

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

Case number: 50604/2023

In re the amicus curia application of:

MEDIA MONITORING AFRICA TRUST

Applicant

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second respondent

**DIRECTOR GENERAL: DEPARTMENT OF JUSTICE
AND CORRECTIONAL SERVICES**

Third respondent

**MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION**

Fourth respondent

**DIRECTOR GENERAL: DEPARTMENT OF
INTERNATIONAL RELATIONS AND COOPERATION**

Fifth respondent

MINISTER OF POLICE

Sixth respondent

**NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICES**

Seventh respondent

**DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

Eighth respondent

FOUNDING AFFIDAVIT


I, **WILLIAM BIRD**, declare under oath:



1. I am an adult male. I am the Director of Media Monitoring Africa Trust ('MMA'). I am duly authorised to depose to this affidavit on behalf of MMA. I provide further details regarding MMA below.
2. The facts described in this affidavit fall within my personal knowledge, unless I state otherwise, or the context makes it clear that they do not. I confirm that those facts are to the best of my knowledge, true and correct.
3. Some of the allegations I make herein deal with matters of law. To the extent that I do so, I rely on the legal advice obtained from my legal representatives during consultation and in the preparation of this affidavit. I accept the correctness of that legal advice. The inclusion of these allegations does not constitute a waiver of legal-professional privilege.

I INTRODUCTION

4. This is an application for admission as an *amicus curia* in the application under the above case number.
5. In the main application, the DA has applied to this Court for relief relating to South Africa's international obligations under the Rome Statute to arrest the President of the Russian Federation, Vladimir Putin. In response, the President of the Republic of South Africa has filed a confidential answering affidavit, invoking article 87(3) of the Rome Statute to justify the confidentiality of the affidavit. The DA objects to the affidavit remaining confidential.
6. MMA is a non-governmental organisation specialising in media monitoring and freedom of expression. MMA intends to make submissions on South Africa's

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constitutional duties to ensure open access to documents filed in court proceedings and South Africa's international duties under the Rome Statute. I attach to this affidavit the written submissions MMA intends to make marked '**MMA1**'. These submissions will assist the Court in determining whether it should permit public access to the President's affidavit. No other party has, to my knowledge, made these submissions.

7. MMA approached the parties to this matter for their consent to admit MMA as *amicus* in terms of Uniform Rule 16A. A copy of the letter is annexed marked '**MMA2**'

8. The DA consented. A copy of the relevant letter is annexed marked '**MMA3**'.

9. The respondents, on the other hand, wrote that they will '*abide by [MMA's] application for intervention as an amicus which application must be made before court*'. A copy of the relevant letter is annexed marked '**MMA4**'.

10. Given the respondents' position, MMA brings this application.

11. This affidavit deals with the requirements for admission as an amicus. It is structured as follows:

11.1. PART II: MMA's interest;

11.2. PART III: the submissions to be made by MMA; and

11.3. PART IV: consent and delay.



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II MMA'S INTEREST

12. MMA is a registered *inter vivos* trust acting as a non-profit organisation dedicated to monitoring the media and promoting the right to freedom of expression, media freedom, openness and fair and ethical journalism. Through its cultivation of a free, fair, ethical and critical media culture, MMA operates in the public interest to enhance and promote the constitutional values of openness and accountability. It has intervened in a number of important media-freedom and open-justice cases, including the *Van Breda* case on broadcasting courts in the Supreme Court of Appeal and most recently the *Mazetti Management v AmaBhungane* case concerning the *ex parte* interdict granted against amaBhungane Centre for Investigative Journalism. Its contributions have been recognised, including by the Constitutional Court in its *Media 24* judgment.
13. MMA has significant expertise in its field and has made many submissions to governments, human-rights bodies and other organisations. It has published a wide range of reports and other material on freedom of expression and the role of media in democracy. It has an interest in ensuring that this Court is fully apprised of the scope and content of the constitutional right to open justice insofar as it applies to the present proceedings.

III MMA'S SUBMISSIONS

14. The DA's application has been brought urgently. MMA does not intend for its application to intervene as an *amicus* to delay proceedings. Accordingly, MMA has already briefed counsel to draft the submissions MMA would make at the


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hearing of this matter. I have already annexed above (marked '**MMA1**') the written submissions MMA would submit were it to be admitted as an amicus.

15. In summary, the submissions comprise two parts:

15.1. First, MMA considers the constitutional right to open justice, as developed by the Constitutional Court and the Supreme Court of Appeal.

15.2. Second, MMA considers the meaning of article 87(3) of the Rome Statute, both in international law and in the South African context.

16. The submissions are relevant to these proceedings. The submissions can assist the Court in determining whether the President's affidavit should remain closed from the public. The submissions may also speak to prospects of success in the DA's case.


17. As far as I am aware, no other party has made these submissions.

IV CONSENT AND DELAY

18. The DA launched its application, which included a rule-16A notice, on 29 May 2023.

19. On 29 June 2023, the media reported that the President filed a confidential affidavit in response to the application. On the same day, the DA reportedly stated that it will object to the confidentiality of the affidavit.

20. On 4 July 2023, after consulting its legal team, MMA wrote to the parties in this matter requesting consent for leave to intervene as an amicus. A copy of the letter has already been annexed above marked '**MMA2**'.

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21. On 5 July 2023, the DA responded, giving its consent, subject to MMA not delaying the hearing of this matter (MMA3).
22. On 6 July 2023, the respondents wrote that they will *'abide by [MMA's] application for intervention as an amicus which application must be made before court'* (MMA4).
23. MMA's lawyers proceeded to prepare this application as well as its submissions, which will be filed by Friday, 7 July 2023.
24. MMA sought parties' consent later than the 20-day period prescribed in Rule 16A. However, the constitutional issue with which MMA is concerned only arose on 29 June 2023, when the President filed his confidential affidavit. Accordingly, to the extent necessary, MMA submits that its delay ought to be condoned. In any event, given the parties' positions, MMA's preparedness, and the expedition with which this application has been filed, no prejudice has been caused by this delay.

V CONCLUSION

25. MMA has an interest in this matter. The matter concerns the constitutional right to open justice and the international principles relevant to article 87(3). The President has filed a confidential affidavit, and the DA objects to this confidentiality. This Court, accordingly, should consider those rights and principles in determining whether the President's affidavit should remain confidential.


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WILLIAM BIRD

Signed and sworn before me at Johannesburg on Friday, 7 July 2023, the deponent having acknowledged that he knows and understands the contents of the affidavit, that he has no objection to taking the prescribed oath and that he considers it binding on his conscience.



COMMISSIONER OF OATHS

**MICHAEL RICHARD HARTY
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA
THE ART HOUSE, No. 4, 4th. AVENUE
PAF.KHURST, JOHANNESBURG**

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MEDIA MONITORING AFRICA TRUST'S SUBMISSIONS

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I INTRODUCTION

1. These written submissions on behalf of the Media Monitoring Africa Trust ('MMA') concern two issues.
 - 1.1. first, the general principles under South African law governing the confidentiality of court documents, especially documents filed by organs of state in matters of national and international importance; and
 - 1.2. second, the constitutional and international legal principles relevant to article 87(3) of the Rome Statute and its application in domestic legal proceedings.
2. These two issues arise given the decision by the first respondent ('**the President**') to file an answering affidavit in the main application under a complete seal of confidentiality. The President, to justify his decision, has apparently invoked article 87(3) of the Rome Statute, as domesticated into South African law by the Implementation of the Rome Statute Act 27 of 2002 ('**the Implementation Act**').
3. The applicant in the main application ('**the DA**') objects to this confidential filing, arguing that the President's affidavit should be accessible to the public. Nevertheless, given that the President's affidavit is provisionally confidential, the DA's replying affidavit has also been filed on a provisionally confidential basis.
4. Accordingly, this Court must determine whether the President's affidavit (and the DA's replying affidavit) should remain confidential, either in whole or in part.
5. MMA makes its submissions as an *amicus curia*. MMA has not seen the President's answering affidavit or the DA's replying affidavit. MMA does not seek relief in this

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matter. MMA makes its submissions to assist the Court in deciding whether to order the public disclosure of the President's affidavit.

6. I turn to MMA's two sets of submissions

II CONFIDENTIAL COURT DOCUMENTS

7. In this part we consider—

7.1. the rules, set out by the Constitutional Court in *Independent Newspapers*,¹ concerning confidential affidavits; and

7.2. the application and development of those rules in four subsequent cases.

(a) *The rules concerning confidential court documents*

8. In *Independent Newspapers*, the Constitutional Court considered an *in camera* affidavit filed by Mr Masetlha, the erstwhile head of the National Intelligence Agency.² Mr Masetlha filed this affidavit *in camera* for reasons of national security. The applicant, a newspaper group, applied to have access to this *in camera* affidavit, as well as various portions of the record that had been removed from the public's access before the Constitutional Court.

9. Moseneke DCJ, writing for the majority, began his analysis by confirming that there is a constitutional right to open justice. The constitutional right to open justice arises from a 'cluster' or 'umbrella' of constitutional provisions:³

¹ *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).

² *Id* para 2.


³ *Id* paras 39 to 40.

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- 9.1. Section 16(1)(a) and (b), which provides in relevant part that everyone has the right to freedom of expression, which includes freedom of the press and other media as well as freedom to receive and impart information or ideas.
- 9.2. Section 34, which protects the right of access to courts. Moseneke DCJ went further. Section 34 '*commands that courts deliberate in a public hearing*'.
- 9.3. Section 35(3)(c), which entitles every accused person to a public trial before an ordinary court.
- 9.4. The founding values in section 1(d) of the Constitution, which '*enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of State function*'.
10. The media bear this constitutional right to open justice:
- 'From the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice and *the right to have access to papers* and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-case basis.'⁴ (emphasis added).
11. Given this constitutional right to open justice, Moseneke DCJ held that, before courts, the '*default position is one of openness*'.⁵

⁴ *Independent Newspapers* at para 41.

⁵ *Independent Newspapers* at para 42.

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12. The right to open justice, like all constitutional rights, is not absolute. Moseneke DCJ went on to explain when the right to open justice may be limited, either by statute or common law. Like all limitations on constitutional rights, the overarching test is that of reasonableness and justification.⁶ A court, moreover, may exercise its inherent power to regulate its processes⁷ and order a secret hearing where *'the impairment of rights is proportional to the purpose the Court seeks to achieve'*.⁸ In each case, the court will have to weigh the competing interests to ensure that the limitations placed on open justice are tailored and proportionate to the end the court seeks to attain.⁹
13. Moseneke DCJ elaborated on the factors relevant to whether it is proportional to restrict public access to court documents:
- 13.1. the nature of the proceedings;
 - 13.2. the extent and character of the materials sought to be kept confidential;
 - 13.3. the connection of the information to the purpose of keeping the information confidential, like national security;
 - 13.4. the grounds advanced for claiming disclosure or for refusing it;
 - 13.5. whether the information is already in the public domain (and if so, in what circumstances it reached the public domain and for how long and to what extent it has been in the public domain); and

⁶ *Id* para 44, invoking the test in section 36 of the Constitution.

⁷ Under section 173 of the Constitution.

⁸ *Independent Newspapers* above n 1 para 45, citing *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) para 42.

⁹ *Id* para 45.

13.6. the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court.¹⁰

14. Moseneke DCJ emphasised that courts have the power and duty to consider for themselves whether a document filed in court should be disclosed to the public. The fact that an organ of state has decided that evidence is confidential does not suffice to refuse the public access to the evidence once that evidence is before a court.¹¹

15. Moseneke DCJ could not have been clearer:

‘I agree with the submission made by Independent Newspapers that ordinarily, the starting point is that court proceedings and so too court records must be open to the public. *A mere classification of a document within a court record as “confidential” or “secret” or even “top secret” under the operative intelligence legislation or the mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts.* Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access.’¹²

(b) *The development of the rule in subsequent cases*

16. *Independent Newspaper’s* principles concerning the constitutional right to open access have been affirmed and developed in several subsequent cases. **Four** are most relevant to these proceedings.

17. **First**, in *Sanral*,¹³ the Supreme Court of Appeal considered whether parts of a rule 53 should have been kept secret by the High Court hearing a review. The Supreme Court of

¹⁰ *Id* para 55.

¹¹ *Id* para 53.

¹² *Id* para 54 (emphasis added).

¹³ *Cape Town City v South African National Roads Authority* 2015 (3) SA 386 (SCA).



Appeal roundly endorsed *Independent Newspapers*. The general rule is openness; public access may only be denied ‘*when the dangers of openness outweigh the benefits*’.¹⁴

18. The Court expanded on *Independent Newspapers* in the context of judicial reviews. The Supreme Court of Appeal placed great weight on the fact that the proceedings were a review of the exercise of public power. Applications reviewing exercises of public power seek to hold decision-makers accountable, and ‘*[s]ecrecy is the very antithesis of accountability. It prevents the public from knowing what decision was made, why it was made, and whether it was justifiable*’.¹⁵

19. The Supreme Court of Appeal also emphasised the role of the media in a democracy, and the media’s constitutional right to disseminate court proceedings. The Court underscored the role reporting on court proceedings plays in holding organs of state accountable:

‘When justice is open, court reporting is a crucial avenue for public knowledge about what the government does. It is particularly important where the government is one of the parties in a case and where other sources of information are limited.

Not all information is readily revealed by the state and even powerful media organisations sometimes face great difficulty in obtaining information in some areas. In an environment of secrecy, journalists become vulnerable to off-the-record briefings and strategic leaks by government. In this context open justice is particularly important because through court cases information can be exposed and tested in ways that may not otherwise be possible.’¹⁶

¹⁴ *Id* para 19. The Supreme Court of Appeal added that open justice is required by section 32 of the Superior Courts Act 10 of 2013, which provides:

“Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except insofar as any such court may in special cases otherwise direct, be carried on in open court.”

¹⁵ *SANRAL* at para 45.

¹⁶ *SANRAL* at paras 20-1.


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20. **Second**, in *Media 24*,¹⁷ the Constitutional Court reiterated the importance of open justice. However, in that case the imperative to protect the identity of child victims of crimes outweighed the imperative for open justice.¹⁸ Various statutory provisions, which disproportionately limited children's rights to achieve open justice, were declared unconstitutional.¹⁹ However, the Court emphasised how protecting children's identity was a subtle infringement on open justice. Mhlantla J held:

'I do not wish to deny the importance of public interest in respect of open justice, but I underscore the distinction between public interest and what is interesting to the public. There is indeed a difference between the two; the former is attached to a legitimate and genuine interest, one founded on fact and one that contributes towards the public's constitutional right to be informed. Public interest can still be served and protected without revealing the names and identities of child participants in criminal proceedings. Media Monitoring Africa's submissions in the High Court on this aspect are most useful:

"In reporting on children, what is necessary to consider is both the public interest and in the best interests of the child. In this regard it is helpful to distinguish between the public interest and what is of interest to the public. Merely because the public might be curious to know the child's identity does not make it appropriate for the media to satisfy this curiosity. Even in cases where the story is in the public interest, like the Eugene Terreblanche murder trial, reporting must still be sensitive to the interests of the child. The story may be in the public interest, but it does not follow disclosing that the identity of the child involved is in the public interest."²⁰

¹⁷ *Centre for Child Law v Media 24 Limited* [2019] ZACC 46; 2020 (3) BCLR 245 (CC); 2020 (1) SACR 469 (CC); 2020 (4) SA 319 (CC) at para 91 onwards.

¹⁸ *Media 24* at para 112.

¹⁹ *Media 24* at para 128.

²⁰ *Media 24* at para 100.



21. **Third**, in *Hoërskool Fochville*, the Supreme Court of Appeal refused an application to compel discovery of questionnaires compiled by children to protect their best interests.²¹ The Court acknowledged the importance of open justice, but found that on the facts open justice could be balanced against the interests of children by permitting the litigation to proceed based on summaries of the questionnaires.
22. **Fourth**, *Van Breda* is the leading of several cases considering the media's right to broadcast a criminal trial.²² Invoking *Independent Newspapers*, the Supreme Court of Appeal reiterated the importance of open justice and the media's role in facilitating open justice.²³ The default, the Court held once again, is open access, including access by the media.²⁴ However, a trial court must and will consider competing interests, most especially those of vulnerable witnesses and victims.²⁵
23. As part of its reasoning, the Court in *Van Breda* relied on the procedures of the International Criminal Court (ICC), which allow for broadcasting proceedings, subject to witness and victim protection.²⁶

²¹ *Centre for Child Law v The Governing Body of Hoerskool Fochville* 2016 (2) SA 121 (SCA).

²² *Van Breda v Media 24 Ltd* 2017 (5) SA 533 (SCA).

Earlier cases include *Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA); *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* 2007 (1) SA 523 (CC); and *S v Pistorius* [2014] ZAGPPHC 793.

²³ *Van Breda* above n 22 para 46.

²⁴ *Id* para 72.

²⁵ *Id* para 69.

²⁶ *Id* para 67.




(c) *Conclusion on open justice*

24. Open justice has been part of how communities resolve disputes for centuries. In England, courts were open since before the Norman Conquest of the eleventh century.²⁷

Closer to home and in the words of Moseneke DCJ, writing extra-curially —

‘[i]n traditional African culture, the shade of a tree was the place where disputes of society were mediated and resolved. It was on this soil that the community would meet for a “lekgotla”. There was room for all to have their say. Everybody was an active participant of the process. This is how justice was done. It is the age-old concept of justice under a tree.’²⁸

25. The rationales behind open justice are obvious. Open justice assists in the search for truth. Open justice plays an important role in informing and educating the public. It enhances accountability and deters misconduct, by litigants, by courts and (of particular importance in this case) organs of state. Open justice has a therapeutic function, offering an assurance that justice had been done. It enhances the legitimacy of state action by submitting it to public scrutiny.²⁹

26. These rationales drive the development and application of the principles set out in *Independent Newspapers*. The more a matter implicates the need for accountability, truth finding, and an assurance that justice has been done, the greater the need to ensure open justice. On the other hand, where a court proceeding or document bears a lessor relation

²⁷ SANRAL para 13.

²⁸ Deputy Chief Justice Moseneke ‘The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice’ 15 May 2015 available at: <http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/The-Media-CourtsandTechnology-Speech-by-DCJ%20Moseneke-on-15-May-2015.pdf>, cited with approval in *Van Breda* para 15.

²⁹ SANRAL at para 12.

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to accountability, truth seeking, or the administration of justice, a court may justifiably limit open justice.

III ARTICLE 87(3) OF THE ROME STATUTE

27. This Court is faced with a novel issue. This is the first time the state has refused to disclose a document publicly on the grounds of article 87(3) of the Rome Statute.

28. In this part, we first consider the meaning of article 87(3) as interpreted by the ICC and leading commentators. We then make submissions concerning article 87(3)'s relationship to *Independent Newspapers* and the Constitution.

(a) *The meaning of article 87(3) in international law*

29. Article 87(3) reads:

‘The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.’

30. Article 87(3) is situated within Part 9 of the Rome Statute. Part 9 concerns international cooperation and judicial assistance. It is the part of the Rome Statute that obliges States Parties to ‘*cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court*’.³⁰ As the first President of the International Criminal Tribunal for the Former Yugoslavia (‘**the ICTY**’) has written: ‘*[T]he ICTY remains very*

³⁰ Article 86.

*much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are State authorities’.*³¹

31. This holds true for the ICC—hence Part 9 of the Rome Statute. The ICC does not have enforcement powers. It relies on States Parties, like South Africa, to (among other things) secure the presence of accused persons, witnesses, and evidence. As Trial Chamber more recently put it:

‘The Chamber recalls that the effective functioning of the Court, in terms of *inter alia*, the arrest and surrender of suspects, evidence gathering and the freezing and seizure of assets, is heavily dependent on State cooperation due to the absence of any direct enforcement powers. For that reason, Part 9 of the Statute establishes a unique vertical relationship between the Court and States by imposing an unqualified obligation on States to “*cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court*”.’³²

32. Article 87(1) authorises the ICC to make requests to States Parties for cooperation. Article 87(3) provides for the confidentiality of those requests and their supporting documentation.
33. The ICC’s Trial Chamber considered article 87(3) in a trilogy of cases involving Kenya. The first matter concerned a ruling on Kenya’s cooperation with the Court.³³ The Government of Kenya, in filing submissions concerning Kenya’s cooperation with the ICC, disclosed the existence and volume of the Prosecution’s request for assistance,

³¹ Cassese, A., ‘On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9 *EJIL* 13.

³² *Prosecutor v. Bemba Gombo* ICC-01/05-01/08-3660-Red2 “Decision on Mr Bemba's preliminary application for reclassification of filings, disclosure, accounts, and partial unfreezing of Mr Bemba's assets and the Registry's Request for guidance” Trial Chamber III, 18 October 2018, at para 9.

³³ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision concerning the Government of Kenya's Submissions on its cooperation with the Court, Trial Chamber V(b), 3 July 2013.

including the specific information requested. The Prosecution requested the ICC to caution Kenya for breaching its confidentiality obligations. Kenya, in response, apologised for inadvertently disclosing the request for assistance. The Chamber, given Kenya's apology, considered the matter moot.

34. In the second matter involving Kenya,³⁴ the ICC's Pre-Trial Chamber had authorised a request to Kenya to freeze certain assets of Mr Uhuru Kenyatta. The Pre-Trial Chamber ordered, under article 87(3), that the request be kept confidential. However, shortly after the order was issued, the press reported on the order's existence. The Court's Registry filed a report on the implementation of the Pre-Trial Chamber's order, including how the request had been publicised. The Court invited the parties, including the Government of Kenya, to file submissions on (inter alia) the appropriate relief regarding *'the apparent violation of the confidentiality direction of the Pre-Trial Chamber'*.
35. The Trial Chamber held that no evidence had been presented which would have allowed the Chamber to make a finding concerning a person's responsibility for the breach. The Chamber held:

'The Chamber regards seriously any allegation that confidential or underseal information has been provided or leaked to the press. It underlines the importance of the parties, participants and other persons appearing before the Court respecting their obligations under the Statute concerning the confidentiality of the proceedings. In the view of the Chamber, it is incumbent upon each to take appropriate measures to ensure that confidentiality is respected, investigate and ascertain any facts pertaining to a potential breach, and take any required measures, including reporting to the Chamber thereon, as applicable. In this regard, the Chamber recalls its authority to sanction breaches of its orders and of statutory

³⁴ *Prosecutor v. Kenyatta* ICC-01/09-02/11-931 "Decision on the implementation of the request to freeze assets" Trial Chamber V(b), 8 July 2014.



obligations of confidentiality, should the Chamber be presented with evidence making it necessary to do so.’

36. In a third matter, Kenya failed to redact confidential information when filing papers before the ICC and referred to confidential information, including a request for cooperation, during a public hearing.³⁵ The Trial Chamber formally cautioned Kenya. It held:

‘Under the Statute, an essential function of the Trial Chamber is its authority to provide for the protection of confidential information. In this respect, it is within the inherent authority of a Chamber to take measures to protect the integrity of its proceedings. Thus, the Chamber has specifically recalled its authority to sanction breaches of its orders and of statutory obligations of confidentiality, should it be presented with evidence making it necessary to do so.’

37. The ICC’s Appeal Chamber, in the matter of *Lubanga*, considered whether the accused should have access to the Prosecutor’s request for assistance from the Democratic Republic of Congo:³⁶



37.1. The accused had applied to have access to the request, arguing that part of the request was material to his appeal against this conviction.

37.2. The Prosecution, in response to the application, argued that ‘*requests for assistance to States* “are, in principle, confidential documents dealing with particular investigative steps, and are not intended as evidence themselves”.’³⁷

³⁵ *Prosecutor v Kenyatta* ICC-01/09-02/11-967 “Order concerning the public disclosure of confidential information” Trial Chamber V(b) 21 October 2014.

³⁶ *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-3017 “Decision on Mr Thomas Lubanga's request for disclosure”, Appeals Chamber, 11 April 2013.

³⁷ *Id* at para 7.

 
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- 37.3. The Chamber held that parts of the request were material to the preparation of the accused's defence. But the Appeals Chamber required the Prosecution to apply to redact those parts of the request unrelated to the defence.
38. In a sequel decision, the Appeals Chamber considered the Prosecution's application not to disclose aspects of the request for assistance.³⁸ The Appeals Chamber rejected the Prosecutor's application, and ordered the Prosecutor to disclose the entire request for assistance. The Chamber held that the Prosecutor failed to establish any prejudice to her investigations with the DRC. The Chamber, affirming a previous decision, held that '*the overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule*'.³⁹ The Prosecutor, to justify a redaction or non-disclosure, must demonstrate prejudice to further or ongoing investigations.
39. The point of the *Lubanga* decisions is to link non-disclosure of a request for assistance to '*objectively justifiable*' prejudice to an investigation.⁴⁰ The rationale behind requiring States Parties to keep requests for assistance confidential is to prevent jeopardy to ongoing or future investigations.
40. Similarly, in *Bemba* the Trial Chamber considered an application by the accused to access to requests for cooperation.⁴¹ The Chamber held:

³⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, "Decision on the Prosecutor's request for non-disclosure in relation to document 'OTP/DRC/COD-190/JCCD-pt, AC'" 27 May 2013.

³⁹ *Ibid* at para 10.

⁴⁰ *Ibid* at para 10.

⁴¹ *Prosecutor v. Bemba Gombo* ICC-01/05-01/08-3660-Red2 "Decision on Mr Bemba's preliminary application for reclassification of filings, disclosure, accounts, and partial unfreezing of Mr Bemba's assets and the Registry's Request for guidance", Trial Chamber III, 18 October 2018.

‘The Chamber has carefully considered the request of Mr Bemba to have access to all under seal and/or *ex parte* filings, orders or decisions in the instant case concerning requests for cooperation to freeze Mr Bemba’s assets. The Chamber recalls the integral nature of the cooperation regime under Part 9 of the Statute to the effective functioning of the Court. *Central to that regime is the relationship of trust between the Court and States Parties and the need for confidentiality in the communication of requests and responses. While confidentiality is not absolute and can be lifted in particular instances, it must be demonstrated that there is a specific need for that action to be taken.*’⁴² (emphasis added).

41. The Trial Chamber refused Mr Bemba’s application, finding that Mr Bemba did not need the requests to undo the freezing order of the Court and in tracing his own assets.
42. The Trial Chamber, in several other decisions, considered applications by accused persons to access requests for assistance. In each case, the issue is of materiality to the accused’s defence and prejudice to the Prosecution’s investigations. The Chamber noted that the ICC may waive the confidentiality required by article 87(3).⁴³
43. Article 87(3) has an exception. A leading commentator explains:

‘The obligation for confidentiality is not absolute. As is the case in similar mutual assistance instruments, it is recognised that in many States the request cannot be executed without some form of disclosure. For example, the request may have to be filed with a public court in order to obtain the requisite court order for arrest or to gather evidence. For this reason, disclosure in the course of the execution is permitted.’⁴⁴

⁴² Id at para 16.

⁴³ *Prosecutor v. Bemba Gombo et al.* ICC-01/05-01/13-1234 “Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews” Trial Chamber VII 10 September 2015; *Prosecutor v. Bemba Gombo* ICC-01/05-01/08-528 “Decision on Re-classification and Unsealing of Certain Documents and Decisions” Pre-Trial Chamber II 18 September 2009

⁴⁴ “International Cooperation and Judicial Assistance.” *Rome Statute of the International Criminal Court: A Commentary*. Ed. Otto Triffterer and Kai Ambos. London: Bloomsbury T&T Clark, 2016. 2003–2172 at 2026.

mb

44. This is critical. Article 87(3) means that if a State's domestic laws require disclosure as part of executing that order, then the State is entitled to disclose that request. The State will not be in breach of its international legal duties if disclosure is necessary under domestic law as part of execution.

45. In the South African context, the Implementation Act provides for the forwarding of the ICC's request to a magistrate for endorsement. As the Supreme Court of Appeal in *Al Bashir* explained:

“I turn then to the provisions of the Implementation Act dealing with requests for assistance from the ICC and, more particularly, requests for assistance in terms of arrest warrants issued by the ICC for the purpose of securing the presence before the Court of alleged perpetrators of international crimes. These are in ss 8 to 10 of the Act. Section 8(1) provides that when a request is received from the ICC for the arrest and surrender of a person for whom it has issued a warrant of arrest it must be referred to the Central Authority. This is defined as the Director-General: Justice and Constitutional Development, the present incumbent of which office is Ms Sindane. The Central Authority must immediately on receipt of the request forward the documents to a magistrate who must endorse the warrant for execution in any part of the Republic. That was what occurred in relation to the request in relation to the first arrest warrant. It was forwarded to the Chief Magistrate, Pretoria, who endorsed it for execution. So far as the record goes that warrant is still extant and operative.”⁴⁵

46. In *Al Bashir*, the state respondents did not attempt to argue that the request for surrender was confidential. The Supreme Court of Appeal noted how ‘*[t]he warrants [of arrest] have been forwarded to all countries that are parties to the Rome Statute, including South*

⁴⁵ *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA) at para 96.

Africa, with a request that they co-operate under the Rome Statute and cause President Al Bashir to be arrested and surrendered to the ICC'.⁴⁶

(b) Article 87(3)'s place in South Africa

47. On the international plane, South Africa is a party to the Rome Statute.⁴⁷ At the same time, the Rome Statute is law *in South Africa*. South Africa, in other words, has domesticated the Rome Statute.⁴⁸

48. South Africa has done so through the Implementation Act. Section 2(a) and (b) of the Implementation Act provides that the Act's objects are '*to create a framework to ensure that the Statute is effectively implemented in the Republic; and to ensure that anything done in terms of this Act conforms with the obligations of the Republic in terms of the Statute*'. The Implementation Act annexes the Rome Statute for information purposes.

49. The implication is that article 87(3) must be interpreted as any other statutory or common law rule. The ordinary rules of interpretation apply to it. The Court must unitarily consider its plain text, its purpose, and its context.⁴⁹ Article 87(3) must be read, reasonably, consistently with the Constitution.⁵⁰ It must be read, where reasonably possible, to promote the spirit, purport, and object of the Bill of Rights.⁵¹

50. In the context of documents before a court, article 87(3) must be read in harmony with the principles of *Independent Newspapers*.

⁴⁶ *Al Bashir* at para 3.

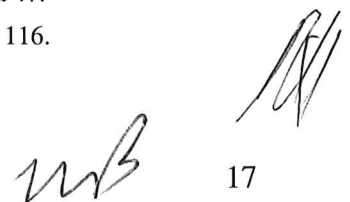
⁴⁷ As envisaged in section 231(2) of the Constitution.

⁴⁸ *SALC* at para 1, as envisaged in section 231(4) of the Constitution.

⁴⁹ *Chisuse v Director-General, Department of Home Affairs* 2020 (6) SA 14 (CC) at para 47.

⁵⁰ *Smit v Minister of Justice and Correctional Services* 2021 (1) SACR 482 (CC) at para 116.

⁵¹ Section 39(2) of the Constitution.



51. The starting point is to recognise that article 87(3) operates as a limitation on the constitutional right to open justice when the state refuses to disclose court documents by invoking article 87(3). Article 87(3), in these cases, is an exception to the rule that everything said before a court must be accessible by the public, including the media.
52. In turn, whenever article 87(3) is invoked, the Court must assess whether the putatively confidential evidence is linked to article 87(3) and its purposes. The article can only be invoked to keep a *request*, and its underlying documents, confidential. The article cannot be invoked to keep anything else confidential. Anything else must be justified with respect to other grounds, like privilege, the best interests of children, or national security.
53. If there is doubt concerning whether evidence falls in or out of article 87(3)'s scope, then the Court must consider the article's purpose and the imperative to ensure open justice. A Court should consider, for example, whether disclosure could endanger victims or witnesses, or otherwise undermine the Prosecution's investigation. The Court would then need to balance those factors, if applicable, against the need to ensure open justice.
54. Moreover, the Court can and must assess whether disclosure is *necessary* as part of executing the request *as a matter of South African law*. In other words, when it comes to executing a request for cooperation, article 87(3) falls away. What matters is whether, on *Independent Newspapers* and its principles, the request should be kept *in camera* before a Court as part of government's execution of that request.
55. In considering that question, the Court must turn its mind to the factors set out in *Independent Media*, as developed in subsequent cases like *SANRAL*.

56. In this case, MMA cannot make submissions on the facts since it has not seen the President's affidavit. However, it may be that the following factors are of particular importance.

56.1. This is an application concerning the exercise of public power. It is a case where public accountability and transparency are of immense significance.

56.2. The fact that there has been a request is in the public domain. This is an ineluctable implication of the President publicly invoking article 87(3).

56.3. The DA's application rests on numerous grounds. Most of these grounds cannot be addressed by, or are irrelevant to, the contents of a request from the ICC. So, much of the President's answering affidavit, and subsequent evidence, likely will not fall within article 87(3).

56.4. The ICC's investigations into the alleged conduct of President Putin are no doubt ongoing. The investigations concern a powerful, incumbent head of state.

56.5. The charges against President Putin involve child victims and potentially child witnesses.

IV CONCLUSION

57. MMA has not sought admission as an *amicus curia* on the basis that it will have access to the President's answering affidavit (although access would facilitate its participation in the hearing). The DA has objected to the President's claimed confidentiality. MMA aims to assist the Court in determining that objection.

58. This Court is to be guided by the clear principles in *Independent Newspapers*. Openness is the default. Confidentiality can only be claimed in justifiable, proportional circumstances.

59. The ICC considers article 87(3) critical to ongoing and future investigations by the Prosecution. If real, objectifiable prejudice will be caused by disclosing the contents of a request for assistance, then the contents may remain confidential. However, insofar as the contents of the President's affidavit do not concern the documents underlying a request from the ICC, then the President cannot invoke article 87(3) to keep those documents from the public.

PIET OLIVIER
ESHED COHEN

MMA's counsel

Chambers, Cape Town
Friday, 7 July 2023

WB



To: Ms Elzanne Jonker

Applicant
Minde Shapiro and Smith
Tyger Valley Office Park
Building 1
Cnr. Old Oak Rd & Willie Van Schoor Ave
Cape Town
7530
Email: elzanne@mindes.co.za; karin@mindes.co.za;
shannon@mindes.co.za

90 Rivonia Road, Sandton
Johannesburg, 2196

PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 (0) 11 530 5000

F +27 (0) 11 530 5111

www.webberwentzel.com

And to: President of South Africa

First Respondent
Union Buildings
Government Avenue,
Pretoria
Per email: robert@presidency.gov.za; mike@presidency.co.za;
PresidentRSA@presidency.gov.za
C/o: State Attorney, Pretoria
Email: StateAttorneyPretoria@justice.gov.za;

And to: Minister of Justice and Constitutional Development

SALU Building, 28th Floor, 316 Thabo Sehume Street (c/o Thabo
Sehume and Francis Baard Streets)
Pretoria
Per email: DeMoraba@justice.gov.za; BSarela@justice.gov.za
C/o: State Attorney, Pretoria
Email: StateAttorneyPretoria@justice.gov.za;

**And to: Director General: Justice and Constitutional
Development**

Third Respondent
Salu Building, 316 cnr Thabo Sehume and Francis Baard Streets,
Pretoria
Per email: RaManzini@justice.gov.za
C/o: State Attorney, Pretoria
Email: StateAttorneyPretoria@justice.gov.za;

And to: Minister of International Relations and Cooperation

Fourth Respondent
OR Tambo Building
460 Soutpansberg Road, Rietondale,

Two handwritten signatures in black ink, one appearing to be 'MB' and the other a more stylized signature.

Pretoria

Per email: minister@dirco.gov.za; HeydenreichC@dirco.gov.za;

MakokoB@dirco.gov.za

C/o: State Attorney, Pretoria

Email: StateAttorneyPretoria@justice.gov.za;

And to: Director General: International Relations and Cooperation

Fifth Respondent

OR Tambo Building

460 Soutpansberg Road, Rietondale,

Pretoria

C/o: State Attorney, Pretoria

Email: StateAttorneyPretoria@justice.gov.za;

And to: Minister of Police

Sixth Respondent

231 Pretorius Street, 756-7th floor Wachthuis Building

Pretoria

Per email: GaehlerSMK@saps.gov.za

C/o: State Attorney, Pretoria

Email: StateAttorneyPretoria@justice.gov.za;

And to: National Commissioner of the South African Police Services

Seventh Respondent

Maupa Naga Building, 3rd Floor, Nr 3 Troye Street

Pretoria

C/o: State Attorney, Pretoria

Email: StateAttorneyPretoria@justice.gov.za;

And to: Deputy President of South Africa

Eighth Respondent

Union Buildings

Government Avenue

Pretoria

C/o: State Attorney, Pretoria

Email: StateAttorneyPretoria@justice.gov.za

Your reference

Our reference

Date

D Milo / N Chandika

4 July 2023

Dear Sirs

REQUEST TO BE ADMITTED AS AMICUS CURIAE IN THE APPLICATION PROCEEDINGS BETWEEN THE DEMOCRATIC ALLIANCE AND THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS FOR THE ARREST OF VLADIMIR PUTIN

1. We act on behalf of Media Monitoring Africa Trust ("**Media Monitoring**").
2. Our client is a registered *inter vivos* trust acting as a non-profit organisation dedicated to monitoring the media and promoting the right to freedom of expression, media freedom,



openness and fair and ethical journalism. Through its cultivation of a free, fair, ethical and critical media culture, our client operates in the public interest to enhance and promote the constitutional values of openness and accountability. It has intervened in a number of important media freedom and open justice cases, including the *Van Breda* case on broadcasting courts in the Supreme Court of Appeal and most recently the *Mazetti Management v AmaBhungane* case concerning the ex parte interdict granted against amaBhungane Centre for Investigative Journalism.

3. We are instructed to address this letter to the parties, seeking to intervene as amicus in the litigation between the Democratic Alliance ("**DA**") and the Government of the Republic of South Africa ("**the Government**"), in which the DA has applied for a declaratory order directing the Government to immediately detain and arrest Russian President Vladimir Putin, should he arrive in South Africa to attend the BRICS Summit, held from 22 August 2023 to 24 August 2023. Our client does so in terms of the rule 16A notice filed by the DA on 29 May 2023.
4. Our client understands that:
 - 4.1 on 17 March 2023, the International Criminal Court ("**the ICC**") issued a warrant of arrest for President Vladimir Putin;
 - 4.2 on 29 May 2023, the DA launched an urgent application in the Gauteng High Court, Pretoria, for an order declaring that, in accordance with the arrest warrant issued by the International Criminal Court read together with the Rome Statute to which South Africa is a party, *inter alia*:
 - 4.2.1 the Government is obliged to take all necessary steps to arrest and detain President Putin, for surrender to the International Criminal Court, should he arrive in South Africa as contemplated for attendance at the 2023 BRICS Summit; or
 - 4.2.2 alternatively, to ensure the fulfilment of a warrant of arrest endorsed by a Magistrate or detention of President Putin as necessary;collectively, "**the urgent application**";
 - 4.3 the urgent application is due to be heard on 21 July 2023; and
 - 4.4 President Cyril Ramaphosa delivered his answering affidavit in the proceedings on Thursday, 29 June 2023 as a confidential answering affidavit. President Ramaphosa's spokesperson issued a statement providing that the contents of this affidavit are subject to absolute, blanket confidentiality in terms of Article 87(3) of the Rome Statute pertaining to requests for cooperation, which states that "*The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.*". The affidavit will thus be kept from public scrutiny in its entirety.
5. Our client notes that the leader of the Democratic Alliance, who has not seen the confidential affidavit, has made various media statements (attached as **A**) in which he states:

"We agreed to them filing the affidavit confidentially but reserved our right to challenge the need for confidentiality once we received the affidavit. While we accept that certain portions of the affidavit can remain confidential, we do not accept that there is any basis



for the majority of the affidavit to be confidential. We will argue that the court should refuse to keep those portions of the affidavit confidential."

6. In light of the blanket confidentiality adopted by President Ramaphosa in relation to his affidavit, and the DA's stated objection to the confidentiality, we are instructed that our client seeks to intervene as amicus in order to set out for the court the open justice principles that apply to court documents. Our client will further make submissions on the applicable international law and the contents of Article 87(3) of the Rome Statute.
7. The confidentiality of President Ramaphosa's affidavit raises numerous issues of public importance.
8. On the one hand, the confidentiality of the affidavit implicates the constitutional imperative for open justice, accountability, and transparency.
 - 8.1 In *City of Cape Town v South African National Roads Authority Limited* [2015] ZASCA 58, Ponnann JA made the following remarks at para 45:

"Secrecy is the very antithesis of accountability. It prevents the public from knowing what decision was made, why it was made, and whether it was justifiable. As Ngcobo CJ pointed out in M&G Media, '[i]t is impossible to hold accountable a government that operates in secrecy'. On that score Justice Brandeis of the US Supreme Court famously remarked that '[s]unlight is said to be the best of disinfectants'; electric light the most efficient policeman."
 - 8.2 The confidentiality of the affidavit undermines the public's access to evidence put before a court — in this case evidence by the President relating to South Africa's role in ensuring the prosecution of alleged perpetrators of international crimes. Access to this evidence is of immense public interest. As the Supreme Court of Appeal has stated in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17 ("**Al Bashir**"), when perpetrators of international crimes are prosecuted, it is "*a matter for national pride*" and "*is wholly consistent with our commitment to human rights both at a national and an international level*".
9. On the other hand, the prosecution of President Putin before the ICC is politically sensitive and, most importantly, involves child victims. Article 87(3) plays a role in preventing disruption to prosecution, ensuring the arrest of indicted persons, and protecting vulnerable victims of international crimes.
10. The Court will need to consider and balance these competing considerations. The Court's decision will entail considering, *inter alia*, whether the answering affidavit of the President can be confidential in its entirety, the meaning of Article 87(3) of the Rome Statute, and the interpretation of Article 87(3) considering the Constitution. While certain portions of the affidavit or its annexures may well attract confidentiality protection under the Rome Statute, this may not be the case for the entire affidavit. The President may have been obliged to file a public affidavit in conjunction with a confidential affidavit.
11. Our client's intended submissions will assist the Court in determining these issues without in any way jeopardising the hearing of the matter on 21 July 2023. Our client intends to —
 - 11.1 submit written submissions of no more than 25 pages on the subject-matter set out above by 17h00 on Friday, 14 July 2023; and



- 11.2 to the extent permitted by any confidentiality regime ordered by this Court in respect of the hearing, make short oral submissions at the hearing of no more than 30 minutes.
12. Our client therefore requests that you consent to its intervention as an amicus curiae in the urgent application on the above terms and provide your response by 17h00 on Wednesday, 5 July 2023.
13. It is our understanding that a case-management meeting will likely be held by next week. We request that our client's legal representatives be notified of and permitted to attend the meeting so as to facilitate its intended involvement (again, subject to any practical and appropriate confidentiality arrangements).
14. This letter is not written on a without-prejudice basis, and our client reserves the right to place this letter before the Deputy Judge President should it be appropriate.
15. We look forward to your response.
16. Our client's rights are reserved.

Yours faithfully

WEBBER WENTZEL

Dario Milo

Partner

Direct tel: +27 11 530 5232

Direct fax: +27 11 530 6232

Email: dario.milo@webberwentzel.com

Letter sent electronically.





NATIONAL / 29 JUN 2023

Ramaphosa affidavit on Putin 'confidential'

By Emsie Ferreira

f t e in s



Russian president, Vladimir Putin. File photo

The court papers President Cyril Ramaphosa has filed in response to an application by the Democratic Alliance to compel the state to arrest Russian leader Vladimir Putin if he were to come to South Africa will not be made public, his office said this week.

The presidency said the reason for this was in the provisions of the Rome Statute, the treaty that established the International Criminal Court (ICC).

WB [Signature]

Mail & Guardian

In papers filed to the Pretoria high court in late May, the DA said the state's failure to confirm that it would either ensure that Putin did not attend, or that it would heed the arrest warrant if he did, created a reasonable apprehension that it "intends to act unlawfully".

The party is asking the court for a declaratory order confirming that the government is obligated to arrest Putin if he enters South Africa.

"The president has filed a confidential answering affidavit," Ramaphosa's office told the *Mail & Guardian*.

"The respondents are obliged in terms of international law to keep the interactions with the ICC on the warrant of arrest against President Putin confidential. The ICC requires the fact of the request for cooperation to be kept confidential. To date there has been no relaxation of the requirement of confidentiality by the ICC."

It cited Article 87(3) of the Rome Statute, which reads: "The requested state shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request."

The department of justice has

confirmed that South Africa has, like all ICC member states, received a formal request asking that Putin be arrested to face prosecution if he were to come into the country.

"It was sent on a confidential basis," said Chrispin Phiri, the spokesman for Justice Minister Ronald Lamola.

The minister, who is cited as the second respondent in the application filed by the DA, has filed a confirmatory affidavit.

The president's answering affidavit was due last week but the state attorney asked the court for a five-day extension, saying Ramaphosa's schedule was busy and he needed more time to consult other members of the government who were cited as co-respondents.

An attorney for the DA said on Thursday it had consented to the president filing on a confidential basis, but would argue that there was no need for the entirety of his papers to remain confidential.

"We agreed to them filing the affidavit confidentially but reserved our right to challenge the need for confidentiality once we received the affidavit," said Elzanne Jonker, of Minde, Schapiro and Smith.

"While we accept that certain portions of the affidavit can remain confidential, we do not accept that there is any basis for the majority of the affidavit to be confidential."

The DA thus plans to argue that the court should refuse to keep the rest of the president's papers secret.

Ramaphosa has been advised by an inter-ministerial committee that there is no legal loophole the government could use to host Putin without arresting him and finding itself in breach of

Mail & Guardian

The presidency has denied reports suggesting that Ramaphosa had wrung an undertaking from Putin that he would not attend the summit when they met in Russia a fortnight ago during a peace mission by representatives of a handful of African nations.

It is understood, however, that Ramaphosa intends to raise the subject with Putin at the end of July when he will attend the Russia-Africa summit in Saint Petersburg.

Tags: BRICS, China, Cyril Ramaphosa, International Criminal Court, MG Mornings Three, Rome Statute, Ronald Lamola, Ukraine, Vladimir Putin



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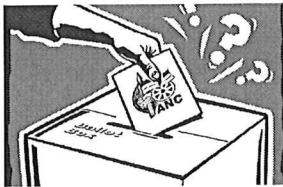
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Ramaphosa files confidential affidavit ahead of Putin's anticipated attendance at BRICS summit

Cebellile Bhengu

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President Cyril Ramaphosa greets Russian President Vladimir Putin at Konstantinovsky Palace in St Petersburg as part of the African peace mission talks on 17 June 2023.
PHOTO: Twitter/@PresidencyZA

- President Cyril Ramaphosa filed a confidential affidavit ahead of Russian President Vladimir Putin's attendance at the BRICS summit in South Africa in August.
- The DA approached the court seeking a declaratory order compelling the state to arrest Putin if he sets foot in SA.
- Presidency spokesperson Vincent Magwenya said the confidentiality was in line with the ICC's requirements.

MB

President Cyril Ramaphosa filed a confidential answering affidavit ahead of Russian President Vladimir Putin's anticipated attendance at the BRICS summit in South Africa in August.

Presidential spokesperson Vincent Magwenya said the confidentiality of the president's affidavit was in line with requirements by the International Crimes Court (ICC).

He said: "The respondents are obliged in terms of international law to keep the interactions with the ICC on the warrant of arrest against President Putin confidential. The ICC requires the fact of the request for cooperation to be kept confidential. To date, there has been no relaxation of the requirement of confidentiality by the ICC."

The move by the president comes after the DA approached the Gauteng High Court in Pretoria to request an order to arrest and surrender Putin to the ICC should he attend the August summit among BRICS leaders in SA.

READ | Putin's problems at home could be SA's get-out-of-jail-free card

The government missed the 23 June deadline to answer the DA's case and asked for a three-day extension. This was unexpected, considering that the state had agreed to file a response by Friday afternoon.


The ICC issued an arrest warrant against Putin in March, accusing him of war crimes relating to Russia's ongoing invasion of Ukraine since February last year.

South Africa is a signatory to the ICC and is obliged to arrest Putin if he attends the summit in August.

DA leader John Steenhuisen slammed the secrecy of Ramaphosa's affidavit. He said portions of it did not warrant confidentiality, and the party would argue in court that portions be made public.

He said: "We agreed to them filing the affidavit confidentially but reserved our right to challenge the need for confidentiality once we received the affidavit. While we accept that certain portions of the affidavit can remain confidential, we do not accept that there is any basis for the majority of the affidavit to be confidential. We will argue that the court should refuse to keep those portions of the affidavit confidential."

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A handwritten signature in black ink, consisting of a stylized, cursive 'A' followed by 'W3'.

Ramaphosa files confidential affidavit in court case about Putin attending Brics summit

Government 'obliged in terms of international law to keep the interactions with the ICC on the warrant of arrest against President Putin confidential'

29 June 2023 - 09:56 BY FRANNY RABKIN



Presidents Vladimir Putin and Cyril Ramaphosa. The ICC's arrest warrant alleges Putin is reasonably believed to bear individual criminal responsibility for the unlawful deportation of children and unlawful transfer of children from occupied areas of Ukraine to the Russian Federation.

Image: Yevgeny Biyatov/Host photo agency RIA Novosti via Reuters

President Cyril Ramaphosa has filed a confidential affidavit responding to the DA's case asking the court to declare that South Africa has a duty to arrest Russian president Vladimir Putin if he comes to South Africa to attend the Brics summit in August.

The affidavit was expected to shed light on the government's position on its legal duty under the Rome Statute, which has been domesticated into South African law. The DA says the law is unequivocal that South Africa must arrest and surrender the Russian president should he set foot in the country, after a warrant for his arrest issued by the International Criminal Court (ICC) in March.

MB

Court papers are normally public documents. But in answer to questions from TimesLIVE Premium, the presidency said the government was “obliged in terms of international law to keep the interactions with the ICC on the warrant of arrest against President Putin confidential”.

Asked directly whether the ICC had issued a request to South Africa for the arrest and surrender of Putin, the presidency said: “The ICC requires the fact of the request for co-operation to be kept confidential. To date there has been no relaxation of the requirement of confidentiality by the ICC.”

The presidency quoted article 87(3) of the Rome Statute, which says: “The requested state shall keep confidential a request for co-operation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.”

EDITORIAL | In the aftermath of the mutiny, SA must read the room

The Wagner mercenaries' march has shown Moscow to be vulnerable. This crisis must be taken advantage of in the search for peace

The ICC's arrest warrant alleges that Putin is reasonably believed to bear individual criminal responsibility for the unlawful deportation of children and unlawful transfer of children from occupied areas of Ukraine to the Russian Federation.

In the DA's founding affidavit, party leader John Steenhuisen said once the ICC has issued a warrant, the obligation to arrest arises “immediately” — once the ICC sends South Africa a request for arrest and surrender.

“Having issued a warrant, the request to arrest and surrender is, in the circumstances of this case, a mere formality — if the ICC believes President Putin will be in South Africa, it will issue a request for South Africa to arrest him and surrender him to the ICC for prosecution.”

Steenhuisen said the DA expected the ICC had already issued the request. “The government is called on to advise this court as to whether it has received a request from the ICC,” he said.

Speaking to TimesLIVE Premium, the DA's attorney, Elzanne Jonker, said the party had agreed to the government filing the affidavit confidentially, “but reserved our right to challenge the need for confidentiality once we received the affidavit”.

“While we accept that certain portions of the affidavit can remain confidential, we do not accept that there is any basis for the majority of the affidavit to be confidential. We will argue that the court should refuse to keep those portions of the affidavit confidential,” she said.

WB



On Wednesday the president's spokesperson, Vincent Magwenya, briefed the media in an update on Ramaphosa's programme. In response to questions about Putin's attendance at the summit, he said the president was consulting his Brics counterparts and would thereafter make an announcement.

When asked what options were being discussed, he said things were at a stage "beyond options". But when pressed by TimesLIVE Premium on whether this implied that a decision had been reached, Magwenya repeated that the president was consulting and would make an announcement soon.

** This article was updated with new comment from the DA's attorney.*

Handwritten initials 'JM' and 'MB' in the bottom right corner.

Docex 1 | Tygerberg
PO Box 4040 | Tyger Valley | 7536 | South Africa
Tyger Valley Office Park | Building Number 1 | Cnr Willie van Schoor & Old Oak Roads | Bellville
T: 021 918 9000 | 021 918 9020 (Direct Line) | F: 021 918 9070 (General) | 021 918 9070 (Direct Fax)

E: karin@mindes.co.za | www.mindes.co.za

Our Ref: DEM16/0924/ELZANNE JONKER/ks | Your Ref: | Date: 5 July 2023

TO: **WEBBER WENTZEL**

PER EMAIL: dario.milo@webberwentzel.com;
odette.geldenhuys@webberwentzel.com

AND TO: **NORTON ROSE FULBRIGHT SOUTH AFRICA INC**

PER EMAIL: laura.macfarlane@nortonrosefulbright.com

AND TO: **WERKSMANS ATTORNEYS**

PER EMAIL: dsingo@werksmans.com; llebepe@werksmans.com

AND TO: **STATE ATTORNEY, PRETORIA**

PER EMAIL: rsebelemetsa@justice.gov.za; ramatics@gmail.com

IN RE: DEMOCRATIC ALLIANCE// PRESIDENT OF RSA & OTHERS CASE NO.: 50604/2023-
REQUEST FOR ADMISSION AS AMICUS CURIAE

1. We refer to your correspondence dated 4 July 2023, wherein you requested our client's consent to the intervention of your various clients as *amici curiae*.
2. Our client consents to the admission of your client as *amici curiae*, provided that it abides by the timetable as per the directives issued by the Deputy Judge President on 20 June 2023, or any further directions issued by the Deputy Judge President. Our client requires that the matter proceed on 21 July 2023, and will not consent to any delay in the hearing.

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MINDE SCHAPIRO & SMITH

3. We confirm that we undertook to maintain confidentiality over the answering affidavit with an express reservation of our client's right to request the Court to order that any portion claimed as confidential be deemed not confidential once our client's legal representatives had an opportunity to consider the affidavit. We cannot, therefore, disclose that affidavit. The DA has, today, served a replying affidavit on the Respondents. In order to comply with our confidentiality undertaking, that affidavit too has not been filed, and cannot be disclosed.
4. We are of the opinion that the answering affidavit should not be confidential and it is in the public's interest to have access to it. We will argue that position to the Deputy Judge President in a case management meeting, and before the Court hearing the matter. In our view, the Government's claim for confidentiality is specious. Unfortunately, we cannot explain the basis for our position without violating our confidentiality undertaking.
5. In line with the directives issued by Deputy Judge President dated 20 June 2023, we propose that your client file any written submissions by no later than 10 July 2023 and to advance oral argument, if any, at the hearing of the matter on 21 July 2023. A copy of the directives is annexed hereto marked "A". Alternatively, if your client is unable to file its written submissions by that time, or is unable to do so without sight of the answering affidavit, we advise that the parties agree to alternative timelines in a case management meeting with the Deputy Judge President.
6. Our office addressed correspondence to the Deputy Judge President last week to request an urgent case management meeting. We have been advised that he is out of the office and will only be able to accommodate all the parties during the week of 10 July 2023, to resolve the following issues:

Minde Schapiro & Smith Incorporated | Attorneys Notaries & Conveyancers since 1929 | Registration number 2010/025182/21

Directors: Heinrich Crous BA LLB | Elzanne Jonker BA LLB | *Jonathan Rubin BComm LLB LLM | Venesen Reddy LLB

Senior Associate: Gerhard Lourens FPSA® BA LLB

Associates: Marlon Koen LLB | Lauren Hermanus LLB | Kyle Pienaar BComm LLB | Shannon Solomon LLB

Consultants: Louis Meyer BJuris LLB | Marianne Olivier BComm LLB LLM | Marais Hoon BA LLB | Patrick Stilwell BA LLB

Val registration number: 4580257428 | *At Greenacres, Gqeberha (previously Port Elizabeth)

Minde

MINDE SCHAPIRO & SMITH

- 6.1. The request by the government for a directive regarding confidentiality;
 - 6.2. The outstanding response from the government to the DA's request for disclosure (under confidentiality) of outstanding documents; and
 - 6.3. The admission of various *amicus*, their right to access to the answering affidavit, and the timelines for them to file written submissions.
7. We will ensure that you are notified of any case management meeting that is arranged.
 8. We trust the above is in order.

Yours faithfully

MINDE SCHAPIRO & SMITH INC.

per: **E JONKER**

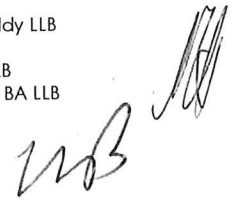
(Done electronically – therefore unsigned)

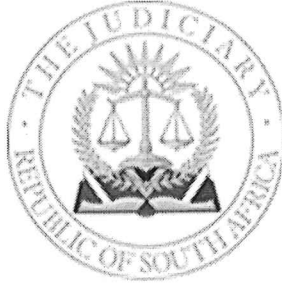
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Vat registration number: 4580257428 | *At Greenacres, Gqeberha (previously Port Elizabeth)





**OFFICE OF THE DEPUTY JUDGE PRESIDENT A P LEDWABA
HIGH COURT OF SOUTH AFRICA, GAUTENG PROVINCIAL DIVISION, PRETORIA**

Gauteng High Court Building, Cnr. Madiba (Vermeulen) & Paul Kruger Str, Room 7.15, Seventh Floor
Tel. (012) 315 - 7571 - E-mail: AnNieuwoudt@judiciary.org.za

20 June 2023

**TO: MINDE SCHAPIRO AND SMITH INC
C/O KLAGSBRUN EDELSTEIN BOSMAN DU PLESSIS INC**

Tel: (012) 425 - 8984
Email: ronie@kebd.co.za
Your Ref: E JONKER/ks
Our Ref: 50604/2023/DJP LEDWABA/AN

TO: THE STATE ATTORNEY, PRETORIA

Tel: (012) 309 - 1623
Email: rsebelemetsa@justice.gov.za / PSkhonde@justice.gov.za
Your Ref: 1796/2023/Z64
Our Ref: 50604/2023/DJP LEDWABA/AN

Dear Madam/Sir

**RE: DEMOCRATIC ALLIANCE / PRESIDENT OF SOUTH AFRICA AND 7
OTHERS
CASE NUMBER 50604/2023**

1. The above matter as well as the case-management meeting held **15 JUNE 2023** refers.
2. The matter is hereby set down as a special motion on **21 JULY 2023**. You are directed to file and upload unto CaseLines and send

msB

via email (AnNieuwoudt@judiciary.org.za) to my office a notice of set down with a copy of this letter attached to it **within 7 (seven) days** after receipt hereof, failing which the allocated date(s) of hearing will lapse and the date may be allocated to other litigants who applied for a special motion date.

3. You are directed to serve and file by uploading unto CaseLines:

3.1 Respondent's to file their answering affidavit by no later than **23 JUNE 2023.**

3.2 Applicant to file its replying affidavit by no later than **30 JUNE 2023.**

3.3 Applicant to file its heads of argument by no later than **5 JULY 2023.**

3.4 Respondents to file their heads of argument by no later than **10 JULY 2023.**

4. The parties should file and upload unto CaseLines and send via email (AnNieuwoudt@judiciary.org.za) to my office a **Joint Practice Note and Chronology of events** by no later than **12 JULY 2023** containing the following:

- Names of the parties and the case number
- Names and telephone numbers of all counsel in the Motion
- Nature of the Motion
- Issues to be determined in the application
- Relief sought at the hearing by the party on whose behalf counsel is appearing
- An estimate of the probable duration of the application
- Number of pages in the application and whether or not all papers need to be read and if not, which portion need not be read

5. In terms of the paragraph 22 of the directive of the Judge President dated 14 April 2020, only matters that have been uploaded on CaseLines shall be heard. All non-compliant matters shall automatically be removed from the roll.

Handwritten signature and initials in the bottom right corner of the page.

6. In terms of the paragraph 5 to 13 of the directive of the Judge Presidents' Consolidated Directive dated 18 September 2020, Legal Practitioners must create those cases on the CaseLines system and thereafter invite Parties and/or their Legal Representatives to each created case they are involved in.
7. The Judge to whom a matter is allocated shall, not later than five Court days before the week in which the matter is set down, notify the Parties that he or she is seized with the matter and all further communication about the matter shall be directly, by email only to the email address stipulated by that Judge.
8. Should it, for any reason(s), transpire that this matter will not proceed on the given date, you are directed to inform the office of the Deputy Judge President via email to AnNieuwoudt@judiciary.org.za immediately.
9. None availability of counsel representing any of the parties shall simply not be allowed as a reason for the matter not to proceed on the date of hearing arranged with my office.
10. **Should the above directive not be complied with, the matter may not be allocated to a Judge and the allocated date(s) will be utilized for other deserving cases.**

Regards

ELECTRONICALLY GENERATED (NOT SIGNED)

**A LEDWABA
DEPUTY JUDGE PRESIDENT
NORTH GAUTENG HIGH COURT
CASE NUMBER 50604/2023**





'MMA4'

Office of the State Attorney Pretoria

Private Bag X 91
PRETORIA
0001

Docex: 298

316 Salu Building
Cnr Francis Baard & Thabo Sehume Str
Ground Floor
Entrance Thabo Sehume Street
Pretoria

Tel: (Switchboard): 012 309 1500
(Direct Line): 012 309 1623
(Cellphone): 071 870 2442
(Secretary): 012 309 1539

Fax (General) 012 309 1649/50
(Personal) 086 507 1910

06 JULY 2023

Enquires: Mr R.J Sebelemetsa
Email: rsebelemetsa@justice.gov.za

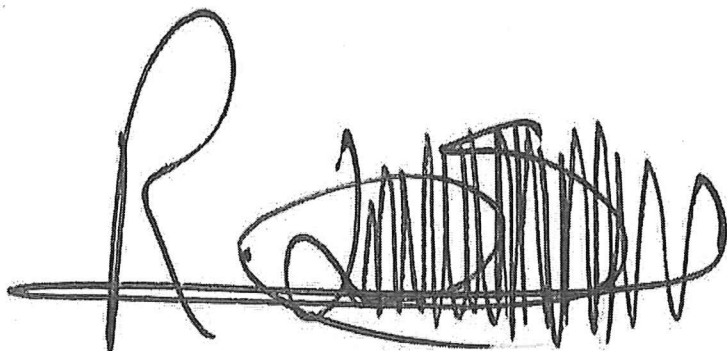
My Ref: 1796/2023/Z64
Your Ref: D Milo / N Chandika

**TO: MR DARIO MILO
WEBBER WENTZEL
EMAIL: dario.milo@webberwentzel.com**

**RE: DEMOCRATIC ALLIANCE // PRESIDENT OF RSA AND 7 OTHERS: CASE NO:
50604/2023**

1. We confirm receipt of your letter dated the 04th instant.
2. We have taken instruction on your client's request for consent to be admitted as an *amicus*.
3. Be informed that the Respondents will abide by your application for intervention as an *amicus* which application must be made before court.
4. Note that, with regard to your client's request to access the Respondents Confidential Answering Affidavit, we will abide by your request, though same must be made to the DJP.

Best regards,

A large, stylized handwritten signature in black ink, consisting of a large initial 'R' followed by a dense, scribbled-out name.

**MR R.J (JOSEPH) SEBELEMETSA
FOR THE STATE ATTORNEY (PRETORIA)**

A small, vertical handwritten signature or initials in black ink.A small, horizontal handwritten signature or initials in black ink.