CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 315/16 and CCT 193/17

CCT 315/16

In the matter between:

THE STATE First Applicant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Applicant

and

HENRY EMOMOTIMI OKAH Respondent

CCT 193/17

In the matter between:

HENRY EMOMOTIMI OKAH Applicant

and

THE STATE Respondent

and

INSTITUTE FOR SECURITY STUDIES First Amicus Curiae

and

SOUTHERN AFRICA LITIGATION CENTRE Second Amicus Curiae

Neutral citation: *S v Okah* [2018] ZACC 3

Coram: Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgment: Cameron J (unanimous)

Heard on: 28 November 2017

Decided on: 23 February 2018

Summary: Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 — section 15(1) — extra-territorial jurisdiction — specified offence — South African courts have jurisdiction to try terrorist acts committed abroad, beyond the financing of terrorism

Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 — section 1(4) — exemption to the definition of terrorist activity — international humanitarian law — indiscriminate bombings violate international humanitarian law and do not qualify for exemption

Criminal Procedure Act 51 of 1977 — section 317 — special entries — irregularities should be refused only when the application is in bad faith, frivolous or absurd, or because granting the application would amount to an abuse of court process

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ORDER

On appeal from a judgment and order of the Supreme Court of Appeal:

1. The application for leave to appeal by the State is granted.
2. The appeal by the State is upheld.
3. The order of the Supreme Court of Appeal upholding Mr Okah's appeal is set aside and is substituted with:

   "The appeal is dismissed."

4. Mr Okah's application for leave to appeal regarding exemption from prosecution under section 1(4) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act is dismissed.
5. The portion of Mr Okah's application for leave to appeal regarding the special entry on the High Court's failure to inform Mr Okah of his right to consular access under Article 7(3) of the International Convention for the Suppression of Terrorist Bombings is granted and the special entry is made.
6. Mr Okah's appeal against his entire conviction on the basis of this special entry is dismissed.
7. The remaining portions of Mr Okah's application for leave to appeal regarding the special entries are dismissed.

JUDGMENT

CAMERON J (Zondo ACJ, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring):

Introduction

[1] Mr Henry Emomotimi Okah, a citizen of Nigeria and a permanent resident of South Africa, was charged with 13 counts relating to terrorism under the Protection of Constitutional Democracy against Terrorist and Related Activities Act[1] (Act). Six counts arose from two car bombings detonated successively in Warri, Nigeria on 15 March 2010. Six additional counts related to a further double car bombing six months later in Abuja, Nigeria on 1 October 2010. One person was killed in the Warri

[1] 33 of 2004.

bombings, and at least eight people were killed in the Abuja bombings. Injuries and damage in both bombings were extensive.[2]

[2] In the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court), the State established that Mr Okah masterminded and bankrolled both bombings.[3] The High Court convicted him on all 13 counts.[4] However, because he was in South Africa when he planned and executed the Abuja bombings and in Nigeria at the time of the Warri bombings,[5] the Supreme Court of Appeal overruled the High Court in part and acquitted Mr Okah on four of the Warri charges[6] on the ground that the Act established only limited jurisdiction over acts committed outside South Africa.[7] The result was that the Supreme Court of Appeal replaced the sentence of 24 years' imprisonment the High Court imposed with a sentence of 20 years.[8]

[3] The State seeks to appeal against the conclusion by the Supreme Court of Appeal that the Act has narrow jurisdictional reach. It thereby seeks to reinstate Mr Okah's convictions on all the Warri charges with consequent reinstatement of the sentence the High Court imposed.[9] Shortly before this Court was due to hear the State's application on 1 August 2017, Mr Okah himself sought leave to appeal on four issues. These were the High Court's refusal to exempt him from culpability for the

[2] The 13th count of which Mr Okah was convicted was for threatening to engage in terrorist activity against South African nationals and companies in Nigeria in contravention of section 14 of the Act: *S v Okah* 2015 (2) SACR 561 (GJ) (Claassen J) (High Court judgment I) at para 4. The Supreme Court of Appeal acquitted Mr Okah on this count, and the State does not seek to appeal: *S v Okah* [2016] ZASCA 155; 2017 (1) SACR 1 (SCA) (Navsa JA and Van der Merwe JA; Shongwe JA, Dambuza JA and Schoeman AJA concurring) (Supreme Court of Appeal judgment) at paras 24 and 49.

[3] High Court judgment I id at para 143.

[4] Id at para 306.

[5] Supreme Court of Appeal judgment above n 2 at paras 11 and 13.

[6] Id at para 55.

[7] Id at paras 39-40.

[8] Id at paras 23 and 55.

[9] Mr Okah at no stage put in issue the propriety of the High Court's exercise of its discretionary power in passing sentence on him.

bombings on the basis of section 1(4) of the Act,[10] and its refusal to make three special entries on the record of the proceedings before it under section 317 of the Criminal Procedure Act.[11] Mr Okah claimed that these omissions on the part of the trial court rendered his trial unfair. As a result of Mr Okah's application, this Court consolidated the State's and Mr Okah's applications and postponed the hearing from 1 August 2017 to 28 November 2017.

[4] The issues in this Court are: first, whether South African courts have jurisdiction under section 15(1) of the Act to try alleged offences – beyond the financing of an offence – that occurred outside South Africa; second, whether Mr Okah qualifies for exemption under section 1(4) of the Act; and, third, whether the High Court wrongly refused to make three special entries on the record.

Background

[5] The High Court found that Mr Okah – who did not testify in his own defence[12] – was the leader of the Movement for the Emancipation of the

[10] Section 1(4) provides:

> "Notwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter, shall not, for any reason, including for purposes of prosecution or extradition, be considered as a terrorist activity, as defined in subsection (1)."

[11] 51 of 1977. Section 317(1) provides:

> "If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court."

[12] High Court judgment I above n 2 at para 12.

Niger Delta (MEND), an umbrella organisation of militant resistance groups in the southern states of Nigeria.[13] MEND represents individuals who believe that the government of Nigeria, with the connivance of international oil companies, is generating vast sums of money from the oil extracted from the Niger Delta, while affording no benefit to the impoverished local inhabitants and simultaneously degrading their environment.[14]

[6] In 2007, Mr Okah was arrested and prosecuted by the federal government of Nigeria on charges of treason and gun-running.[15] However, in 2009, that government implemented an amnesty to restore peace in the Niger Delta.[16] Mr Okah accepted the Nigerian government's offer of amnesty and was later released.[17]

Warri bombings

[7] On 15 March 2010, following instructions from Mr Okah, two bombs were detonated at Government House Annex in Warri.[18] At the time, the Vanguard Newspaper was due to hold a post-amnesty dialogue meeting.[19] This was attended by stakeholders in the Niger Delta region as well as dignitaries.[20] One person died in the bombing, and several others were injured.[21] The Warri bombings were the subject of counts 1, 3, 5, 7, 9 and 11.[22] Counts 9 and 11 related to the financing of the Warri bombings.[23] The Supreme Court of Appeal upheld convictions on these two counts,[24] but dismissed counts 1, 3, 5 and 7.[25]

[13] Id at paras 1 and 39.

[14] Id at para 1.

[15] Id at paras 46 and 150-1.

[16] Id at para 46.

[17] Id at para 47.

[18] Id at para 52.

[19] Id.

[20] Id at para 53.

[21] Id at para 55.

[22] Id at para 3.

[23] Supreme Court of Appeal judgment above n 2 at paras 46-7.

Abuja bombings

[8] On 1 October 2010, on the instruction of Mr Okah, two vehicles packed with hidden explosives were parked on a public road in close proximity to where the then-President of Nigeria, Dr Goodluck Jonathan, and other dignitaries were celebrating the country's fiftieth independence anniversary.[26] The bombs were successively detonated for maximum carnage.[27] Eight people died, and many others sustained serious injuries.[28] The Abuja bombs accounted for counts 2, 4, 6, 8, 10 and 12.[29] The Supreme Court of Appeal upheld convictions on all six counts.[30]

In the High Court

High Court judgment on the merits and section 1(4)

[9] Aside from challenging the Court's jurisdiction, Mr Okah, at the close of his trial, invoked section 1(4) of the Act for the first time to exempt him from liability for the bombings. The trial court held that this was misplaced.[31] It found that, in the light of the government amnesty and Mr Okah's own acceptance of it, "no further armed struggle was legitimate".[32] In any event, Mr Okah had laid no basis for invoking section 1(4).[33]

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[24] Id.

[25] Id at para 45.

[26] High Court judgment I above n 2 at para 59.

[27] Supreme Court of Appeal judgment above n 2 at para 14.

[28] High Court judgment I above n 2 at para 60.

[29] Id at para 3.

[30] Supreme Court of Appeal judgment above n 2 at para 48.

[31] High Court judgment I above n 2 at para 8.

[32] Id.

[33] Id.

High Court judgment on the special entries

[10] At the close of the trial, Mr Okah applied to the Court to make three special entries on its record regarding alleged irregularities in its proceedings. The alleged irregularities were:

(a) the presence at the trial of Mr Clifford Osagie, a barrister employed by the Nigerian State Security Services as a prosecutor;

(b) the State's admitted failure to inform Mr Okah of his right to consular access under Article 7(3) of the International Convention for the Suppression of Terrorist Bombings, 15 December 1997 (Terrorist Bombings Convention); and

(c) the trial court's failure to issue a letter of request under section 2(1) of the International Co-operation in Criminal Matters Act[34] to secure evidence from witnesses in proceedings that took place in Nigeria.[35]

[11] The trial court refused the application.[36] The Supreme Court of Appeal refused leave to appeal. There the matter lay until, days before the initial set-down in this Court of the State's challenge to Mr Okah's acquittal on the Warri bombings, Mr Okah sought to revive the alleged irregularities.

In the Supreme Court of Appeal

[12] The trial court granted Mr Okah leave to appeal against his convictions on counts 1 to 12 on only the narrow basis that the Court lacked jurisdiction because the acts were committed beyond South Africa's borders.[37] Mr Okah's counsel abandoned the attempt to invoke section 1(4) before the Supreme Court of Appeal.

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[34] 75 of 1996.

[35] *S v Okah* [2013] ZAGPJHC 85 (Claassen J) (High Court judgment II) at paras 1-2.

[36] Id at para 39.

[37] *Okah v S* [2013] ZAGPJHC 413 (Claassen J) (High Court judgment III) at para 8. As indicated above, leave to appeal to the Supreme Court of Appeal was granted also on count 13. The Supreme Court of Appeal set aside that conviction: Supreme Court of Appeal judgment above n 2 at paras 24 and 49; the State does not put this acquittal in issue.

[13] The Supreme Court of Appeal provided an overview of our law relating to extra-territorial jurisdiction preceding the Act.[38] The Court noted that section 15(1) of the Act now constitutes the main basis of South African courts' jurisdiction to try terrorism offences committed outside South Africa.[39] This section confers extra-territorial jurisdiction only in respect of a "specified offence" as defined.[40] Because each of the sections referred to in the introductory words to the definition deals specifically with financing terrorist acts,[41] the Supreme Court of Appeal interpreted a "specified offence" itself to include only offences of financing.[42]

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[38] Supreme Court of Appeal judgment above n 2 at paras 27-30.

[39] Id at para 35. Section 15(1) provides:

> "A court of the Republic has jurisdiction in respect of any specified offence as defined in paragraph (a) of the definition of 'specified offence', if—
>
> (a) the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic; or
>
> (b) the offence was committed—
>
> (i) in the territory of the Republic;
>
> (ii) on board a vessel, a ship, an off-shore installation, or a fixed platform, or an aircraft registered or required to be registered in the Republic at the time the offence was committed;
>
> (iii) by a citizen of the Republic or a person ordinarily resident in the Republic;
>
> (iv) against the Republic, a citizen of the Republic or a person ordinarily resident in the Republic;
>
> (v) on board an aircraft in respect of which the operator is licensed in terms of the Air Services Licensing Act, 1990 (Act 115 of 1990), or the International Air Services Act, 1993 (Act 60 of 1993);
>
> (vi) against a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises, or any other property of the Republic;
>
> (vii) when during its commission, a national of the Republic is seized, threatened, injured or killed;
>
> (viii) in an attempt to compel the Republic to do or to abstain or to refrain from doing any act; or
>
> (c) the evidence reveals any other basis recognised by law."

[40] See [20].

[41] Supreme Court of Appeal judgment above n 2 at para 38.

[42] Id at paras 39-40.

[14] The Supreme Court of Appeal thus held that the South African courts "have extra-territorial jurisdiction in terms of section 15(1) of the Act only in relation to the crimes of the financing of the offences".[43] On this limited reading, the Court overturned the Warri convictions. The Court, however, confirmed Mr Okah's convictions on counts 2, 4, 6, 8, 10 and 12. This was because he had orchestrated the Abuja bombings from within South Africa.[44]

Friends of the Court (amici curiae)

[15] Shortly before the hearing, this Court directed that the papers be brought to the attention of certain persons and organisations with expertise in international law.[45] In response, the Institute for Security Studies and the Southern Africa Litigation Centre applied for and were admitted as first and second amici. Both assisted this Court with written and oral submissions. The amici made common cause with the State in regard to the interpretation of "specified offence" as well as, given the facts, the inapplicability of section 1(4) under international humanitarian law. This Court is greatly indebted to the amici.

Leave to appeal

[16] Deciding the scope of jurisdiction of South African courts is a constitutional matter;[46] therefore, this Court has jurisdiction. It also became evident during argument that determining the South African courts' jurisdiction under the Act relates to a number of pending prosecutions. That question, which is clearly arguable, is thus

[43] Id at para 43.

[44] Id at para 48.

[45] The directions, issued on 15 November 2017, directed the Registrar to serve the parties' written arguments on and make all other papers in the matter available to the Southern Africa Litigation Centre, the International Committee of the Red Cross, Dr Hannah Woolaver of the University of Cape Town and her associates, and Professor Max du Plessis of the Institute for Security Studies.

[46] See, for example, *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75 and *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at paras 155 and 169, where this Court pronounced on the concurrent jurisdiction of the Labour Court and the High Court.

one of general public importance, which this Court ought to consider.[47] This Court thus also has general jurisdiction.

[17] The ambit of section 1(4) of the Act is, likewise, a matter of general public importance, though whether the Court ought to hear it in the form in which Mr Okah raises it depends on the interests of justice.[48] I consider, later, whether Mr Okah's application for leave to appeal against the refusal of the special entries should be granted.

Extra-territorial jurisdiction under section 15(1) of the Act

[18] As the Supreme Court of Appeal noted, the primary question is the extent to which section 15 of the Act confers extra-territorial jurisdiction on our courts to try alleged offences – beyond the financing of an offence – that occurred outside South Africa. This, in turn, centres on what is meant by "specified offence".

[19] Section 15(1) confers jurisdiction over "specified offences", a term defined in section 1(1). That provision in turn refers to six other sections: 2, 3, 4, 13, 14 and 23. Section 15(2) acts as a residual jurisdiction-granting clause.[49] It provides that any act alleged to constitute an offence committed by a person not contemplated by section 15(1) may nonetheless be brought to justice in our courts so long as there is a

[47] Section 167(3)(b)(ii) of the Constitution.

[48] See *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 17-8.

[49] Section 15(2) provides:

> "Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person other than a person contemplated in subsection (1), shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that—
>
> (a) act affects or is intended to affect a public body, any person or business in the Republic;
>
> (b) person is found to be in the Republic; and
>
> (c) person is for one or other reason not extradited by the Republic or if there is no application to extradite that person."

particular nexus between the act or person and South Africa. The charges that are the subject of this appeal do not meet the section 15(2) nexus requirements.

[20] Section 1(1) sets out the definitions of various terms used throughout the Act. Regarding the term at issue, it states:

> "'[S]pecified offence', with reference to section 4, 14 (in so far as it relates to section 4), and 23, means—
>
> (a) the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, a Convention offence, or an offence referred to in section 13 or 14 (in so far as it relates to the aforementioned sections); or
>
> (b) any activity outside the Republic which constitutes an offence under the law of another state and which would have constituted an offence referred to in paragraph (a), had that activity taken place in the Republic."

The Supreme Court of Appeal concluded that the term "specified offence" means the financing of activities listed in paragraphs (a) or (b). The core of its reasoning proceeded from the introductory words "with reference to section 4, 14 (in so far as it relates to section 4), and 23".

[21] In ascribing this meaning, the Supreme Court of Appeal did not undertake a grammatical or other analysis of the words "with reference to". It said only that the definition of "specified offence" was "qualified by" the introductory words.[50] Although not making this explicit, it appears to have taken the words to mean something like "co-extensively with" or "limited to" or "only to the extent of".

[22] But this seems wrong. The usual meaning of "with reference to" is not limiting. It is generally just a neutral connective phrase, meaning "in relation to" or

[50] Supreme Court of Appeal judgment above n 2 at para 38.

"alluding to" or "in connection with" or "having to do with". The job it does is just to connect one concept or subject with another. It does not do this by limiting or constricting the former by alluding to the latter.[51]

[23] That the usual meaning of "with reference to" is the right one here emerges from two textual indicators. First, that meaning makes sense of the many other instances in which the statute's definitions provision – section 1 – uses "with reference to". Second, and more dramatically, that meaning avoids absurd constructions of sections 4, 14 and 23.

[24] The term "with reference to" is used no fewer than 17 times in the Act, all within the definitions section. Each time, "with reference to" is used to connect a particular term to textual locations in which it is used later. It either alludes to provisions, as is the case with "specified offence", or it alludes to other terms. For example:

> "'[I]nfrastructure facility', with reference to the definition of 'terrorist activity' in this section and section 5, means . . ."

In turn, the definition of "terrorist activity" contains the term "infrastructure facility". The term "with reference to" has been included simply to assist readers in locating terms.

[25] What complicates the issue before us is that some terms, including the term "specified offence", are used beyond the provisions that are in fact alluded to.[52] This, however, is the result of poor drafting. Both parties acknowledged that the statute is anything but a paragon of clear or deft drafting.

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[51] This is helpfully illustrated by *Continental Illinois Bank v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D) at 528E-F, where Thirion J noted that "with regard to", "in respect of" and "with respect or reference to"—

> "are all expressions of wide import and are used merely to relate the claim to the description of it."

[52] See section 11 of the Act.

[26] Aside from this, the Supreme Court of Appeal's narrow interpretation creates a series of absurdities. First, the effect of its interpretation is to grant courts wide jurisdiction over terrorism-financing crimes, but very narrow jurisdiction over the crime of terrorism itself.[53] This (in the words of counsel for the first amicus) would create instances in which it would be possible to "prosecute the banker, but not the bomber".

[27] Absurdity is also apparent in section 11. This section makes it a crime to harbour a person "who has committed a specified offence". According to the Supreme Court of Appeal's interpretation of "specified offence", a court would have no jurisdiction to try someone for harbouring a terrorist, but it would have jurisdiction to try someone for harbouring a terrorist-financier. That can't be.

[28] Second, the Supreme Court of Appeal's interpretation radically and absurdly restricts section 4. Section 4 is titled "Offences associated or connected with financing of specified offences". It criminalises the acquisition, possession, use or provision of property intending that it be used – or knowing or being obliged reasonably to know or suspect that the property will be used – "to commit or facilitate the commission of a specified offence".[54] If the definition of "specified offence" is

[53] A court would have jurisdiction over the terrorism crime only if the conjunctive nexus requirements in section 15(2) were met. It would have jurisdiction over the terrorism-financing crimes if any of the disjunctive requirements in section 15(1)(a)-(c) were met, or, alternatively, if the requirements in section 15(2) were met.

[54] Section 4 provides:

> "(1) Any person who, directly or indirectly, in whole or in part, and by any means or method—
>
> [acquires, collects, possesses, uses, owns, provides property or provides financial or economic support]
>
> intending that the property, financial or other service or economic support, as the case may be, be used, or while such person knows or ought reasonably to have known or suspected that the property, service or support concerned will be used, directly or indirectly, in whole or in part—
>
> (i) to commit or facilitate the commission of a specified offence;

limited – because of the reference to section 4 – to mean *the financing of* terrorism, then section 4 becomes "offences associated or connected with *financing the financing of* terrorism". On the Supreme Court of Appeal's reading, instead of criminalising any use of property with the specified intention and knowledge *to commit any terrorist offence* here or abroad, section 4 would criminalise only using property with the specified intention and knowledge *to finance terrorist activities*.

[29] Third, the Supreme Court of Appeal's approach fails to explain how section 23 – which is one of the provisions implicated "with reference to" – could limit the definition of a specified offence. Unlike sections 4 and 14, which define derivative crimes, section 23 does not define criminal activity at all. Instead, it empowers a court to issue a freezing order. A High Court may freeze property in respect of which

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(ii) for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission of a specified offence

. . .

is guilty of an offence.

(2) Any person who, directly or indirectly, in whole or in part, and by any means or method—

(a) deals with, enters into or facilitates any transaction or performs any other act in connection with property which such person knows or ought reasonably to have known or suspected to have been acquired, collected, used, possessed, owned or provided—

(i) to commit or facilitate the commission of a specified offence;

(ii) for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission of a specified offence

. . .

is guilty of an offence.

(3) Any person who knows or ought reasonably to have known or suspected that property is property referred to in subsection (2)(a) and enters into, or becomes concerned in, an arrangement which in any way has or is likely to have the effect of—

(a) facilitating the retention or control of such property by or on behalf of—

(i) an entity which commits or attempts to commit or facilitates the commission of a specified offence

. . .

is guilty of an offence."

reasonable grounds exist for believing that it is owned or controlled by any entity that has committed a "specified offence".[55]

[30] The Supreme Court of Appeal's interpretation overlooks the fact that section 23 is included in the list of provisions "with reference to" which "specified offence" is defined. Instead, the Court merely said tersely, "Section 23 deals with prohibition and freezing orders in respect of property believed to be owned or controlled by an entity which has committed a specified offence and need not detain us further".[56] Yet pausing at section 23 shows the weakness in the approach. If "with reference to" means "limited by", specified offences would be limited by a court's discretionary ability to make freezing orders. This makes no sense. There is no possible bearing that the judicial power to make freezing orders can have on the ambit of the criminal offence sought to be defined.[57]

[31] Fourth, the Supreme Court of Appeal's interpretation riddles the definition of "specified offence" itself with surplusage. Paragraph (a) of the definition provides

[55] Section 23 is titled "Freezing order". It provides:

> (1) A High Court may, on ex parte application by the National Director to a judge in chambers, make an order prohibiting any person from engaging in any conduct, or obliging any person to cease any conduct, concerning property in respect of which there are reasonable grounds to believe that the property is owned or controlled by or on behalf of, or at the direction of—
>
> (a) any entity which has committed, attempted to commit, participated in or facilitated the commission of a specified offence; or
>
> . . .
>
> (2) An order made under subsection (1) may include an order to freeze any such property."

[56] Supreme Court of Appeal judgment above n 2 at para 38.

[57] Another absurd result would be that courts would be able to make section 23 freezing orders only in relation to financing offences but not in relation to the offence of terrorism. Counsel for Mr Okah, in a spirited address, conceded that this is absurd, but he urged this Court to sever this consequence from its interpretation of the statute as a whole. He enjoined us to read the impact of the Supreme Court of Appeal's interpretation on section 23 disjunctively, and separately to "test absurdity in each and every section" of the Act. This approach is not permissible. It is well established in this Court's jurisprudence that the provisions of a statute must be given a sensible and cohesive meaning in light of the wording, background and context as a whole: see, for example, *AB v Minister of Social Development* [2016] ZACC 43; 2017 (3) SA 570 (CC); 2017 (3) BCLR 267 (CC) at para 274.

four categories of offences.[58] The last of these is "an offence referred to in section 13 or 14 (in so far as it relates to the aforementioned sections)". If the definition were already limited by "with reference to section . . . 14", why would section 14 be repeated in paragraph (a)?

[32] What is more, the definition of "specified offence" is closely integrated with the offence of terrorism that lies at the heart of the entire legislative scheme.[59] Indeed, the definition reads: "specified offence . . . means the offence of terrorism referred to in section 2". Section 2 provides that "any person who engages in a terrorist activity is guilty of the offence of terrorism". Terrorist activity is, in turn, widely defined in section 1. In compacted form, it includes any act committed "in or outside the Republic" that creates specified deleterious effects; is intended to cause certain effects; and is committed "for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking".

[33] The Act here creates a carefully interconnecting web linking the offence of terrorism in section 2, the definition of terrorist activity in section 1 and the conferral of extra-territorial jurisdiction in section 15. The effect of the Supreme Court of Appeal's interpretation is to unravel this structure. It makes "specified offence" a lame partner in the statutory mechanism. This would disable the functional utility of the entire statutory scheme.

[34] On its own, the statutory scheme compels a broad reading of section 15(1) and, hence, the conferral of extra-territorial jurisdiction.[60] Yet we are of course obliged by

[58] See [20].

[59] See Supreme Court of Appeal above n 2 at para 33.

[60] As the statute is clear on its face, the presumption under Roman-Dutch law that in "case of doubt, we are obliged to interpret [penal] prohibitions restrictively" does not apply: see *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at paras 129-30. Even if the statute were not clear, the presumption would likely not apply because the ambiguity relates to jurisdiction and not to the definition of a crime. The rationale for the presumption is that a "subject must know clearly and

ordinary good sense and by the hermeneutic precepts articulated by both this Court and the Supreme Court of Appeal to take account of the statute's purpose.[61] Doing so likewise commands the broader interpretation.

[35] The long title and preamble record that the Act is designed primarily to create an offence of terrorism that gives effect to international instruments, which are listed in the preamble,[62] and that extends the South African courts' jurisdiction over these offences wherever they are committed. As the preamble acknowledges, "terrorist and related activities are an international problem, which can only be effectively addressed by means of international co-operation". The definition of "terrorist activity" does this by expressly including any act committed "in or outside the Republic".[63]

[36] The statute fulfils a number of international instruments. These establish that South Africa is under both a general duty to combat terrorism and a specific duty to bring to trial perpetrators of terrorism, wherever perpetrated, whom it does not extradite. The international instruments establishing these twin duties include conventions, protocols and UN Security Council resolutions.[64]

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certainly when he or she is subject to penalty by the state": *Democratic Alliance* at para 130. It is clear that Mr Okah's activities fall within the definition of the offence of terrorism in section 2 of the Act.

[61] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28(a) and *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper N.O.* [2017] ZASCA 177; 2017 JDR 1955 (SCA) at para 26.

[62] The preamble lists 14 instruments that South Africa is either bound by, including UN Security Council Resolution 1373/2001 and the OAU Convention for the Prevention and Combating of Terrorism, 14 July 1999, or "desires to become a party to".

[63] See [32]. The preamble also explicitly states that one of the purposes of the Act is to provide broad jurisdiction:

> "And realizing the importance to enact appropriate domestic legislation necessary to implement the provisions of relevant international instruments dealing with terrorist and related activities, to *ensure that the jurisdiction of the courts of the Republic of South Africa enables them to bring to trial the perpetrators of terrorist and related activities*."

[64] As of the date of commencement of the Act, South Africa was party to the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 14 December 1973; International Convention against the Taking of Hostages, 17 December 1979; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 February 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1 March 1991; International Convention for the Suppression of

[37] The general duty to combat terrorism is broad. It commands a reading of the Act that enables South Africa to participate, as a member of the international community, in the fight against an international and transnational phenomenon. The conspicuous consequence of the contested interpretation is that it would pull the Act's teeth, rendering futile its expressed endeavour to give bite to this duty.

[38] The specific duty to prosecute or extradite provides a yet stronger imperative to overturn that interpretation.[65] Even if one were to assume that interpretation were reasonable, which a textual analysis shows it is not, section 233 of the Constitution requires this Court to interpret the Act in line with international law. Here, there is a clear obligation that South Africa prosecute or extradite persons like Mr Okah. The interpretation in this judgment gives effect to that obligation, whereas the Supreme Court of Appeal's interpretation does not.

Terrorist Bombings (Terrorist Bombings Convention), 15 December 1997; and International Convention on the Suppression of the Financing of Terrorism, 9 December 1999.

The preamble of the Act acknowledges UN Security Council Resolution 1373/2001 as binding on all Member States. UN Security Council Resolution 1373/2001 requires that states shall—

> "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts."

[65] The duty to prosecute or extradite can be found in several international and regional instruments to which South Africa is a party and which are mentioned in the preamble of the Act. For example, Article 6(4) of the Terrorist Bombings Convention obliges South Africa to—

> "take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction."

Article 7(4) of the International Convention for the Suppression of the Financing of Terrorism obliges South Africa to—

> "take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction."

Article 6(4) of the OAU Convention for the Prevention and Combating of Terrorism provides:

> "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the acts set forth in Article 1 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction."

[39] There are two possible reasons that the Supreme Court of Appeal reached the conclusion that it did. The first may be a wish to give meaning to section 15(2). The second may be concerns about international comity.

[40] The Supreme Court of Appeal rejected the State's argument on the breadth of section 15(1) because it was satisfied that all other offences mentioned in the Act, besides the offence of financing, would fit within section 15(2). This seems wrong. The Court's understanding of the relationship between section 15(1) and (2) is not consonant with the text. The residual nature of section 15(2) relates primarily to other *persons*, not to other offences. This is shown by the fact that section 15(2) says, "Any act alleged to constitute an offence under this Act . . . *by a person other than a person* contemplated in subsection (1)". In other words, section 15(2) is meant to cover a *person* who neither was arrested within the South African jurisdiction nor committed an act fulfilling one of the criteria in section 15(1)(b).

[41] What is more, invoking section 15(2) to give effect to the international duty to prosecute-or-extradite is insufficient. This is because of the various restrictions on the provision's applicability that are set out in subsections (a) to (c).

[42] It is true, as the Supreme Court of Appeal noted, that jurisdiction has traditionally been limited to crimes occurring within a state's territory, and that international terrorism conventions have, of necessity, relaxed this limitation.[66] Before this Court, counsel for Mr Okah urged that a wide reading of jurisdiction would violate principles of international comity. This argument cannot be sustained.

[43] While it is true that territoriality has been the traditional basis on which courts establish jurisdiction, international and South African jurisprudence recognise other

[66] Supreme Court of Appeal judgment above n 2 at paras 27-31.

methods of asserting jurisdiction.[67] Comity concerns fall away in cases where there is no infringement on the sovereignty of another state. This is particularly true when the crimes over which a court asserts jurisdiction have an international dimension.[68] We should not, through a narrow interpretation of section 15(1), mistakenly perpetuate an historical disinclination to extra-territoriality.

Section 1(4) of the Act

[44] Mr Okah belatedly sought to revive a claim for exemption under section 1(4) of the Act,[69] which was abandoned before the Supreme Court of Appeal. Section 1(4) of the Act exempts certain acts from the definition of terrorism, and, thus, prosecution under the Act. To fall under section 1(4), the following criteria must all be met: (1) the act must have taken place within the context of a "struggle waged by peoples"; (2) that struggle must be "in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces"; and (3) the act

[67] Other methods of asserting jurisdiction include subjective and objective territoriality, protection of the state, nationality, passive personality and universal jurisdiction: see Dugard I*nternational Law: A South African Perspective* 4 ed (Juta Ltd, Cape Town 2011) at 148-57. See also *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at paras 223-5.

[68] While true universal jurisdiction applied only to crimes under customary international law (piracy, slave-trading, war crimes, crimes against humanity and torture)—

> "in recent years a number of international crimes have been created by multilateral treaties, which confer wide jurisdictional powers upon state parties. Here there is a type of quasi-universal jurisdiction in that signatory states are required to prosecute or extradite persons who happen to be present in their territory."

Dugard id at 154. See also *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC); 2014 (12) BCLR 1428 (CC) at para 74, noting that the—

> "cornerstone of the universality principle, in general, and the Rome Statute, in particular, is to hold torturers, genocidaires, pirates *and their ilk*, the so-called *hostis humani generis*, the enemy of all humankind, accountable for their crimes, wherever they may have committed them or wherever they may be domiciled."

We need not determine whether terrorism has crystallised into a crime under customary international law, though the plethora of UN resolutions, treaties and state practice suggests that it has. See *Interlocutory Decision of the Appeals Chamber of the Special Tribunal for Lebanon*, Case No STL-11-01/1 at para 85. It is enough to note that there are 170 parties to the Terrorist Bombings Convention, including both South Africa and Nigeria.

[69] See above n 10.

must be taken "in accordance with the principles of international law, especially international humanitarian law".[70]

[45] This application for exemption under section 1(4) cannot be countenanced. Not only is the evidential material relating to the first two criteria wholly insufficient for this Court to make a determination in favour of Mr Okah, but the evidential material that is available indicates that the third criterion has not been met. Therefore, section 1(4) does not apply, and Mr Okah cannot rely on it for exemption from prosecution.

[46] The first two criteria of the section 1(4) exemption raise many thorny factual and conceptual questions, both in the abstract and in the facts here. Do those for whose rights MEND fought count as a "people" contemplated by the Act? Can one's own government, or can foreign corporations, be "alien or foreign forces"? Can a well-grounded complaint about relentless, life- and livelihood-threatening environmental degradation be the basis for a legitimate right to self-determination and national liberation?[71]

[47] The questions that arise cannot and should not be answered here. This is because evidence relevant to determining them was not properly led during the trial. Consequently, the record does not enable us to make any sort of determination that might have assisted Mr Okah.[72]

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[70] Section 1(5) complicates the applicability of section 1(4), though it need not be addressed here. Section 1(5) reads:

> "Notwithstanding any provision in any other law, and subject to subsection (4), a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason, including for purposes of prosecution or extradition, to be a justifiable defense in respect of an offence of which the definition of terrorist activity forms an integral part."

[71] See also Cachalia "Counter-Terrorism and International Cooperation Against Terrorism – An Elusive Goal: A South African Perspective" 2010 *SAJHR* 510 at 519-25.

[72] Section 1(4) was raised belatedly in argument at the very end of the High Court trial. No evidential inquiry took place during the trial regarding its terms. The claim was abandoned before the Supreme Court of Appeal and only raised before this Court one week before the initial set-down date of 1 August 2017.

[48] More particularly, those questions need not be answered for a narrower reason. This is because Mr Okah's actions were not in accordance with international humanitarian law.[73] Indeed, the High Court, in rejecting Mr Okah's section 1(4) argument, focussed on the legitimacy of Mr Okah's actions.

[49] One of the cornerstones of international humanitarian law is the obligation to distinguish between combatants and civilians and between military objectives and civilian objects. Military action may not directly target civilians, nor may it be taken with indifference to the effects on the civilian population. Furthermore, particular means and methods of warfare may be unlawful because they are, either by their nature or use, indiscriminate.[74]

[50] The undisputed facts before the trial court establish that both the Warri and Abuja bombings were carried out in clear violation of international humanitarian law.[75] Each bombing entailed two sets of explosives crammed into vehicles with timing devices set to delay the detonation of the second vehicle until after the first. As the Supreme Court of Appeal noted, the intention was deadly. And cruel. It was that "a crowd would be attracted to the site of the first explosion, which would then be

[73] The applicability of international humanitarian law ordinarily requires the determination that either an international or non-international armed conflict exists. However, under Article 1(4) of the First Additional Protocol to the Geneva Conventions, 8 June 1977, "international armed conflict" includes "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination". Therefore, it may be assumed that international humanitarian law will apply in any situation in which criteria (1) and (2) of section 1(4) have been met.

[74] See, for example, Article 51(4) of the First Additional Protocol to the Geneva Conventions, which states:

> "Indiscriminate attacks are prohibited. Indiscriminate attacks are:
>
> (a) those which are not directed at a specific military objective;
>
> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
>
> (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."

[75] Mr Okah's actions violated core principles of international humanitarian law. Therefore, the Court need not determine the applicability of section 1(4) in instances where only minor violations have been alleged.

caught in a blast zone of the second explosion, resulting in maximum injury and death".[76]

[51] Counsel for Mr Okah contended only feebly that the bombings were not aimed at civilian targets, and that they were not designed to inflict maximum damage, including killing and maiming innocent people. The submission is not tenable. It flies in the face of the established and uncontested facts. And, even if the bombings had a limited aim or design, as contended, they would remain grossly indiscriminate and, thus, in breach of international humanitarian law.

[52] The result is that Mr Okah's section 1(4) argument can and should be decided on narrow grounds, without attempting to decide the broader questions that may also be at issue. The narrow facts are that the acts in issue plainly violated international humanitarian law and, therefore, forfeited protection under the statute's exemption under section 1(4).

The special entries

[53] Belatedly, Mr Okah also sought to bring three further issues before this Court. These three issues arose from Mr Okah's application at the trial court to make special entries on the record regarding three alleged irregularities.[77] Section 317 of the Criminal Procedure Act governs special entries at the close of a criminal trial. An accused person may "on good cause" shown make an application for an irregularity or

[76] Supreme Court of Appeal judgment above n 2 at para 14.

[77] The three special entries sought are described in Mr Okah's notice of motion as follows:

> "The proceedings in the above matter are irregular in that:
>
> (i) Mr Clifford Osagie, a member of the Nigerian State Security Services, sat directly across from witnesses, who were participants in the acts for which the Applicant was tried, during their testimony;
>
> (ii) The Applicant had not been warned of his rights in terms of Article 7(3)(a), (b) and (c) of the International Convention for the Suppression of Terrorist Bombings;
>
> (iii) The learned Judge should have, in the interests of justice, issued a letter of request to obtain the Defence's evidence from witnesses in Nigeria."

illegality to be entered into the record either in the course of his or her trial or within 14 days of conviction.

[54] The threshold for granting special entries is far lower than that required for granting leave to appeal.[78] Leave to appeal requires reasonable prospects on appeal. By contrast, section 317(1) spells out that any irregularity or illegality must be entered on the record—

> "unless the court to which . . . the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court."

[55] In *Xaba*, the Appellate Division interpreted this to mean "that the power of a trial judge to refuse to make a special entry of an alleged irregularity on the record is confined within very narrow limits".[79] That Court affirmed its earlier decisions in *Nzimande*[80] and *Nafte*, which held that a special entry should be made even where there are scant prospects of success on appeal—

> "[i]f the incident of procedure which it is sought to make the subject of a special entry is *in any way capable* of being regarded as an irregularity or illegality, however little argument there may be advanced in support of it, and however little merit the presiding Judge may consider there is in the application."[81]

[56] These principles are sound, and this Court embraces them. They mean that, in assessing Mr Okah's application for special entries, this Court must consider (1) whether the subjects of the special entries are "in any way capable" of being

[78] See *S v Xaba* 1983 (3) SA 717 (A) (*Xaba*) at 731.

[79] Id.

[80] *R v Nzimande* 1957 (3) SA 772 (A) at 774, where the Appellate Division noted:

> "In the light of the decisions of this Court it could happen, apparently, that a convicted person might be able to bring an irregularity appearing on the record before this Court by way of a special entry even though he would not be able to obtain leave to appeal on account of the same irregularity."

[81] *R v Nafte* 1929 AD 333 at 338-9.

interpreted as irregularities, and if so, (2) whether the irregularities should be excluded from the record because the application is in bad faith, frivolous or absurd, or because granting the application would amount to an abuse of court processes.

[57] Consequently, even if the subject of a special entry is an irregularity, a trial court could still rightly dismiss the application if one or more of the section 317 exceptions were to apply. If, however, a trial court makes a special entry under section 317, an accused may as of right note an appeal under section 318,[82] and leave to appeal is automatically afforded.

[58] Like Mr Okah's attempt to claim exemption under section 1(4) of the Act, this application for special entries must fail. This is not on the formalistic basis that the Supreme Court of Appeal has refused leave to appeal against the trial court's refusal to make the three special entries. Indeed, it is true that, after the Supreme Court of Appeal refused leave to appeal in 2013, Mr Okah took no further action in relation to the special entries until the week before the initial set-down in this Court. Nevertheless, the reason is rather substantive. It is that the evidential material is wholly insufficient to make a determination in favour of Mr Okah. That was the reason why the High Court refused to make these special entries on the record. That reason remains good.

[59] I now examine in more detail why this is so.

[82] Section 318(1) provides:

> "If a special entry is made on the record, the person convicted may appeal to the Appellate Division against his conviction on the ground of the irregularity stated in the special entry if, within a period of twenty-one days after entry is so made or within such extended period as may on good cause be allowed, notice of appeal has been given to the registrar of the Appellate Division and to the registrar of the provincial or local division, other than a circuit court, within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he so presided."

Mr Osagie's presence in court

[60] The first application was based on the presence of Mr Clifford Osagie in the trial court. Mr Okah alleges that, as a member of the Nigerian State Security Services, Mr Osagie was placed in court deliberately to intimidate witnesses into testifying against him. He contends that Mr Osagie's presence was a direct threat to the trial. He seeks to bring new evidence on affidavit of Mr Osagie's involvement in state-sanctioned torture in Nigeria. He seeks to call into question the credibility of state witnesses' testimony on the basis that they were under threat by Mr Osagie. He insists that he was not aware of Mr Osagie's position in the State Security Services until the trial had ended.

[61] Mr Osagie's presence at trial is capable of being interpreted as an irregularity and, thus, meets the first part of the test for admission of a special entry. However, the application for special entry nonetheless fails because granting it would amount to an abuse of court processes.

[62] First, there was no evidence establishing that Mr Osagie was a State Security Services "agent". Before us, Mr Okah's counsel claimed that there was a concession by the State that he was. That is not so. On the contrary, the affidavit submitted on behalf of the State recorded only that Mr Osagie was "employed by the State Security Department *as a prosecutor*" – not an "agent". What is more, Mr Okah provided no plausible basis for inferring that Mr Osagie's presence during the trial was intrinsically sinister or that it did in fact intimidate the state witnesses. The sole evidence Mr Okah relied on came from affidavits that his brother, Mr Charles Tombra Okah, and one other person, Mr Obi Nwabueze, supplied after the High Court convicted him. These made vague and unsubstantiated claims against Mr Osagie without affording any basis for determining their credibility.

[63] Second, the State provided persuasive evidence, including from Mr Osagie himself, indicating that Mr Okah knew Mr Osagie – and that he even knew his position in the state security apparatus before he encountered him during the

High Court proceedings. It is also clear that Mr Okah is a person of considerable agency and personal force. At no stage, while the trial was proceeding, did he raise a murmur about Mr Osagie's presence and its supposed impact. It is inconceivable that Mr Okah would not have complained immediately if Mr Osagie, by conduct or by his mere presence, was intimidating the state witnesses.

[64] In argument before this Court, counsel for Mr Okah was obliged to fall back on the contention that the perception had been created that Mr Osagie's presence was improper – and that this was enough to make the trial unfair. But this, too, is without merit. No perception of impropriety can reasonably be inferred from the record. The Nigerian government sent a prosecutor to South Africa to observe what transpired in the trial here. That person had been involved in the trial, in Nigeria, of those implicated in the self-same Warri and Abuja bombings. The propriety of this can hardly be impugned.

[65] Even if on these scanty allegations Mr Osagie's presence at the trial could conceivably have given rise to an irregularity, the fact is that Mr Okah's belated raising of the special entry is a last-ditch attempt to re-open evidential proceedings that conclusively implicated him in terrorist activity. Granting the application for admission of this special entry would have constituted an abuse of court processes. It falls into the section 317 exclusions, and the trial court rightly dismissed it.

Letters of request

[66] The second basis on which Mr Okah seeks to impugn his trial is the trial court's failure to issue letters of request on his behalf under section 2(1) of the International Co-operation in Criminal Matters Act.[83] This provides that, while a trial

[83] Section 2(1) provides:

> "If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign state, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which

is in progress, the presiding officer "may" make a request to a foreign state for assistance securing testimony from witnesses in that state. Therefore, issuing letters of request falls within the High Court's discretion. An appellate court will not interfere in the exercise of discretion unless it determines that the High Court failed to exercise its discretion judicially, had been influenced by wrong principles or a misdirection of facts, or reached a decision that no reasonable court would have made.[84]

[67] It is true that, during his trial, Mr Okah initiated an application for certain witnesses in Nigeria to be procured. In fact, in an attempt to assist him to do so, the trial judge postponed the trial twice. But, on 3 December 2012, Mr Okah's counsel placed on record that he was unable to secure the presence of the witnesses. That being so, he closed his case.

[68] In closing his case, Mr Okah complained of obstruction by the Nigerian government. This was because it insisted that Mr Okah had to comply with the correct procedures in international law and could not simply issue South African subpoenas to secure Nigerian witnesses from Nigeria. The Nigerian government referred to an extradition and mutual legal assistance treaty between Nigeria and South Africa.[85] In this Court, the State conceded that this treaty had not yet been brought into effect at the time of the trial (it has still not been), but urges that this is "of no consequence" because section 2(1) is "clearly applicable".

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assistance from that foreign state is sought to obtain such evidence as is stated in the letter of request for use at such proceedings."

[84] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 88.

[85] Treaty Between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa on Mutual Legal Assistance in Criminal Matters, 28 March 2002. Article 1(2)(e) of the treaty specifies that mutual assistance between Nigeria and South Africa will include "transferring persons in custody for testimony or other purposes". Article 2 then specifies that requests pursuant to the treaty would be made through the Director-General of the Department of Justice and Constitutional Development, who would then communicate directly with the designated Nigerian official. The treaty goes on to stipulate the form and required content of the request at Article 4.

[69] This means that Mr Okah was obliged to comply with section 2(1) before the Nigerian government could act on his request. He failed to do so.

[70] The decision not to persist with the request to call the Nigerian witnesses in these circumstances was that of counsel on behalf of Mr Okah. It seems to have been soundly based. In any event, Mr Okah is bound by the decision of his counsel, taken in his presence, unless he can show that the incompetence of his counsel vitiated the fairness of his trial.[86]

[71] During oral argument in this Court, counsel for Mr Okah was asked whether he now contended that there had been a mistrial through incompetent representation. He hedged. The most he was willing to say was that the conduct of Mr Okah's former counsel "borders on mistrial". This half-hearted submission was understandable. Nothing in the record suggests anything other than that Mr Okah was competently represented at every stage of the trial, and moreover that his defence was conducted under close scrutiny by himself. There can be no suggestion of a mistrial because Mr Okah's former counsel failed to call any Nigerian witnesses, nor on the basis that the trial court did not issue letters of request.

[72] Considering Mr Okah's counsel explicitly abandoned this point, and there is no evidence of incompetent representation to indicate a mistrial, it is untenable to contend now that the trial judge's failure to issue letters of request amounts to an irregularity. Moreover, the High Court exercised its discretion judicially, and there is no basis for this Court to interfere. Therefore, the trial court rightly dismissed this application for special entry.

Consular access

[73] Mr Okah further contended that an irregularity occurred in relation to the duty to afford him consular access under Article 7(3) of the Terrorist Bombings

[86] See *S v Tandwa* [2007] ZASCA 34; 2008 (1) SACR 613 (SCA) at paras 7-9.

Convention. Article 7(3)(a) and (b) provides that a suspected terrorist has the right to be informed of his or her rights to "[c]ommunicate without delay with the nearest appropriate representative of the state of which that person is a national or which is otherwise entitled to protect that person's rights" and to "[b]e visited by a representative of that state". Article 7(4) of the Terrorist Bombings Convention provides:

> "The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the state in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended."

[74] The State correctly notes that Article 7(3) rights are intended to protect fair trial rights, similar to those afforded by the South African Constitution. However, the Terrorist Bombings Convention specifically requires that a suspect be informed of the right to consular assistance. The importance of that right cannot be trivialised. Nor can we assume that the right is waived if a person acquires permanent residence in South Africa – as Mr Okah did, in 2007 – where the person remains a "national" of another state – as Mr Okah did.

[75] Although there is a dearth of case law elucidating Article 7(3), the obligation it places on states is analogous to that created by Article 36(1)(b) of the Vienna Convention on Consular Relations.[87] It is therefore helpful to consider some of the ample comparative precedent on Article 36 of the Vienna Convention on Consular Relations.

[87] The Vienna Convention on Consular Relations, 24 April 1963, provides that "competent authorities of the receiving state shall . . . inform [a national of another state who has been arrested or committed to prison or to custody pending trial or is detained in any other manner] without delay of his [or her] right" to communicate with consular officials.

[76] In *LaGrand (Germany v United States of America)*,[88] the International Court of Justice heard a dispute concerning two brothers who had lived in the United States since childhood but had never acquired nationality of that country. They were arrested on suspicion of murder but were not informed of their right to consular access. The Court considered the requirement of notifying the relevant consular authorities "without delay" and alerting the accused person of that right.[89] The failure to do so was held to be a violation of rights under Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations.[90] As a result, the Court concluded that the United States should "allow the review and reconsideration of the conviction and sentence by taking account of the violation of rights set forth in the [Vienna] Convention".[91]

[77] The High Court made two findings here. It found that Mr Okah was not warned of his right to consular assistance, and that this omission amounted to an irregularity in his trial. The Court nevertheless concluded that this did not imperil the fairness of the trial and for this reason refused the special entry.

[78] Is Mr Okah's complaint about the irregularity made in bad faith, frivolous or absurd, or an abuse of court process? It would seem not. Bad faith or abuse of court process requires intention on the part of the accused person to mislead or misuse the courts.[92] There is no basis for inferring bad faith on Mr Okah's part. And invoking a breach of South Africa's international obligations in trying a foreign national in its courts cannot be said to be frivolous or absurd.

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[88] [2001] ICJ Rep 466.

[89] Id at para 77.

[90] Optional Protocol to the Vienna Convention on Consular Relations, 24 April 1963.

[91] *LaGrand* above n 88 at para 125. See also *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12 and *Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo)* (Merits) [2010] ICJ Rep 639.

[92] See, for example, *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* [2004] ZASCA 64; 2004 (6) SA 66 (SCA) at para 50.

[79] As a result, I conclude the High Court erred in refusing to make a special entry regarding the State's failure to notify Mr Okah of his Article 7(3) right to consular access. The High Court's decision must be reversed. A special entry must be made.

[80] The consequence is that section 318 of the Criminal Procedure Act now affords Mr Okah a right of appeal against his entire conviction on the basis of the special entry now made.

[81] In *Xaba*, the Appellate Division established that whether remittal is necessary pursuant to a special entry made on appeal depends on whether everything relating to it has been fully canvassed and whether the irregularity is so gross as to vitiate the proceedings.[93] This Court has the benefit of the full record and transcripts of the High Court. Both Mr Okah and the State afforded the Court the benefit of written and oral argument on how denying consular access may have impinged on the fairness of Mr Okah's trial. Nothing in all this evidences any irregularity that could render Mr Okah's trial unfair. It is therefore not necessary to remit the matter to the High Court. This Court is capable of deciding the appeal.[94]

[82] In determining the appeal, this Court must consider section 322(1) of the Criminal Procedure Act. This provides that "no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from the irregularity". A failure of justice has in fact occurred when the irregularity affects the outcome.[95]

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[93] *Xaba* above n 78 at 736.

[94] Id at 735

[95] See *S v Nkata* 1990 (4) SA 250 (A) at 257G, where the Appellate Division admitted a special entry but held:

> "Despite the comparative seriousness of the irregularity as a matter of principle, I do not think that, in the circumstances of the present case, the conviction of [the] accused . . . was in any way affected by it, and an appeal based on this special entry cannot succeed."

[83] Did the failure to notify Mr Okah of his right to consular access result in a failure of justice? The answer is No.

[84] As the High Court noted, Mr Okah's own complaint was not that the omission vitiated the entire trial; his complaint was in fact much narrower and more specific. It sprang from the emollient evidence a Nigerian official gave during the trial. The official was Mr Godsday Peter Orubebe, Minister of Niger Delta Affairs. He testified that, had Mr Okah approached the authorities, "a different solution might have been arrived at".[96] Mr Okah's complaint seems to be directed, belatedly, at now establishing "a different solution".

[85] But this, perhaps poignantly, is to clutch at straws. The bombings took place, and terrible carnage resulted. The trial and this appeal are the result. No denial of consular access can change what happened, and Mr Orubebe's conciliatory statement cannot ameliorate Mr Okah's responsibility for the carnage he caused.

[86] There is an even more practical point. The entitlements that would have accrued to Mr Okah had he been informed of his Article 7(3) rights under the Terrorist Bombings Convention were, in any event, in practical terms, bestowed upon him at the trial. A Nigerian consular representative was present in court for most of the trial. This person could readily have been approached to afford Mr Okah any home-country assistance he may have needed or sought.[97] In the vivid language of the trial judge, had Mr Okah at any stage wanted consular assistance, "then he needed merely to have raised his hand and stretched out his arm towards the consular representative (a very well dressed lady)[98] who sat in court, just a few rows behind him".[99] Whether or not Mr Okah knew of his right, he was in substance not prejudiced in any way.

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[96] High Court judgment II above n 2 at para 20.

[97] Id at para 23.

[98] We interpret this comment by the trial court, of course, not as gender-directed, but merely to emphasise that the consular representative, of whatever gender, was conspicuously present and, thus, readily accessible to assist Mr Okah should he have wanted this.

[87] To revert to Mr Orubebe, he was well-acquainted with Mr Okah, whom he said he regarded as a "friend". For this reason, the trial court was right to conclude that "failure to have afforded the accused the necessary warning in terms of Article 7 did not render this trial unfair".[100]

[88] The blunt reality is that it was Mr Okah himself who did not approach the Nigerian consulate – and this was presumably because he was *persona non grata* in Nigeria.[101] More grimly, he was not extradited to Nigeria because, had he stood trial there, he would have faced the death penalty.

[89] The clincher is this. The trial court found that Mr Okah did in fact receive some assistance from Nigerian authorities.[102] These findings of fact were not challenged before us. They drove counsel for Mr Okah to a more speculative contention. This was that the warning was required to enable him to explore unspecified "alternatives". That, then, is the high-water mark of Mr Okah's case on this point. And it is wholly unpersuasive. It also has no bearing on the South African courts' jurisdiction to hear this matter, or the trial court's obligation to convict where a terrorism offence is proven.

[90] Hence, although the special entry on Mr Okah's right to be informed of his right to consular access is now made, his appeal to overturn his conviction on the basis of that special entry fails under section 322(1) of the Criminal Procedure Act. The application to admit the two further special entries is dismissed.

[91] The State's application for leave to appeal must succeed. The convictions overturned in the Supreme Court of Appeal must be reinstated together with the

[99] High Court judgment II above n 2 at para 23.

[100] Id at para 22.

[101] Id at para 23.

[102] Id at para 24.

sentences the High Court imposed. Both of Mr Okah's applications for leave to appeal must be dismissed, barring the special entry on consular access, in which the appeal for the special entry to be made succeeds. The appeal against his entire conviction on the basis of the special entry that has been made in this Court is dismissed.

Order

[92] The following order is made:

1. The application for leave to appeal by the State is granted.
2. The appeal by the State is upheld.
3. The order of the Supreme Court of Appeal upholding Mr Okah's appeal is set aside and is substituted with:

   "The appeal is dismissed."
4. Mr Okah's application for leave to appeal regarding exemption from prosecution under section 1(4) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act is dismissed.
5. The portion of Mr Okah's application for leave to appeal regarding the special entry on the High Court's failure to inform Mr Okah of his right to consular access under Article 7(3) of the International Convention for the Suppression of Terrorist Bombings is granted and the special entry is made.
6. Mr Okah's appeal against his entire conviction on the basis of this special entry is dismissed.
7. The remaining portions of Mr Okah's application for leave to appeal regarding the special entries are dismissed.

For the Applicant in CCT 315/16:	W Trengove SC and P Khoza instructed by the State Attorney.
For the Respondent in CCT 193/17:	R C Macadam instructed by the State Attorney.
For the Respondent in CCT 315/16 and for the Applicant in CCT 193/17:	A P S Nxumalo and P M Mahlatsi instructed by PI Uriesi Attorneys.
For the First Amicus Curiae:	M Du Plessis and A Coutsoudis instructed by Nortons Inc.
For the Second Amicus Curiae:	K Premhid instructed by Webber Wentzel Attorneys.