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DISPUTE RESOLUTION ALERT

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ISSUE

SPECIAL NEWS ALERT

PUBLIC LAW: SOUTH AFRICA'S ICC WITHDRAWAL NOTICE DECLARED INVALID

On Wednesday, 22 February 2017, the High Court in Pretoria handed down its judgment in the litigation challenging the procedural aspects of South Africa's decision to withdraw from the Rome Statute of the International Criminal Court (Rome Statute).

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The decision to deliver the notice of withdrawal prior to obtaining parliamentary approval consequently violated s231(2) of the Constitution and breached the doctrine of separation of powers.

The High Court found that there is no question that the power to conduct international relations and conclude treaties is in the hands of the national executive in terms of s231 of the Constitution.



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The application was brought in November last year after South Africa delivered its notice of withdrawal to the United Nations (UN). The application before the High Court concerned four main issues:

- Was parliamentary approval required before the notice of withdrawal could be delivered to the UN?
- Was prior repeal of the Implementation of the Rome Statute of the International Criminal Court Act, No 27 of 2002 (Implementation Act) required before delivery of the notice to the UN?
- Was the delivery of the notice to the UN without prior consultation with parliament irrational?
- Does the withdrawal from the Rome Statute breach the state's obligations under s7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights?

In respect of the first question, the High Court held that the national executive requires prior parliamentary approval to withdraw from an international agreement. The national executive thus did not have the power to deliver a notice of withdrawal to the UN without such approval. The decision to deliver the notice of withdrawal prior to obtaining parliamentary approval consequently violated s231(2) of the Constitution and breached the doctrine of separation of powers.

In reaching this conclusion, the High Court found that there is no question that the power to conduct international relations and conclude treaties is in the hands of the national executive in terms of s231 of the Constitution. However, in exercising this power, the national executive must engage Parliament. While the signature and delivery of the notice of withdrawal were acts in the realm of international relations, they remained an exercise of public power, which is subject to constitutional control.

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The power to determine whether to remain bound to a treaty remains vested in Parliament.



Therefore, although the formulation of policy to withdraw from the Rome Statute falls within the purview of the Cabinet, the execution of that policy through signing and delivering the notice of withdrawal has "concrete legal effects" in international law as it is a binding, unconditional and final decision to terminate South Africa's treaty obligations under the Rome Statute. The power to determine whether to remain bound to a treaty remains vested in Parliament.

Although the state respondents argued that the Cabinet's decision could be ratified by Parliament (as it has now asked Parliament to do), the High Court rejected that argument. It held that because the national executive had purported to exercise a power it does not have under the Constitution, that conduct has no effect in law.

Importantly, the High Court was at pains to emphasise that its decision on this issue in no way affects the validity of the Minister of Justice and Correctional Services' tabling of the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill and Related International Instruments Bill [B23-2016] (Repeal Bill). That process is legitimately and properly before Parliament.

With regards to the second question, the High Court found that it is necessary to repeal the Implementation Act prior to delivering a notice of withdrawal, as the national executive is effectively ordering the legislature to finalise its repeal process before the effective date of the notice of withdrawal (ie 18 October 2017) and in favour of the executive, which is impermissible. As pointed out, Parliament may – after its due processes – decide against the withdrawal and the Repeal Bill.

In relation to the third question concerning procedural irrationality, the High Court noted that government action must be connected to a legitimate government purpose in order to be considered rational. The reason advanced for withdrawal from the Rome Statute was that this would enable government to pursue its peacemaker role on the African continent without the obligation to arrest indicted heads of state.

The High Court concluded that South Africa's international law obligations, including the obligation to arrest indicted persons in South African territory, are incorporated in the Implementation Act and are thus not dependent on the Rome Statute. Those obligations are not displaced unless the Implementation Act

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Overall, the High Court declared the notice of withdrawal from the Rome Statute as well as the national executive's decision to deliver that notice without prior parliamentary approval unconstitutional and invalid.

is repealed. The state respondents also provided no reason for the seemingly urgent need to withdraw from the Rome Statute. The High Court considered this unexplained haste on its own to constitute procedural irrationality.

Given the findings in relation to the issues above, the High Court did not delve into the fourth, substantive question of whether South Africa's withdrawal from the Rome Statute breaches s7(2) of the Constitution. This question was left open to be decided by another High Court at a later stage if necessary.

Overall, the High Court declared the notice of withdrawal from the Rome Statute as well as the national executive's decision to deliver that notice without prior parliamentary approval unconstitutional and invalid. It ordered the state respondents to revoke the notice immediately.

When considering this judgment, it is interesting to note its striking parallels with the recent United Kingdom Supreme Court's [judgment](#) in relation to triggering article 50 of the Treaty of the European Union (through delivery of a withdrawal notice) which would begin the "Brexit" process. The key question in that case was whether an article-50 notice could be delivered by government ministers without an Act of Parliament. The majority judgment in that case ruled along similar lines to the South African High Court and found that an Act of Parliament is required before any notice can be delivered triggering Britain's withdrawal from the European Union.

*Sarah McGibbon,
overseen by Lionel Egypt*

INVITATION TO COMMENT

The Portfolio Committee on Justice and Correctional Services is currently inviting public comments on The Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill and Related International Instruments Bill [B23-2016]. The Bill aims to repeal the Implementation of the Rome Statute of the International Criminal Court Act, No 27 of 2002, by which South Africa bound itself to the obligations under the Rome Statute. Members of the public are also invited to comment on the declaration of the decision to withdraw from the ICC and the explanatory memorandum to that withdrawal. The deadline for comments is 8 March 2017. They can be emailed to vramaano@parliament.gov.za.

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