice also raised that the High Court lacks jurisdiction under international law due to the principle of sovereign immunity and the Vienna Convention on Diplomatic Relations whereby domestic courts of one state do not have jurisdiction over the sovereign acts or diplomatic affairs of another state.

[4] The Government filed a notice in terms of Rule 30(2)(b) of the Uniform Rules of Court that the Society had taken an irregular step as there was not proper service. Reliance for this was also placed on sections 13(1) and 13(2) of the Act. The Society was called upon to rectify the service and if the cause of complaint was not removed within 10 days the Government would in terms of Rule 30(2)(c) of the Uniform Rules launch an application to set aside the irregular step.

[5] The day before the hearing of the urgent application the Society filed a notice of withdrawal against all 12 the sovereign foreign states.

The argument on behalf of the Society

[6] It was submitted that this matter is of extreme urgency as people are dying of starvation. The trucks containing food, water and medicine are prevented from entry into Gaza, and especially woman and children continue to lose their lives on a daily basis.

[7] It was submitted that the facts relied upon are the images transmitted by Al-Jazeera broadcasted on Channel 406 in South Africa. These images show the State of Israel preventing ± 3000 trucks containing supplies of food, water, medicine and vaccines from entering the border of Gaza. It was reported that 57 men, women and children have died in Gaza from malnutrition, famine and dehydration. The people of Gaza face psychological torture in watching their children die from hunger and burying them.

[8] South Africa is a Signatory to the Genocide Convention with Article VIII imposing on the Government to call upon the competent organs of the United Nations to take action which they consider appropriate to suppress acts of genocide. It is under this obligation that the Government and the Minister must be directed to appeal to the 12 states to take all reasonable measures, including using force, to enable the trucks to enter Gaza.

[9] The State of Israel is inflicting an act of war. The State of Israel's cruelty inflicted on the people of Gaza is causing the infringement of fundamental rights of South Africans. Observing fellow human beings inflicted to cruelty upon other fellow beings undermines section 12 of the Constitution in undermining the dignity of South Africans. These acts are also offending section 12(1)(c) and (d) of the Constitution in that people are to be free from violence. Section 28 of the Constitution is offended because the cruelty inflicted on children when watching the television leads children to think that to inflict genocide is a normal form of lifestyle.

[10] In terms of s165(2) of the Constitution the Court has a constitutional duty to protect South Africans from the violation of these fundamental rights.

[11] It was submitted that this Court has jurisdiction to entertain the matter. Reliance for this was placed on the matter of *Southern Africa Litigation Centre v*

*Minister of Justice and Constitutional Development and Others* 2016 (1) SACR 161 (GP). Much reliance was placed on paragraph [11] which reads as follows:

“In terms of the Implementation Act South African authorities are enjoined to cooperate with the ICC, for example, to effect the arrest and provisional arrest of persons suspected of war crimes, genocide and crimes against humanity. These crimes have been specifically created in the South African context in terms of s4 of the Implementation Act.”

[12] The Society has standing and has been granted such in other matters before Court. The Society pleads that it is a Society committed to the protection of the Constitution, Democracy and the Rule of Law and Enforcement of Fundamental Rights and has the power to participate in litigation affecting constitutional principles. It was submitted that they had been successful in an urgent application previously.<sup>1</sup>

#### Argument on behalf of the Government

[13] The effect of the Rule 30 Notice is that the Government was prevented from taking a further step, i.e. also filing an answering affidavit. The Government however raised points in law. The withdrawal is a further irregular step as it has created further legal problems for the Society.

[14] It was argued that this Court does not have the jurisdiction to entertain this application. Reliance for this was sought in the matter of *Kaunda and Others v The President of the Republic of South Africa* 2005 (4) SAS 235 (CC) and specifically par [77]:

“A decision as to whether protection should be given, and if so, what, is an aspect of foreign policy which is essentially the function of the Executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in

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<sup>1</sup> *The Society for the Protection of our Constitution v Minister of Cooperative Governance and Traditional Affairs and Others* (B3991/2024) [2024] ZAGPHC 1231 (25 November 2024)

which diplomats are better placed to make decisions than Judges, and which could be harmed by court proceedings and the attendant publicity.”

[15] None of the orders sought can be granted because policy decisions fall within the realm and exclusive competence of the executive arm of Government. There is no constitutional or legislative authority that empowers this Court to compel the executive to conduct international relations or military interventions. The Court will be pronouncing on matters of foreign policy, diplomacy and military engagement vested in the National Executive in terms of section 198, 202, 201 and 231 of the Constitution. Judicial interference would breach the principle of Separation of Powers. The matter relied on by the Society is distinguishable and not relevant to these proceedings at all.

[16] The principle of subsidiarity also bars the Society from relying on broad constitutional rights without first involving or challenging the Society’s complaint contained in section 10, 12(1)(c) and 28 of the Constitution.

[17] It was argued that the standing of the Society lacks. It had not identified its interests be it on behalf of its members, or in the public interest. The Society failed to demonstrate any infringement of its own rights. It also failed to demonstrate that it acted on behalf of an identifiable group of persons whose rights are infringed. The alleged harm, exposure to violent imagery is speculative and unsupported by evidence.

[18] Lastly it was argued that the Society had failed to demonstrate urgency as the hostilities between Palestine and Israel had been present since 7 October 2023. The Government pursuant thereto launched the application against Israel at the ICJ in SA v Israel in terms of the Genocide Convention.

[19] The withdrawal against the 12 states renders the application incongruous.

Decision on jurisdiction of this Court

The withdrawal

[20] The Society's application must be dismissed on multiple fronts. The first being that the withdrawal against the 3<sup>rd</sup> to 12<sup>th</sup> respondents render the orders sought obsolete. It is trite that a Court cannot make orders against a party not cited. The State of Israel cannot be declared an enemy of the State if not a party. The order sought to call upon the "relevant organs of the United Nations" is incompetent. Such order would be vague and impractical. Directing the Government to appeal to the 5<sup>th</sup> to 14<sup>th</sup> respondents to take reasonable steps is incompetent in view of the withdrawal. Directing the Government to impose sanctions against the State of Israel and withdrawing Israel's ambassador is incompetent due to the withdrawal, but also because this would breach the separation of powers principle.

[21] On behalf of the Society much was made of the fact that there was no opposing affidavit and the Court could not entertain this point *in limine*. Not only can points of law be raised from the bar, but the court can *mero motu* raise the Court's lack of jurisdiction. This Court has no jurisdiction to entertain this matter. The orders sought fall squarely within the functions of the executive. The orders sought relate to policy which no Court can entertain. In *Bernstein and Others v Bester and Others NNO*<sup>2</sup> Ackermann J found "The internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights. – The Bill of Rights is extensive and covers conventional and less conventional rights in detail. A right to diplomatic protection is a most unusual right, which one would expect to be spelt out expressly rather than being left to implication." The same can be said of the orders sought herein, unusual rights that have not been spelt out which cannot be entertained by a Court.

[22] I am not persuaded that the case law relied upon by the Applicant is applicable to the present matter in establishing this Court's jurisdiction. The case referred to, concerned the South African Government's failure to arrest Sudanese President Omar Al Bashir during his 2015 visit, notwithstanding existing ICC warrants for his arrest on charges of war crimes, crimes against humanity, and genocide. In that instance, the Southern African Litigation Centre (SALC) challenged

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<sup>2</sup> *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 CC

the Government's inaction on the basis that South Africa was bound by its obligations under the Rome Statute to effect the arrest. The factual matrix in the present matter differs fundamentally. Here, by contract, the Society seeks to involve this Court in directing the South African Government to take actions implicating foreign sovereign states, thereby engaging issues of foreign policy and diplomatic relations that fall exclusively within the executive domain.

[23] Unlike the Al Bashir matter, the current application raises matters that are non-justiciable due to their inherently political and diplomatic nature. As such, the reliance on the Al Bashir case as a precedent for establishing jurisdiction in this matter is misplaced. The Society's submissions regarding jurisdiction are manifestly tenuous and fail to establish a sound legal basis for the Court's jurisdiction. The argument lacks coherence and is unsupported by any authoritative legal principles. The Society proffered no real substance in the establishment of jurisdiction based on the case law referred to.

[24] In oral argument the application was watered down to "just please tell the Government to do something." The irony is it is a well-known fact that there is a pending application against Israel at the ICJ in *SA v Israel (Genocide Convention December 2023)* wherein the Government launched proceedings against Israel. In December 2023, a case was filed before the ICJ alleging that Israel committed, and failed to prevent, acts of genocide against Palestinians in Gaza. This matter remains pending before the ICJ. The Government has taken a leading role in this matter by referring the case to the ICJ, demonstrating a commitment that surpasses that of many other states' parties to the Genocide Convention. This referral underscores South Africa's active engagement in addressing serious international humanitarian concerns and its dedication to upholding international law. Consequently, this Court is precluded from making any order at this stage, given that the same humanitarian issue is pending before the ICJ.

[25] The orders sought are all aspects of foreign policy which is essentially the function of the executive and will be better served by diplomats than Judges.<sup>3</sup> A

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<sup>3</sup> Par [77] of *Kaunda supra*



Court cannot tell the government to make diplomatic interventions, it is within the prevue of the government.

[26] In argument of the Society the relief sought was explained as to afford the Society to obtain a domestic remedy before turning to the ICJ. But, only states can turn to the ICJ. If the Society want to turn to the ICC then the order sought must be of a criminal nature, which it is not.

The lack of foundation in the founding affidavit

[27] The evidence or facts on which the application is based is images on the television broadcasted by a certain broadcaster. There is no substantiation thereof. If children are affected by these images, the parents or caregivers should switch off the television. There is no foundation to bring this averred harm of the people of South Africa within the auspices of our Constitution, let alone a link to the orders sought.

Lack of standing

[28] From the application it would seem that the Society is brining the application on behalf of its members. But even if the Society is bringing it in terms of both sections 38(1)(d) and (e) of the Constitution the Society is obligated to identify the interests on which the matter is brought.<sup>4</sup> In the matter of *Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others*<sup>5</sup> the Constitutional Court found that an entity like the Society must establish that its own interests or potential interest are directly affected by the actions of the Government. The two components to own-interest standing being interest and direct effect needs to be established. It must also show that its interests and the direct effect are not unsubstantiated. Mere allegations, without more, are not sufficient to prove the elements of own-interest standing.

[29] No infringement of the Society's rights has been established. No legal interest for the public has been established because the harm is speculative and

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<sup>4</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) at para [16]

<sup>5</sup> *Tulip Diamons FZE v Minister for Justice and Constitutional Development and Others* 2013 (1) BCLR 1180 (CC)

unsupported by evidence and does not sustain a factual nexus to the relief sought. The Society has no standing.

#### Urgency

[30] The Government argued that the matter was not urgent because the hostilities between Palestine and Israel has been ongoing since 7 October 2023. The blockage of aid to Palestine has been known since 2 March 2025.

[31] The blockage of aid to vulnerable people is horrific. But it is ongoing and the Society has not set out what has triggered this application and has failed to set out explicitly the circumstances that renders the matter urgent. The Society has also not set out why it cannot be afforded substantial redress at the hearing in due course.

#### Costs

[32] On behalf of the Government punitive costs were sought due to the abuse of process in this matter. It was submitted that the *Bio-Watch* principle is not applicable herein. On behalf of the Society it was argued that it should not pay the costs.

[33] Even if good intentions were behind the lodging of this application, it was so factually and legally flawed in its execution that the Society cannot expect the Government to carry the costs herein. The service was fatally flawed, the withdrawal had fatal consequences for the application, the factual basis for the application was far-fetched and does not provide a nexus to the relief sought. Organisations cannot be seen to be sanctioned in bringing such applications with the opposing parties to carry the costs.

[34] The application is dismissed with costs. Costs are to be paid on Scale C.

**S. POTTERILL**  
**JUDGE OF THE HIGH COURT**

HEARD ON: 4 June 2025

FOR THE APPLICANT: MR Z OMAR  
MS Y OMAR

INSTRUCTED BY: Zehir Omar Attorneys

FOR THE 1<sup>st</sup> RESPONDENT: ADV. B. LEKOKOTLA  
ADV. L. PHASHA

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 6 June 2025