IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case no.
HC case no. 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second applicant
MINISTER OF POLICE	Third applicant
COMMISSIONER OF POLICE	Fourth applicant
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fifth applicant
DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	Sixth applicant
MINISTER OF HOME AFFAIRS	Seventh applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Tenth applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	Eleventh applicant
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	Twelfth applicant

and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

NOTICE OF MOTION

TAKE NOTICE that the applicants hereby apply to this Court for an order granting leave to appeal against the whole of the judgment dated 24 June 2015 and all of the orders delivered on 15 June 2015 by a full bench of the Gauteng Division (Pretoria) of the High Court, sitting as a court of first instance.

TAKE NOTICE FURTHER that this application is supported by the founding affidavit of TERRESA NONKULULEKO SINDANE and confirmatory affidavit of JAKOBUS MEIER, together with their annexures, filed herewith.

TAKE FURTHER NOTICE that if you intend opposing this application you are required to lodge your affidavit in support of your opposition, after prior service on the applicants, with the Registrar of this Court within one month after service of this application on you.

DATED AT PRETORIA ON THIS 30th DAY OF SEPTEMBER 2015

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To: THE REGISTRAR OF THE SUPREME COURT OF APPEAL
BLOEMFONTEIN

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -09- 30
E. S. DREYER
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

And
To: THE REGISTRAR OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

And
To: **RESPONDENT'S ATTORNEYS**
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Sonder benadeling van klient se regte
2015 -09- 30
Without prejudice of Clients rights

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and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

FOUNDING AFFIDAVIT

SAC.47.

I, the undersigned,

TERRESA NONKULULEKO SINDANE

do hereby make oath and state that:

1. I am the second applicant, and also the Central Authority as defined in section 1 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("the Implementation Act").

2. The facts contained herein are, save where otherwise indicated or so appears from the context, within my personal knowledge. They are to the best of my knowledge and belief true and correct. Where I make legal submissions I do so on the advice of the applicants' legal representatives. As will become apparent, making legal submissions in this affidavit is necessary because this application involves issues of law.

3. I am duly authorised to depose to this affidavit and institute this application on behalf of all the applicants. The applicants were cited as set out in the heading above, but as the first to twelfth *respondents* in the court *a quo*. I refer to them collectively as "Government".

4. In essence, this application seeks special leave to appeal to this Court from the Gauteng Division of the High Court, Pretoria (sitting as a Full Bench at first instance). It raises a pure question of law: whether a sitting head of State enjoys immunity *ratione personae*,[1] or whether he is liable to arrest as ordered by the court *a quo*. The question arises in the context of the most recent visit of President al Bashir of Sudan ("President Bashir") to South Africa in June this year. It is expected that President Bashir may visit

[1] In other words, personal immunity attaching to a head of State during his term of office only; as opposed to functional immunity (immunity *ratione materiae*), which applies to official conduct.

S. C. N.

South Africa again in December this year, or on other occasions of State or private affairs in future. The High Court's open-ended order requires his arrest, contrary to what I am advised is generally considered by experts on international criminal law – and has indeed been confirmed by the International Court of Justice itself – to be the correct legal position.

5. As I shall show in this affidavit, the legal question is of considerable legal importance; there is a very good prospect that this Court may come to a different conclusion; and the question is not academic. In doing so, I adopt the following scheme

   (a) First, I provide an overview of this application and the issues it raises.

   (b) Second, I briefly explain the procedural background to this application.

   (c) Third, I demonstrate that there are good prospects of success.

   (d) Fourth, I show that the decision by the court *a quo* has not been rendered moot.

   (e) Fifth, I identify additional factors militating in favour of an appeal to this Court.

   (f) Sixth, I conclude by asking for what I am advised is an appropriate order.

6. I seek at the outset condonation from this Honourable Court in one respect. This is that this affidavit exceeds by two pages the prescribed total for applications of this kind. The length is necessitated by the fact that both the issue of mootness and that of reasonable prospects entail legal arguments – in the case of the latter in particular, with reference to sets of statutory provisions, international law and foreign law addressed to the court *a quo* in the leave application, but not considered by it. The issues raised are also of great importance and novelty.

7. I accordingly respectfully ask that the additional length be condoned in the particular circumstances of this matter.

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A. <u>This application in outline</u>

8. Three questions arise in the determination of the application now directed to this Honourable Court.

9. The first is whether the order of the Gauteng High Court directing the arrest of President Bashir is academic, since he left the country before it could be enforced. Is the court *a quo*'s declaration that Government acted in breach of the Constitution moot too by virtue of President Bashir's departure?

10. The second issue is whether (as SALC urged, and the court *a quo* held) in the estimation of this Court there *is* indeed no further issue (*lis*) between the parties themselves, does that mean that this Court cannot and will not in the right kind of case grant leave, ever?

11. The third is whether there is a reasonable prospect of this Court holding that the court *a quo* – so far as is known the first to do so in legal history – erred in law in considering that it could direct the arrest of a serving head of a foreign State.

12. In relation to the obvious lack of mootness in relation to the first order (which declares the conduct of Government inconsistent with the Constitution), the court *a quo* entirely omitted to address this in its ruling on leave to appeal. This despite the issue being addressed squarely in argument at the hearing on behalf of Government (while not being addressed at all in argument by SALC, as was pointed out). The declaratory order is final. It declares that the Executive has acted in conflict with the Constitution. SALC clearly did not consider this order too abstract or hypothetical to seek from the Court *a quo*, nor did that Court think it too academic to grant. It is a serious adjuration of Government's conduct (as it was intended to be), and it is of obvious importance to the way Government will conduct itself in future. It has lead to the attempted impeachment

in Parliament of the President. SALC moreover has publicly stated that it is further considering criminal contempt proceedings on the basis of the order.[2]

13. Government's position is that there was, with respect, no proper basis for the finding of mootness in relation to the second order either. This order compelled Government "to take all reasonable steps to prepare to arrest President Bashir without a warrant". The order is indefinite; it is extant; it requires the arrest of President Bashir; he continues to serve as head of State. In that capacity, and given both bilateral relations between South Africa and Sudan, as well as their co-membership of the African Union, there is every likelihood that he will return to South Africa. This is confirmed by the meeting earlier this month between President Bashir and President Zuma in Russia, the public reiteration then by President Zuma of the strong ties between the two countries, and the statement by President Zuma of Government's wish to invite President Bashir to return to South Africa. SALC itself has proclaimed – after the hearing on leave to appeal, despite its argument on mootness – that the order it procured from the High Court sets a prohibitory precedent.[3]

14. Accordingly neither order granted is conceivably academic. SALC sought both, and seeks to preclude any appeal, precisely because it wishes to enforce both orders – and even set in train now criminal contempt proceedings. But even if notionally the orders had been moot, the court *a quo* with respect plainly erred (as I shall show) in holding that mootness is dispositive.

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[2] *Moneyweb* quoting the SALC's Ms Angela Mudukudi on 16 September 2015 (a copy of which is attached marked "A").

[3] This on the SALC's own website on 17 September 2015 (a copy of which is attached marked "B"), stating *inter alia* "[t]here's a standing warrant for his arrest and the judges made it clear that South Africa is obligated to arrest him. Those rulings need to be taken seriously and President Omar al-Bashir should understand that should he come to South Africa he's likely to be arrested."

15. As regards prospects of success, it is submitted that for the reasons that follow there is not merely a reasonable prospect, but indeed a real prospect, of another court holding that, consistent with international customary law codified in domestic statute law, the court *a quo* erred in becoming the first court in the world (so far as is known) to order the arrest on its soil of the serving President of another sovereign State.

16. An unfortunate fact needs to be recorded regarding the court *a quo*'s reliance on the contended lack of prospects of success in dismissing the application for leave to appeal. This is that the court *a quo* in chambers advised counsel on both sides that it did not wish to be addressed on prospects of success. The inference is that prospects of success were not, and would not be, in the court's estimation (having read the application, and been assisted by heads of argument on both sides) a determinant of the outcome. This clear instruction by the court was placed on record by senior counsel for Government in commencing oral argument. It was, with respect, in the circumstances irregular for the court *a quo* without notice to the parties to reverse that direction, and to seek to base its ruling on (or at least bolster it by reference to) a directly contrary estimation of the prospects of success conveyed as aforesaid. I shall address this aspect further in the procedural overview to which I now turn.

B. <u>Procedural background to this application</u>

17. The ultimate question for determination in this application is whether special leave to appeal should be granted against a decision of the court *a quo*. This issue arises in a specific procedural context which I shall briefly explain in what follows.

18. The procedural context shows that

refer to this judgment in what follows as "the main judgment". (It is this judgment which comprises annexure "E", to which I have already referred.)

25. The main judgment made very severe findings of "a clear violation of the order handed down by Fabricius J".[9] It found "clear indications that the order of Sunday 14 June 2015 was not complied with".[10] It thereupon made serious observations regarding "the democratic edifice ... crumbl[ing] stone-by-stone until it collapses and chaos ensues" "if the government ignores its constitutional obligations and fails to abide by Court orders".[11] The judgment concludes that President Bashir's departure from South Africa "demonstrates non-compliance with [the Fabricius J] order".[12] All of these findings were made without giving Government a hearing on its compliance with the Fabricius J order. Judgment was handed down on the morning on which government's explanatory affidavit became due, and the judgment did not consider it.

Application for leave to appeal

26. Government duly applied to the court *a quo* for leave to appeal against the main judgment. The application was lodged on 13 July 2015. The notice of application for leave to appeal is attached marked "G". It identifies sixteen respects in which Government contended that the main judgment is reasonably liable to a different conclusion by another court. These are dealt with below.

27. The application was set down for hearing on 14 August 2015. Both SALC and Government filed written argument in advance of the hearing.

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[9] Para 8 of the main judgment.
[10] Para 37.2 of the main judgment.
[11] *Ibid.*
[12] Para 38 of the main judgment.

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28. As mentioned, in chambers before the hearing and during the hearing itself the presiding judge specifically directed counsel for both parties *not* to address the Court on the merits. In other words, the court *a quo* directed counsel to approach the hearing not on the basis of the prospects of success, but to limit legal argument to the question whether an appeal would have any practical effect. This was a significant direction, because in the urgent circumstances of the main hearing Government had not been able to file heads of argument. In contrast, the heads of argument filed in anticipation of the hearing on leave to appeal cited important authorities contradicting the court *a quo*'s understanding of international law reflected in the main judgment. Because these authorities were not cited until then, they could not and were not considered by the court *a quo* in its main judgment. The judgment indeed does not reflect a consideration of any of these authorities.

29. Judgment on the application for leave to appeal was reserved *sine die*.

Subsequent events

30. Later on the same day, during the 17h00 SAFM news broadcast a spokesperson for SALC was reported as stating that the main judgment would ensure that President Bashir is never again able to visit South Africa, and that the judgment established a "binding precedent". Thereafter not only international interest but also local political parties' and the media's conduct emphasised what the main judgment itself has expressly held. It is that "the order we handed down, as well as this judgment *remain relevant* in view of the important constitutional and international law principles at stake".[13]

[13] Para 3 of the main judgment (emphasis added).

31. Thus, the court *a quo* confirmed already in its main judgment that despite the fact that "the central figure in the proceedings [President Bashir] had left South Africa",[14] the orders that Government acted unconstitutionally in not arresting President Bashir, and that Government is compelled to take all reasonable steps to do so, remain "relevant" and "important". Indeed, so live did the judgment and order remain that they have already formed the subject-matter of an attempt in Parliament to impeach President Zuma (even though he was not cited as a party by SALC). The judgment and orders also precipitated an unprecedented meeting held between the Executive and the Judiciary on 27 August 2015. Contempt proceedings are also threatened by SALC.

32. As indicated, despite the court directing that the only issue for consideration was the appeal's mootness, judgment on the application for leave to appeal was only delivered on 16 September 2015 – over a month after the hearing on leave to appeal.

Judgment on leave to appeal

33. The court *a quo* dismissed the application for leave to appeal with costs, including costs of two counsel. This was on a twofold basis. First, the matter was held to be moot in that there is no longer a live controversy between the parties. Second, the court *a quo* considered that there is no reasonable prospect of success, because no other court could come to a conclusion other than that President Bashir enjoyed no immunity from arrest or from prosecution under customary international law as a serving head of State.

34. A copy of the judgment refusing leave is annexed marked "H". I shall refer to it as "the judgment on leave to appeal".

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[14] *Ibid.*

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35. This judgment held that Government's argument on the merits had been "fully" addressed in the main judgment.[15] This, with respect, is not only demonstrably incorrect.[16] It also resulted in an irregular and unfair hearing on leave to appeal. This is because it is based on matters the court *a quo* directed the parties *not* to address. Not only could the court *a quo* not explain how Government's subsequent arguments were fully addressed by a preceding judgment, it did not even refer, for instance, to a key judgment by the International Court of Justice, which Government's heads of argument cited extensively.

C. Prospects of success

36. In the circumstances to which the procedural history gave rise, there is a very good prospect that Government's argument (based on international law textbooks, reports by international scholars, and important judgments by the International Court of Justice and highest courts in comparable jurisdictions) could lead another court to a different conclusion.

37. In what follows I demonstrate this with reference to the court *a quo*'s misconstruction of international law; its erroneous interpretation of the Implementation Act; its misapplication of the Immunities Act and misalignment with comparable caselaw; and its failure to apply the *Oudekraal* principle.

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[15] Para 3 of the judgment on leave to appeal.

[16] Para 33 of the main judgment shows that the judgment on leave to appeal was wrong to suggest that Government's argument on leave to appeal was already fully addressed *a quo*. The main judgment states that at the main hearing on 15 June 2015 Government's "argument was solely founded on the relevant Statutes and legislative documents". (Para 22 of the main judgment inconsistently records that the court *a quo* construed the "essence" of Government's oral argument as being the contents of the affidavit deposed to by Dr Lubisi. Whatever the court *a quo* considered Government's argument to be, it clearly did not recognise that Government's position is supported by authoritative pronouncements on international law.)

The main judgment misconstrued international law

38. Government's heads of argument seeking leave to appeal summarised for the court *a quo* the crucial aspects of the important judgment in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium).*[17] In this judgment the ICJ confirmed a number of important legal principles.

39. The first is that "it is firmly established that ... certain holders of high-ranking office in a State, such as the head of State ..., enjoy immunities from jurisdiction in other States, both civil and criminal".[18] Thus, the court *a quo* erred in holding that President Bashir "does not enjoy immunity in accordance with the rules of customary international law".[19]

40. Second, "article 32 [of the Vienna Convention on Diplomatic Relations (1961) provides] that only the sending State may waive such immunity", and this "reflects customary international law".[20] The domestic legislation giving effect to this Convention requires that any such waiver always be explicit and in writing.[21] No such waiver exists here. To the contrary, Sudan explicitly invoked its immunity by requesting that its head of State be "accorded all the privileges and immunities of a delegate attending an AU Summit".[22] Thus, the court *a quo* erred in attaching any weight to the notion that immunity was waived "implicitly" – and this purportedly not even by Sudan itself (*qua* sending State) but by the Security Council.[23] This is not only contrary to domestic law, but also against Article 98 of the Rome Statute itself. It

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[17] (2002) ICJ Rep 3; reaffirmed in *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (2008) ICJ Rep 177.
[18] *Op cit* at para 51.
[19] Para 30 of the main judgment.
[20] *Op cit* at para 52.
[21] Section 8(3) of the Immunities Act.
[22] Para 3.2 of Dr Lubisi's supporting affidavit.
[23] Para 29.9 of the main judgment.

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requires that waiver be effected "by the third State" (or, in other words, "the sending State") itself.

41. Third, "the functions of a Minister of Foreign Affairs [who is one of the high-ranking officials like a head of State in whom immunity vests][24] are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability".[25] Thus the court *a quo* erred in considering that it could exercise its jurisdiction over President Bashir and violate his freedom of movement (as the second order does).

42. Fourth, "there exists under customary international law [no] form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs [or heads of State], where they are suspected of having committed war crimes or crimes against humanity".[26] Thus the court *a quo* erred in construing an exception in the case of "international human rights law".[27]

43. Fifth, "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction".[28] Thus the court *a quo* erred in conflating immunity with jurisdiction, and in equating the existence of jurisdiction with the absence of immunity.[29]

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[24] Although the ICJ's judgment dealt with a Minister of Foreign Affairs, it "appl[ies], *a fortiori*, to heads of Government" (Foakes *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014) at 22).
[25] *Op cit* at para 54.
[26] *Op cit* at para 58.
[27] Para 28.13.1 of the main judgment.
[28] *Op cit* at para 58.
[29] Para 28.11 of the main judgment.

44. I interpose to note that SALC's heads of argument filed in the application for leave to appeal reveal that this very error underlies SALC's entire approach. SALC contended that "it must follow" that once the South African court has criminal jurisdiction, no immunity exists.[30] SALC also misconstrued the ICJ's judgment as authority for the proposition that no immunity exists.[31] This not only elides the previous three paragraphs from the judgment.[32] It also confuses immunity against the ICC's jurisdiction with immunity from the process of a domestic court. It further ignores that the ICC Pre-Trial Chamber II has itself "ma[d]e clear that it is not disputed that under international law a sitting head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes within the jurisdiction of the [ICC]".[33] In these circumstances SALC's contention that the findings of the ICC "on the scope of its jurisdiction are binding on State parties, including South Africa"[34] not only repeats the mistake of confusing the presence of jurisdiction with the absence of immunity. It is also self-defeating, because the ICC itself accepted the ICJ's confirmation of "inviolability before national courts of foreign States". The court *a*

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[30] Para 27 of SALC's heads of argument. The premise for the proposition is wrong, because neither article 27 of the Rome Statute nor section 4(2) of the Implementation Act abolishes immunity *ratione personae*. Both provisions quite clearly provide that official capacity is neither a defence nor attenuating for *purposes of sentencing*. They do not deal with immunity. Section 4 deals with jurisdiction.

[31] Para 44.4 of SALC's heads of argument filed in the application for leave to appeal, citing para 61 of the ICJ judgment in the *Arrest Warrant* case.

[32] These paragraphs confirm immunity *ratione personae* even in the case of crimes against humanity (para 58); caution that the distinction between jurisdiction of national courts must be carefully distinguished from jurisdictional immunities, because jurisdiction does not imply the absence of immunity (para 59); note that the extension of jurisdiction over serious crimes and duties imposed on States by international conventions "in no way affects immunities under customary international law" (para 59); state that such immunities subsist "before national courts of a foreign State, even where those courts exercise such jurisdiction under these conventions (para 59); and clarify that immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts (para 60).

[33] *Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* 9 April 2014 ICC-02/05-01/09 at para 25. The judgment thus accepts the correctness of the ICJ's decision that immunity ratione personae persists, and makes it clear that what article 27 does is to create an exception when the ICC exercises "its jurisdiction" over such a person.

[34] Para 44.4 of SALC's heads of argument filed in the application for leave to appeal.

quo's second order – for which SALC has asked on a mistaken understanding of international law – is accordingly inconsistent with ICJ and ICC authority.

45. Sixth, "although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law".[35] Thus the court *a quo* erred in holding that the Rome Statute (or the Implementation Act giving effect to it) abrogated immunity under international customary law.[36]

46. Seventh, immunity is retained "before the courts of a foreign State, even where those courts exercise such jurisdiction under these conventions."[37] Thus, again, the court *a quo* erred in construing a contrary legal position.[38]

47. Furthermore, article 27 of the Rome Statute does not affect immunity *ratione personae* before a domestic court.[39] Article 27 deals exclusively with immunity before the ICC itself, and in any event can only operate to defeat the immunity *ratione personae* of a head of a State which is a Rome Statute signatory.[40] Thus the court *a quo* erred also in this respect in seeking to find support for its judgment in a ruling by an ICC Pre-Trial Chamber.[41] What the *Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* in fact confirms is that the position articulated by the ICJ in its *Arrest Warrant* case prevails: "under international law a sitting head of State enjoys personal immunities from criminal

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[35] *Op cit* at para 59.
[36] Para 28.8 of the main judgment.
[37] *Ibid.*
[38] Para 28.13.1 of the main judgment.
[39] *Op cit* at para 61.
[40] Broomhall *op cit* at 141.
[41] Para 32 of the main judgment.

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jurisdiction and inviolability before national courts of foreign States", and that article 27(2) applies to "proceedings before the Court".[42] "The Court" is the ICC, not a national court.

48. The court *a quo* accordingly erred, as a result, in construing a legal duty to arrest a serving head of State, and particularly in ordering the arrest of a head of State. The correct legal duty is to desist from arresting a sitting head of State. Neither the Rome Statute nor its Implementation Act requires member States to violate the sovereign immunity of third party States' heads of State. The court *a quo* not only held that they do, but also imposed such legal duty on Government. It did so by declaring in the first order that Government's failure to take steps to "arrest and/or detain" President Bashir was "inconsistent with the Constitution of the Republic of South Africa".

49. In doing so, the court *a quo* also misconstrued Articles 86 and 89 of the Rome Statute. Both provisions are internally qualified. Article 86 is subject to other provisions of the Statute, and article 89 is subject to Part 9 of the Statute. Thus both provisions are expressly subject to article 98(1) of the Statute.[43] The effect of article 98(1) is that a request by the ICC which would require South Africa to act inconsistently with the immunity of Sudan's President may not be made by the ICC "unless the [ICC] can first obtain the cooperation of [Sudan] for the waiver of the immunity". Thus not only is it Sudan (not the Security Council) which must waive the immunity. The immunity is also expressly extant – otherwise there could be nothing to waive.

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[42] *Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* 9 April 2014 ICC-02/05-01/09 at paras 29 and 30.

[43] Article 98(1) of the Rome Statute expressly retains diplomatic immunity under customary international law. It provides: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

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50. Therefore, contrary to the court *a quo*'s construction, the Rome Statute does not expressly abolish the immunity.[44] Instead, the Rome Statute expressly retains the immunity of third-party States. The Rome Statute (which is itself a treaty) does not purport to repudiate the fundamental tenet of treaty law: privity. It accordingly cannot and does not abrogate rights of third parties.

51. As I shall show, the Implementation Act – whose purpose it is to give effect to the Rome Statute – unsurprisingly does likewise.

The main judgment misconstrued the Implementation Act

52. Section 2 of the Implementation Act itself records its governing interpretative principles. A court interpreting this Act "must also consider" conventional international law; customary international law; and comparable foreign law. Having not considered the ICJ judgment (which deals *inter alia* with the legal effect of article 27), the court *a quo* failed to give effect to the mandatory requirement in section 2 of the Implementation Act. Accordingly the court *a quo* also failed to comply with the Constitutional Court's only judgment on the Implementation Act.[45]

53. The domestic equivalent of article 27 of the Rome Statute is section 4 of the Implementation Act. Whereas article 27 deals with member States' immunity *before the ICC*, section 4 deals with immunity *before a South African court*.

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[44] Para 28.8.

[45] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para 23 requires a court to consider international law when interpreting the Implementation Act. The recordal in paras 25 and 26 of the main judgment refers to the Constitutional Court's judgment, but with respect does not give effect to it.

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54. Section 4 is quite clear. What it provides expressly is that being (*inter alios*) "a head of State"[46] "is neither a defence to a crime; nor a ground for any possible reduction of sentence".[47] Section 4 does not render a serving head of State liable to arrest, and it does not abrogate a fundamental principle of international law: inviolability from arrest. It deals with the jurisdiction of South African courts. This is made sufficiently clear by the heading of the second chapter of the Act (of which section 4 is one of the only two sections). As the ICJ held, jurisdiction and immunity must not be confused (as they were by the court *a quo*). The presence of jurisdiction does not imply the absence of immunity (as the court *a quo* apparently presumed).

55. Because section 4 evidently does not avail it, SALC shifted its reliance at the leave to appeal stage to section 10(9). Also in this respect SALC has misstated the law. It explicitly contended that "s 10(9) unequivocally provides that a person cannot escape arrest and surrender on the basis that he is a serving head of State."[48] The correct position is that section 10(9) *does not deal with arrest at all.*

56. As the heading to section 10 spells out, and the provisions of section 10 confirm, it deals with proceedings "after *arrest*". It is section 9 which deals with arrests. Significantly section 9 contains no provision similar to section 10(9). In short, section 9 on arrests is silent on heads of State. Thus, for purposes of arrest the fundamental principle of international law – absolute inviolability as a consequence of immunity *ratione personae* – remains preserved. This accords with the Rome Statute which itself not only preserves immunity of third States, but explicitly qualifies any duty to arrest with

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[46] Section 4(2)(a).
[47] Section 4(2)(b)(i) and (ii).
[48] Para 30 of SALC's heads of argument on leave to appeal (emphasis added).

reference to member States' national law.[49] Thus reliance on section 10(9) is an own goal.

57. While the Implementation Act was careful to deal with immunity (e.g. section 7, dealing with the immunity of the Court itself – thus recognising the importance of immunity) it did not abrogate immunity in the context of arrests. Because immunity is such a fundamental principle of international law (and because section 2 provides that the Act "must" be interpreted and applied with reference to international law), reading in words which section 9 does not contain (but which the immediate context of section 9 does contain) is not a permissible construction.

58. There is thus no abolition of immunity against arrests to be found in section 10(9) either.[50] Subsection (9) refers to "an order contemplated in subsection (5)", and subsection (5) contemplates an order by a magistrate that a person be "surrendered to the [International Criminal] Court and that he or she be committed to prison pending such surrender." This is not the order sought from or granted by the court *a quo* (which is, of course, not a magistrates' court). The court *a quo* ordered the arrest (without a warrant) and detention of President Bashir pending a formal request for his surrender from the ICC. The Court demonstrably did not grant a section 10(5) order. The judgment did not purport to invoke any part of section 10. Nor did it consider the jurisdictional facts for a section 10(5) order. What is more, a section 10(1) inquiry itself requires that a person be detained under a warrant of arrest. And any arrest must itself

[49] Article 89(1) of the Rome Statute.

[50] Section 10(9) provides – when it is read with section 10(5), to which it refers – is that "[t]he fact that a person to be *surrendered* is a [head of State] does not constitute a ground for [a magistrate to] refus[e] to issue an order that [he] be surrendered to the [ICC] and that he ... be committed to prison *pending such surrender*" (emphasis added).

have been lawful.[51] There was no arrest, there was no inquiry, and the arrest purportedly ordered was one without a warrant. Thus there could not, and have not been, a section 10(5) order. Thus section 10(9) clearly finds no application.

The court *a quo* made an order which is inconsistent with the Immunities Act and comparative law

59. Section 4(1) of the Immunities Act precludes both the first and second orders granted by the court *a quo*. It entrenches immunity *ratione personae* for heads of States and accordingly codifies the customary international law position as part of domestic statutory law. This is buttressed by section 15(1) of the Immunities Act. It actually criminalises the arrest of a serving head of State. The arrest order below flouts this.

60. This legal position operates as a matter of national law and is reinforced by international law. As has been shown, there is no provision in the Implementation Act which imposes a legal duty to act contrary to these sections. But had it been otherwise, the court *a quo* would have had to interpret the provisions it perceived to be in conflict by seeking to harmonise them with one another. It could not simply construe customary international law or the Immunities Act as being trumped by section 4(2) of the Implementation Act (as SALC urged),[52] because section 4(2) does not apply. It is nonetheless significant that section 10(9) does not even purport to trump either the Immunities Act or customary international law. It contains no wording similar to section 4(2).

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[51] Section 10(1)(b) requires a magistrate to inquire whether an arrest was in accordance with South African domestic law; otherwise the arrestee "must" be released (section 10(8)(e)(i)). Section 10(8)(e)(i), which deals with an appeal, requires that in the event that an appeal based on the requirement that domestic law be complied with succeeds, release of the detainee "must" follow.

[52] Paras 33 and 44.1 of SALC's heads of argument filed in the application for leave to appeal.

61. In harmonising the applicable statutory matrix, the court *a quo* had to give effect not only to international law (and, most importantly, the ICJ's judgment).[53] It should also have considered foreign law. It referred to none. Had it done so, it would have seen (as Government's heads of argument in the application for leave to appeal demonstrated) that foreign law confirms the position under international law as articulated by the ICJ.

62. For instance, applying the same fundamental principle of international law as the ICJ did, in *Pinochet* the House of Lords held that immunity *ratione personae* continues to apply except only before an international tribunal whose constitutive treaty (to which the sending State is a signatory) abolishes immunity.[54] Thus, immunity *ratione personae* before a domestic court remains intact.[55]

63. The legal literature reflects that the same legal position had been accepted and applied throughout the world by many comparable domestic courts.[56] In the light of section 2 of the Implementation Act, the court *a quo* erred in its judgment on leave to appeal by suggesting that Government's argument supported by these authorities was "irrelevant".

The court *a quo* also ignored the *Oudekraal* principle

64. As mentioned, the Republic of Sudan formally requested that President Bashir be accorded all privileges and immunities of a delegate attending the AU Summit. It was, so the answering affidavit of Dr Lubisi explained, the express premise that promulgating

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[53] As SALC's heads of argument contended by invoking "the constitutional requirement to prefer a legislative interpretation that gives effect to international obligations over one that does not" (para 33).

[54] *R v Bow Metropolitan Stipendary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97 (HL) at 120-121 and 189. For a recent reported judgment applying it, see *Harb v Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2015] 1 All ER 77 (Ch).

[55] *Id* at 111-112, 152 and 189.

[56] The Report of the International Law Commission on the work of its sixty-fifth session, 6 May to 7 June and 8 July to 9 August 2013 (available at http:// legal. un.org/ docs/? path=../ ilc/ reports/ 2013/ english/ chp5. pdf& lang=EFSRAC) at fn 267 reflects that a very large number of national courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent head of State.

the host agreement has the legal effect of affording immunity to President Bashir as head of State of an AU member.[57] Through it President Bashir would "be accorded", as requested, "all the privileges and immunities of a delegate attending an AU Summit".[58] The judgment on leave to appeal itself accepts this.[59]

65. But the court *a quo* held that President Bashir was not a delegate and that section 5(3) of the Immunities Act does not apply to him. Government's position is that this is wrong for reasons identified in its heads of argument filed for the hearing on leave to appeal.

66. The yet shorter answer, however, is that even were the court *a quo* correct, it could not simply ignore the ministerial notice. In the event that the Minister misconstrued her powers or acted *ultra vires* the empowering Act in promulgating the host agreement (in order to ensure immunity *inter alios* to heads of State and President Bashir in particular), the promulgation had to be impugned, reviewed and set aside. It could not simply be ignored because the court *a quo* disagreed with its validity or legal effect. The promulgation had legal effect until it was set aside. But it was not set aside.

67. Instead the court *a quo* went behind an extant act by the Minister acting pursuant to the Minister's empowering Act. This, I am advised is contrary to this Court's judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town.*[60] The Constitutional Court itself has confirmed and applied the *Oudekraal* principle on numerous occasions.[61]

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[57] Record p 208 para 3.6.
[58] Record p 207 para 3.2.
[59] Para 2: "it will be recalled that the notice was issued in terms of the ... Immunities Act and it was sought thereby to immunise any delegate attending the African Union summit in this country from arrest."
[60] 2004 (6) SA 222 (SCA).
[61] E.g. *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).

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68. Thus, even were SALC's argument on section 4 of the Immunities Act correct, it still fails to address the *Oudekraal* principle. It was pleaded explicitly,[62] yet the court *a quo* failed entirely to address it. SALC, for its part, *accepted* in a supplementary affidavit – as it did in its heads of argument on leave to appeal – that the ministerial notice had to be impugned. Yet the notice of motion was not amended accordingly, and no such order was granted.

69. For the above and other reasons identified in the notice of application for leave to appeal field *a quo* and Government's heads of argument on leave to appeal *a quo*, I submit that the court *a quo* clearly erred in granting the orders. There are accordingly good prospects of success in an appeal. It remains to consider the basis on which leave to appeal was refused.

D. <u>The decision sought will have "practical effect or result"</u>

70. As mentioned, the court *a quo* indicated that mootness was the only issue for purposes of leave to appeal and then reserved judgment for over 30 days on this single issue. In this period Government informed the court *a quo* that its judgment is already having the most profound "practical effect or result" imaginable in a democracy. As mentioned, on the basis of the judgment impeachment proceedings against the President of the Republic of South Africa were purportedly instituted.

71. This was precisely because the court *a quo* held – without hearing Government on this issue – that there "are clear indications that the order of Sunday 14 June 2015 was not complied with".[63] On this basis the court *a quo* held that despite the departure of

[62] Para 38.3 of Government's answering affidavit.
[63] Para 37.2 of the main judgment.

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President Bashir the main judgment and order "remain relevant".[64] This was because of the important constitutional (and international law) principles at stake.[65]

72. President Bashir's departure made no difference to the importance of the profound findings and order of unconstitutionality. So profound is the order that had it been made against the President himself, the Constitution provides that such order would have had no effect unless it is confirmed by the Constitutional Court.[66] Thus the Constitution itself renders such matters appealable, because in confirmation proceedings an automatic right of appeal exists. A comparable final order against other members of the Cabinet, and one which is so important that it invoked "the democratic edifice" itself, is not one which could have become moot on the sudden discovery of the real position under international law. Its mootness has nothing to do with President Bashir's departure, and no other basis for its contended mootness has been suggested by the court *a quo*.

73. The first order stands. Its relevance, importance, practical effect and result will remain forever. It records with finality that Government's conduct was "inconsistent with the Constitution". Furthermore, the order will in perpetuity operate as imposing a constitutional duty on Government "to take steps to arrest and/or detain" the head of a foreign State against whom an ICC arrest warrant has been issued.

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[64] Para 3 of the main judgment.
[65] Para 3 of the main judgment. The important constitutional principle at stake was that "[a] democratic State based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by Court orders". Otherwise "the democratic edifice will crumble stone-by-stone". Hence the continued importance and relevance of the first order, which declared that to the extent that Government had failed to take steps to arrest President Bashir (which the judgment held was the position), Government's conduct was "inconsistent with the Constitution".
[66] Section 172(2)(a) of the Constitution.

74. The same applies to the second order. It is not time-bound. It "compel[s]" Government to take all reasonable steps to prepare to arrest President Bashir without a warrant … and detain him". The mandamus does not contemplate President Bashir's presence. Government must "forthwith" take reasonable preparatory steps. Just as SAPS was previously directed under the Implementation Act to take preparatory investigative steps despite the absence of suspected perpetrators from South Africa,[67] so too does paragraph 2 of the order impose a duty to take reasonable steps "*to prepare to arrest* President Bashir" irrespective of his current whereabouts. The order has not reached its sell-by date on President Bashir's departure. Should President Bashir return to South Africa, he must be arrested, pursuant to paragraph 2 of the order – if not paragraph 1 (to escape another declarator of constitutional inconsistent conduct, and the rebuke of destabilising constitutional democracy). SALC was invited at the leave hearing to abandon any reliance in future on the orders, if they are moot. Of course it did not do so.

75. SALC in fact has already publicly proclaimed a directly contrary stance. As mentioned, SALC is reported by the public broadcaster as having said that the judgment indeed sets a precedent and indeed precludes President Bashir from ever again entering South Africa. It said so hours after its counsel argued the contrary in court. Yet it is expressly on the basis of SALC's argument that the court *a quo* embraced mootness.[68] This further confirms that the conclusion in paragraph 7 of the judgment of leave to appeal is, on a principled approach, indefensible.

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[67] *National Commissioner of Police v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC).

[68] Para 5 of the judgment on leave to appeal, quoting para 3 of SALC's heads of argument "that because President Bashir had left South Africa, the issues between the parties had become academic that that any order by the Supreme Court of Appeal … would have no practical effect or result".

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76. The same applies to the conclusion in paragraph 8 of the judgment on leave to appeal. It is that "we do not hold the opinion that the appeal has reasonable prospects of success at all."[69] While the judgment does not disclose this, this conclusion reflects Fabricius J's insistence at the hearing on leave to appeal that a subjective approach is henceforth to be exercised by the judge(s) considering an application for leave to appeal. This regression to the discredited notion of subjective jurisdictional facts resonates also in the subsequent paragraph of the judgment.[70] Objective authority which the court *a quo* refused to entertain demonstrates the fallacy in the main judgment. Yet the court *a quo* did not engage with the question why another court would prefer the court *a quo*'s conclusion over that by the international law experts sitting as judges in the ICJ and who wrote the *Arrest Warrant* judgment. It is the latter judgment which has been followed throughout the world by domestic courts.

77. The suggestion that "article 27 of the Implementation Act applies"[71] demonstrates the further defects in the court's exercise of its subjective approach to granting leave to appeal. This is because it is objectively quite clear that article 27 forms part of the Rome Statute. It is not part of the Implementation Act. It is the Implementation Act which implements (as its name suggests) the Rome Statute. It is therefore the Implementation Act which applies. Article 27 of the Rome Statute applies to immunity of member States *vis-à-vis* the ICC. It does not apply to Sudan *vis-à-vis* the ICC. Nor to Sudan *vis-à-vis* a South African court.

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[69] Para 8 of the judgment on leave to appeal.
[70] In para 9 of the judgment on leave to appeal the court simply states "[w]e are not of that opinion [i.e. that an appeal would have a reasonable prospect of success] and for the reasons stated in our [main] judgment President Bashir enjoyed no immunity from arrest or from prosecution under customary international law as a head of State."
[71] Para 9 of the judgment on leave to appeal.

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78. It follows that nothing in the judgment on leave to appeal provides a tenable basis for a conclusion that the appeal would be academic (or, for that matter, that there are no reasonable prospects of success). The only suggestion is that President Bashir's departure had this effect. But this reasoning (flawed as it is) does not even apply to the first and most important order: one relating to the Constitution itself. SALC, too, could not at the hearing on leave to appeal explain how the departure-rationale could conceivably explain the mootness of the declaration of constitutional malfeasance. The Court itself had said this "remains relevant"; the "democratic edifice" itself was endangered. While this was expressly pointed out in reply, the judgment on leave to appeal is silent on this.

79. The court *a quo* went further than merely adopting an unwarranted subjective approach to the correctness of its own conclusion. In this process it also eschewed this Court's established approach to mootness under section 16(2)(a)(i) of the 2013 Act.

80. This Court's approach to exercising its discretion to dismiss an academic appeal on mootness alone has been articulated in *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd.*[72] The correct approach is to consider whether the appeal turns on "a discrete legal issue of public importance ... that would affect matters in the future and on which the adjudication of this Court was required". In such cases an appeal is not dismissed on the ground of mootness alone. The present is strikingly just such a case.

81. As this affidavit shows (*inter alia* in section E below), this is demonstrably <u>not</u>, with respect, a matter in which this Court "may" in the proper exercise of its judicial discretion based on its own previous judgments on section 16(2)(a) dismiss an appeal on

[72] 2013 (3) SA 315 (SCA) para 5. For a recent application of this approach see *Legal Aid South Africa v Magidiwana* 2015 (2) SA 568 (SCA) at para 15, upheld by the Constitutional Court in *Legal Aid South Africa v Magidiwana* [2015] ZACC 28.

the ground of mootness alone. Hence it is not a matter "falling within with ambit of section 16(2)(a)" of the 2013 Act. Therefore it is not a matter on which the High Court was precluded from granting leave to appeal under section 17(1)(b) of the 2013 Act.

E. Compelling other reasons exist which warrant an appeal

82. I have already shown that there are real prospects of success and that there is no mootness. In what follows I show that there are yet further compelling reasons which operate as alternative basis for granting leave to appeal and also further confirms that this is not a matter in respect of which the mere departure of President Bashir can bring the appeal "within the ambit of section 16(2)(a)" of the 2013 Act.

83. First, if the main judgment is allowed to stand, it will adversely affect the conduct of South Africa's international relations. South Africa has mediated, and mediates, many disputes in relation to which serving heads of State from time to time are present in this country: the Great Lakes Region, Côte d'Ivoire, Central African Republic and Sudan itself are a few examples. In particular, whether South Africa is in a position to host African events without having to arrest its guests is of pressing practical relevance to Government and of considerable importance to South Africa generally.

84. Second, serving heads of State visit for other reasons too: State visits, funerals, medical visits. It is in the interests of legal certainty that the appeal should be heard in order to obtain clarity on how Government should respond to such visits. This is because the matter raises crucial issues about the inter-relationship between domestic law and international law on immunity and privileges of heads of State. If the main judgment is left to stand as precedent (as SALC itself says it would), it would bring the South African domestic law in conflict with international law as articulated by the ICJ in the

Arrest Warrant case. This means that Government will either find itself before the ICJ for violating a fundamental principle of international law, or before a domestic court in contempt proceedings.

85. Third, a court order compelling the arrest of President Bashir without a warrant is without parallel in this country and in the world. There is no prior instance in known legal history of the arrest of a serving head of State at the instance of the court of another country.

86. Fourth, given the overwhelming public scrutiny and interest in this matter, it is in the interests of justice that this matter receives the attention of our highest courts. It is important, as the court *a quo* held, for the democratic project that Government's compliance with or defiance of the rule of law and the Constitution be placed beyond doubt. Government acted on legal advice in taking the steps it did to bring itself within the ambit of the Immunities Act. It did so in an attempt lawfully to guarantee the immunity of all delegates attending the AU Summit, including President Bashir. While the court *a quo* presented Government's stance as one intent on bending the law, the affidavits bear out that Government was concerned to act within the law. The first order confirms what the main judgment bears out. It is that Government can never act under any provision of the Immunities Act to give effect to the international law position on immunity *ratione personae*. How, then, must Government act within the law? If it arrests serving heads of State (as the court *a quo* required) it will be accountable to the international community, as Belgium was held to be by the ICJ in the *Arrest Warrant* case. Government should be permitted to obtain legal certainty as regards the correct position under South African domestic law.

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87. Fifth, in similar circumstances, the Constitutional Court itself confirmed that the interpretation and application of the Implementation Act has far-reaching consequences for South African authorities in the execution of their constitutional, international and domestic law obligations. This not only confirms the importance of the issues arising in this matter (as the main judgment itself invoked in support of granting the declaratory and mandatory relief). It also demonstrates the appropriate outcome of an application for leave to appeal. As happened on the previous occasion when Fabricius J sat in the court of first instance on the only other occasion when the Implementation Act arose for consideration,[73] leave to appeal was again refused by the court *a quo*.[74] As before an application for special leave to this Court became necessary.

88. On that previous occasion this Court rejected the refusal of leave and itself granted leave to appeal and so did the Constitutional Court subsequently. Both courts of appeal had to reformulate the orders by the court of first instance. And both courts of appeal accepted that the importance of the matter warranted granting leave to appeal. This despite the court *a quo* having evidently been convinced that its orders were immutable. In the event, the orders were held to require correction on appeal both by this Court and the Constitutional Court. And while SALC itself previously opposed the application for leave to appeal to this Court, it abandoned its opposition eventually. It is invited to do the same in the light of its public statement repudiating its argument at the hearing on leave to appeal, and its threat of instituting criminal contempt proceedings.

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[73] The matter culminated in this Court's judgment in *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA) and the Constitutional Court's subsequent judgment in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC).

[74] In suggesting that leave to appeal had previously been granted, Government's heads of argument filed for the hearing on leave to appeal incorrectly attributed a different approach to Fabricius J. The correct position was recorded by this Court in *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA) at para 3: a petition was required, and it succeeded.

B. C M.

F. Conclusion

89. Neither the order to arrest President Bashir nor the declarator of unlawful conduct by the Government is academic. They stand. They have precipitated an impeachment motion against the President. For SALC they stand as an avowed "precedent" it (or others) will enforce. SALC threatens consequential criminal contempt proceedings. And Government's conduct of its international relations is directly affected.

90. Even were either order conceivably now without practical effect, this Court has the power (under section 17 of the 2013 Act) to grant leave by virtue of the continuing importance of the legal issues. They are by their very nature of exceptional importance.

91. There is a reasonable prospect this Court will hold the court *a quo* to have been wrong, in view of the statutory provisions, international law and foreign law outlined above, in directing the arrest of President Bashir and in declaring Government's conduct to have been contrary to law.

92. I accordingly ask that leave to appeal be granted to this Court, and that costs be costs in the appeal.

TERRESA NONKULULEKO SINDANE

I certify that the deponent acknowledged to me that she knows and understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on her conscience; that the deponent thereafter uttered the words, I swear that the contents of this declaration are true, so help me God; and signed this declaration in my presence at Pretoria on this 30th day of September 2015.

S. C. M.
Pretoria

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State can't appeal Al-Bashir ruling – SA High Court

Government can approach Supreme Court of Appeals, but the court isn't obliged hear the case – law professor.

Mike Cohen, Bloomberg | 16 September 2015 12:24

South Africa's High Court rejected a government bid to appeal its earlier order that had aimed to prevent visiting Sudanese President Umar al-Bashir from leaving the country.

The government defied a High Court order by allowing al-Bashir to leave South Africa on June 15 after he attended an African Union summit while the tribunal was considering whether he should be arrested. The International Criminal Court has indicted the Sudanese leader twice for war crimes and genocide.

"We do not hold the opinion that the appeal has reasonable prospects of success at all," Judge Hans Fabricius said in his ruling broadcast by Johannesburg-based eNCA television. "The application for leave to appeal is dismissed with costs."

Al-Bashir, 71, has ruled Sudan for a quarter century since taking power in a military coup. The ICC, based in The Hague, indicted al-Bashir in 2009 and 2010 for his role in atrocities in Sudan's western Darfur region, where insurgents took up arms in 2003. As many as 300,000 people have died in the conflict, mainly from illness and starvation, according to the United Nations.

While South Africa is a signatory to the Rome Statute that established the ICC, the government argued that it couldn't arrest al-Bashir because he was in the country for an event that fell under the AU's jurisdiction.

While the government can approach the Supreme Court of Appeals directly and ask it to hear the case, the court isn't obliged to do so, Pierre de Voss, a law professor at the University of Cape Town, said by phone.

Mthunzi Mhaga, a spokesman for the justice ministry, told eNCA the government would study the judgment before deciding on its next course of action.

Angela Mudukuti, a lawyer at the Southern African Litigation Centre which filed the lawsuit seeking al-Bashir's arrest, said the human rights group would wait to hear whether the government would appeal the ruling before deciding whether to file contempt of court charges against state officials.

"B"

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SALC IN THE NEWS: AL BASHIR RULING DEMONSTRATES THE INDEPENDENCE OF THE JUDICIARY

17 September, 2015

Eye Witness News

The High Court dismissed government's application for leave to appeal a previous order.

PRETORIA – The Southern African Litigation Centre says the latest ruling on Sudanese President Omar al-Bashir demonstrates the independence of the judiciary and its commitment to upholding the rule of law.

Yesterday, the High Court in Pretoria dismissed government's application for leave to appeal an order which found its failure to arrest al-Bashir in June was unlawful and unconstitutional.

Al-Bashir left South Africa after the African Union summit despite a court ordering the state to prevent him from doing so.

The centre's Angela Mudukudi says the court's judgment shows that South Africa's courts are independent.

"I think it paints the judiciary in a very positive light because what we see here is the manifestation of the separation of powers. We see the judiciary making strong judgments, sound in law and unafraid of the government or the powers that be. I think that important for a Constitutional democracy."

The justice department says it's studying the ruling to establish whether its worth petitioning the Supreme Court of Appeal directly.

Yesterday, the centre also said the ruling upheld the correct precedent by re-affirming government's obligations to the International Criminal Court (ICC).

Mudukuti said the ruling made it clear that government had obligations to the ICC.

"We're thrilled with the results. I think it's important that the right precedent has been maintained and the judge has been very clear on that the previous judgment, indicating that South Africa's duty to arrest President al-Bashir, stands."

The Department of Justice's Mthunzi Mhaga said they were disappointed.

"We're of a firm view that the important issues have a bearing on public and international law. However, we will reflect on the judgment and all the issues that have been raised in a view to determine whether the judgement itself is appealable."

Government has until next month to explain to the ICC why it failed to arrest al-Bashir.

ZUMA'S INVITATION

President Jacob Zuma will have to relook his invitation list for the forum for Africa-China co-operation after the High Court in Pretoria re-affirmed the government's obligations to arrest al-Bashir.

Zuma told the media this week that as a member of the forum, Sudan was expected to take part in the meeting scheduled for next month, prompting debate about whether al-Bashir would be returning to South Africa.

Judge Hans Fabricius made it clear that South African law does not trump obligations set out in the Rome Statute.

"President al-Bashir enjoyed no immunity from arrest or from prosecution under customary international law as a serving head of State."

Mudukuti says the government is legally obliged to act.

"There's a standing warrant for his arrest and the judges made it clear that South Africa is obligated to arrest him. Those rulings need to be taken seriously and President Omar al-Bashir should understand that should he come to South Africa he's likely to be arrested."

http://ewn.co.za/2015/09/17/Al-Bashir-ruling-demonstrates-the-independence-of-the-judiciary

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"C"

CASE NO: 27740/15

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

PRETORIA 14 JUNE 2015

BEFORE THE HONOURABLE MR JUSTICE FABRICIUS

In the matter between:

THE SOUTHERN AFRICA LITIGATION CENTRE	APPLICANT
And	
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	1ST RESPONDENT
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2ND RESPONDENT
THE MINISTER OF SAFETY AND SECURITY	3RD RESPONDENT
THE DIRECTOR-GENERAL OF SAFETY AND SECURITY	4TH RESPONDENT
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	5TH RESPONDENT
THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION	6TH RESPONDENT
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	7TH RESPONDENT
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	8TH RESPONDENT
THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATIONS	9TH RESPONDENT
THE DIRECTOR OF THE PRIORITY CRIMES LITIGATION UNIT	10TH RESPONDENT

HAVING HEARD counsel(s) for the party(ies) and having read the documents filed of record

IT IS ORDERED:

THAT an interim order is granted in terms of Prayer 5 which will read as follows:

Having regard to the introduction to these prayers thus compelling Respondents to prevent President Omar Al Bashir from leaving the country until an order is made in this Court.

BY THE COURT

REGISTRAR

"D"

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

"X"

ON 14 JUNE 2015

BEFORE THE HONOURABLE MR JUSTICE FABRICIUS

14/6/15

Case number: 27740/15

In the matter between:

THE SOUTHERN AFRICA LITIGATION CENTRE Applicant

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent

THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

THE MINISTER OF POLICE Third Respondent

THE DIRECTOR-GENERAL OF POLICE Fourth Respondent

THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION Fifth Respondent

THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION Sixth Respondent

MINISTER OF HOME AFFAIRS Seventh Respondent

14/6/15

DIRECTOR GENERAL OF HOME AFFAIRS Eighth Respondent

SOUTH AFRICAN POLICE SERVICE Ninth Respondent

THE NATIONAL DIRECTOR OF PUBLIC PROSECTIONS Tenth Respondent

THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION Eleventh Respondent

THE DIRECTOR OF THE PRIORITY CRIMES LITIGATION UNIT Twelfth Respondent

---

DRAFT ORDER

Having read the papers filed of record and having heard counsel for the parties, an interim order is granted as follows:

1. President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the respondents are directed to take all necessary steps to prevent him from doing so;

2. The eighth respondent, the Director General of Home Affairs is ordered:

   2.1. to effect service of this order on the official in charge of each and every point of entry into, and exit from, the Republic; and

14/6/15

2.2. once he has done so, to provide the applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit;

3. The matter is postponed until 11h30 on Monday 15 June 2015;

4. The respondents are directed to file any answering affidavits by 09h00 on 15 June 2015, the applicant to reply by 10h00.

BY ORDER

REGISTRAR OF THE NORTH GAUTENG
HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
JUDGE'S SECRETARY
14 JUN 2015
REGTERS KLERK
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG
HOË HOF, PRETORIA

"E"

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

Case Number: 27740/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES ~~NO~~.

(3) REVISED.

24 June 2015

DATE SIGNATURE

In the matter between:

THE SOUTHERN AFRICA LITIGATION CENTRE APPLICANT

And

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT 1ST RESPONDENT

THE DIRECTOR-GENERAL OF JUSTICE

C.M.

AND CONSTITUTIONAL DEVELOPMENT	2ND RESPONDENT
THE MINISTER OF POLICE	3RD RESPONDENT
THE COMMISSIONER OF POLICE	4TH RESPONDENT
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	5TH RESPONDENT
THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION	6TH RESPONDENT
THE MINISTER OF HOME AFFAIRS	7TH RESPONDENT
THE DIRECTOR-GENERAL OF HOME AFFAIRS	8TH RESPONDENT
THE NATIONAL COMMISIONER OF THE SOUTH AFRICAN POLICE SERVICE	9TH RESPONDENT
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	10TH RESPONDENT
THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	11TH RESPONDENT
THE DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	12TH RESPONDENT

JUDGMENT

S. C. NG.

The Court

1.

Introduction

This matter involves a consideration of the duties and obligations of South Africa in the context of the *Implementation of the Rome Statute of the International Criminal Court Act, Act 27 of 2002* ("**the *Implementation Act***"). Directly posed, the question is whether a Cabinet Resolution coupled with a Ministerial Notice are capable of suspending this country's duty to arrest a head of state against whom the International Criminal Court (ICC) has issued arrest warrants for war crimes, crimes against humanity and genocide.

2.

The Court Proceedings

On Monday 15 June 2015 this court handed down an order in the following terms:

> "1. THAT the conduct of the Respondents, to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir ("President Bashir"), is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;
>
> 2. THAT the Respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40 (1) (k) of the Criminal Procedure Act, 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;

3. THAT the Applicant is entitled to the costs of the application on a pro-bono basis."

3.

Pursuant to handing down the order referred to above the court undertook to provide its reasons for that order. We hand down these reasons in keeping with that undertaking. We point out however that subsequent to the handing down of the order, we were informed that the President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir ("**President Bashir**"), the central figure in the proceedings, had left South Africa. Nevertheless, it is our view that the order we handed down, as well as this judgment remain relevant in view of the important constitutional and International law principles at stake.

4.

The court's order referred to above was actually a sequel to and a continuation of proceedings which had commenced the day before, Sunday the 14th June 2015. On that day the Applicant launched proceedings in the urgent court seeking the following orders:

"2. Declaring conduct of the Respondents, to the extent that they have failed to prepare to take steps to arrest and/or detain the President of The Republic of Sudan Omar Hassan Ahmad Al Bashir ("President Bashir"), to be inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;

3. Compelling the respondents forthwith to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40 (1) (k) of the *Criminal Procedure Act, 51 of 1977* and detain him, pending a formal request for his surrender from the International Criminal Court; alternatively

4. Compelling the Respondents forthwith to take all reasonable steps to provisionally arrest President Bashir in terms of the ***Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002***;

5. Compelling the Respondents to prevent President Bashir from leaving the country without taking reasonable steps to facilitate his arrest in terms of domestic and international laws.

6. Compelling the Respondents who oppose the application to pay costs jointly and severally, such costs to include the costs of two Counsel..."

5.

On that Sunday morning Adv I. Ellis who appeared for all the Respondents, laid out the basis of Respondents' defence to Fabricius J who was on duty at that stage. The defence propounded was to the effect that the Cabinet had taken a decision to grant President Bashir immunity from arrest, and that this decision "trumped" the government's duty to arrest the President on South African soil in terms of two warrants of arrest issued by the ICC, and its concomitant obligation in terms of the ***Implementation Act***. Adv Ellis requested a three hour adjournment to prepare a complete argument. Fabricius J granted a three hour adjournment, but issued an interim order that in its terms compelled the Respondents to prevent President Bashir from leaving the country until a final order was made in the proceedings. A request to lead oral evidence by a law professor to explain the defence proffered by Adv Ellis was disallowed. The court's attitude to this request then was that it is for the court to decide what the law is, and that the opinion of a witness is in most (but not all) instances inadmissible evidence.

6.

At about 15:00 on the same day Adv Mokhari SC appeared with Adv Ellis and instead of arguing the legal point mentioned earlier, requested time to draft an answering affidavit. Such a request is not easily refused in urgent proceedings depending on the particular facts at issue, Fabricius J, mindful of the fact that

the African Union Summit, which President Bashir was attending, would be in session for the whole of that day and for the entire day on Monday, granted a further adjournment until 11:30 on Monday 15 June 2015, but deemed it necessary to make the following order:

1. "President Omar Al Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the Respondents are directed to take all necessary steps to prevent him from doing so;
2. The Eighth Respondent, the Director General of Home Affairs is ordered:
   2.1 to effect service of this order on the official in charge of each and every point of entry into, and exit from, the Republic; and
   2.2 once he has done so, to provide the Applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit;
3. the matter is postponed until 11:30 on Monday 15 June 2015;
4. the Respondents are directed to file any Answering Affidavits by 09:00 on 15 June 2015, the Applicant to reply by 10:00."

7.

The proceedings were adjourned accordingly. Due to the importance of the matter especially having regard to South Africa's Constitutional and international legal obligations in respect of international crimes that are at issue, the Judge President of this Division took a decision that the application would continue before a Full Court on Monday, i.e. before three Judges, being Mlambo JP, Ledwaba DJP and Fabricius J. The Answering Affidavit was only filed at about 11:25 instead of 9h00 on Monday 15 June 2015, without any explanation being tendered as to why it was late. The lack of an explanation for the lateness is particularly significant as the Answering Affidavit only consisted of 24 typed pages, a supporting affidavit of four pages, and printed annexures of 87 pages. In our experience, all of this could easily have been

produced within a few hours.

8.

In view of the late filing of the Answering Affidavit and the need for the court and the applicant to peruse it, as well as the necessity to file a reply, if any, the proceedings were adjourned until just before 13h00. When adjourning the proceedings at 11h30 and upon resumption thereof the court specifically requested Adv Mokhari SC to provide an indication whether President Bashir was still in the country. This was rendered necessary in the light of media reports, which we took judicial notice of, that suggested that President Bashir was either in the process of flying out or had already left this country. Adv Mokhari SC, specifically disavowing reliance on media reports, stated that his instructions were that President Bashir was still in the country. During the entire hearing Adv Mokhari SC repeatedly re-assured us that President Bashir was still in the country, which fact was necessary for the Court's jurisdiction. As it transpired later that day and after we handed down our order, all these assurances were not correct as President Bashir had, most probably left the country before argument commenced just before 13h00. We return to this aspect later.

9.

The court concluded hearing argument just after 14h30 and handed down the order referred to in para 2 above at about 15:00. It is only then that the court was informed by Adv Mokhari SC that President Bashir had left the country. This, in our view, is a clear violation of the order handed down by Fabricius J on Sunday afternoon. On being apprised of this state of affairs the Court issued an order that the Minister in the Office of the Presidency and the Minister of State Security should file an affidavit within seven days explaining the circumstances under which President Bashir managed to fly out of this country despite the explicit court order prohibiting this, handed down on Sunday 14 June referred to in para 6 above.

10.

The Adoption of the Rome Statute of the International Criminal Court

An understanding of the issues involved in this matter necessitates that we first speak about the ICC and how President Bashir became its fugitive. The ICC came into being when the Statute of the International Criminal Court was adopted in July 1998 by a majority of the states attending the Rome Conference hence the name – Rome Statute. The adoption of the statute and creation of the ICC is properly articulated at para 40 of the judgment of the Supreme Court of Appeal in ***National Commissioner of the South African Police Service vs Southern African Human Rights Litigation Centre 2014 (2) SA 42 (SCA)*** as follows:

> "[40] The Statute of the International Criminal Court was adopted on 17 July 1998 by an overwhelming majority of the states attending the Rome Conference. The Conference was specifically organized to secure agreement on a treaty for the establishment of a permanent international criminal tribunal. After five weeks of intense negotiations, 120 countries voted to adopt the treaty. Only seven countries voted against it..., and 21 abstained. By the 31 December 2000 deadline, 139 states had signed the treaty. The treaty came into force upon 60 ratifications. Sixty-six countries – six more than the threshold needed to establish the court – had ratified the treaty by 11 April 2002.... To date, the Rome Statute has been signed by 139 states and ratified by 117 states. Of those 117 states, a significant proportion – 31 – are African. South Africa is a party to the Statute and has been a vocal endorser of the International Criminal Court. One significant absentee amongst the ratifications is that of the United States.

[42] The Rome Statute's structures of international criminal justice are grounded in the core principle of complementarity. The Statute devises a system of international criminal justice wherein the primary responsibility for the investigation and prosecution of those most responsible for serious violations of international law rests with domestic jurisdictions. In principle, a matter will only be admissible before the ICC where the state party concerned is either unable or unwilling to investigate and prosecute, which operates so as to ensure 'respect for the primary jurisdiction of States' and is based on 'considerations of efficiency and effectiveness'."

11.

A critical obligation of a state party that signed on to and ratified the Rome Statute was the domestication of the provisions of the statute into national law to ensure that such law became compatible with the statute. In the case of South Africa, ratification of the statute was in terms of section 231 of the ***Constitution of the Republic of South Africa, 1996***. It is also in terms of that section of the Constitution that South Africa enacted the ***Implementation Act*** through which the incorporation of the Rome Statute was accomplished. In this regard Article 86 of the Rome Statute provides:

"States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the court [ICC] in its investigation and prosecution of crimes within the jurisdiction of the Court."

In similar vein article 89(1) provides:

"The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request

the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender."

In terms of the ***Implementation Act***, South African authorities are enjoined to cooperate with the ICC, for example, to effect the arrest and provisional arrest of persons suspected of war crimes, genocide and crimes against humanity. These crimes have been specifically created in the South African context in terms of section 4 of the Implementation Act.

12.

During 2009 the ICC issued a warrant for the arrest of President Bashir for war crimes and crimes against humanity. Thereafter and in 2010 the ICC issued a second warrant for the arrest of President Bashir for the crime of genocide. Both warrants were issued pursuant to the situation in Darfur. In the wake of these warrants and relying on Article 59 of the Rome Statute, the ICC requested States Parties to the Statute including South Africa to arrest President Bashir in the event that he came into their jurisdictions. Indeed it is common cause that during 2009, President Bashir was invited by South Africa to attend the inauguration of President Zuma in South Africa. As a result of the 2009 warrant of arrest issued by the ICC and South Africa's obligation to give effect thereto, South African officials confirmed that they would arrest President Bashir should he arrive in the country. For this reason President Bashir declined South Africa's invitation to attend the inauguration.

13.

Background facts relating to the current proceedings

The facts giving rise to the current proceedings are in large measure found in the answering affidavit deposed to by the Director-General: Justice and Constitutional Development who is also the Central Authority as defined in

section 1 of the ***Implementation Act***. She was also authorised by all other Respondents to depose to the Answering Affidavit. She states that on or about January 2015, the Republic of South Africa agreed to host an African Union ("AU") Summit during June 2015; that in order to facilitate the hosting of the AU Summit, the Republic of South Africa was required to enter into an agreement with the Commission of the AU, specifically relating to the material and technical organization of the meetings ("the host agreement") which was concluded on or about 4 June 2015.

14.

The Director General makes reference to the preamble to the host agreement, *inter alia*, which records:

"These Meetings which are provided for in the Constitutive Act of the African Union, the Rules and Procedures of the Assembly, the Executive Council and the Permanent Representatives' Committee as well as in decisions of the African Union policy organs will be held in Pretoria, Republic of South Africa, from 7 – 9 June, and from 10 – 13 June and on 14 – 15 June 2015 in Johannesburg, respectively, at the invitation of the Government; that accordingly, the Commission is charged with the exclusive responsibility of organising, conducting and managing the Meetings, while the Government will, on its part, provide all the necessary facilities and assistance to ensure the success and smooth running of the Meetings."; that although the preamble to the host agreement contains the phrase "at the invitation of the Government", the Republic of South Africa was in no manner whatsoever involved or responsible for extending invitations to any or all of the delegates or attendees of the AU Summit; that the preamble to the host agreement clearly

provides that the Commission of the AU is charged with the exclusive responsibility of organising, conducting and managing the meetings. The Director General states in this regard that the Republic of South Africa merely agreed to host the AU Summit, whilst the Commission of the AU was solely responsible for inviting all the delegates and attendees of the AU Summit".

15.

The Director General proceeds to make out the case that Article VIII of the host agreement specifically provides for privileges and immunities; that Clause 1 of Article VIII records that the Republic of South Africa shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organisations attending the Meetings, the privileges and immunities set forth in Section C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the Organisation of African Unity ("**the OAU Convention**").

16.

The Director General then refers to Section C, Article V (1) (a) and (g) of the OAU Convention, which reads:

> "1. Representatives of Member States to the principal and subsidiary institutions, as well as to the Specialized Commission of the Organization of African Unity, and to conferences convened by the Organization, shall, while exercising their functions and during their travel to and from the place of meetings, be accorded the following privileges and immunities:
>
> (a) Immunity from personal arrest or detention and from any

official interrogation as well as from inspection or seizure of the personal baggage;

...

(g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of the personal baggage) or from excise duties or sales taxes."

17.

The Director General further points out that the aforesaid provisions are contained in the ***Vienna Convention on Diplomatic Relations, 1961 ("the Vienna Convention")***, which she asserts, has the force of law in terms of section 2 of the ***Diplomatic Immunities and Privileges Act 37 of 2001 ("the DIPA")***; that article 29 of the ***Vienna Convention*** specifically provides that the person of a diplomatic agent shall be inviolable, that he shall not be liable to any form of arrest or detention, that the receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity; that accordingly and in order to give effect to the provisions of the host agreement, the Fifth Respondent on 5 June 2015 and in terms of the provisions of section 5(3) of DIPA read with section 231 (4) of the ***Constitution***, published Article VIII of the host agreement under Government Gazette NO 38860 and thereby incorporated the privileges and immunities accorded delegates and attendees of the AU Summit as provided for in the host agreement, as domestic law in South Africa.

18.

She continues to state that she was advised that the provisions of Article VIII

of the host agreement are specific privileges and immunities extended by the AU to all its delegates and attendees of the AU Summit, which the hosting country of an AU Summit, the Republic of South Africa in this instance, is required to uphold. She then contends that the Court is enjoined to take cognizance of the fact that the provisions of the host agreement read with the contents of Government Gazette No 38860 are only effective for the duration of the AU Summit in South Africa, provided that the host agreement specifically provides for its termination two days after conclusion of the AU Summit. She makes the point that by necessary implication, the provisions of Article VIII would cease to be effective after the expiration of the aforesaid period.

19.

The Director General states further that after having agreed to host the AU Summit during June 2015, the Government of South Africa, through the appropriate diplomatic channels received confirmation from the Republic of Sudan that President Bashir would attend the AU Summit, with a concomitant request by that country that President Bashir should be granted the necessary privileges and immunities as provided for in Article VIII of the host agreement; that the Executive Authority of the Republic of South Africa discussed and received the aforesaid request by the Republic of Sudan.

20.

The Director General further states that she was advised that the immunities and privileges referred to in Article VIII of the host agreement (which she says is law in South Africa) prevent the Respondents from arresting President Bashir during the duration of the AU Summit and an additional two days after the conclusion of the AU Summit.

21.

The Director-General of the Presidency and Secretary of Cabinet, Dr. Cassius Reginald Lubisi deposed to a supporting affidavit stating that Cabinet was aware of the invitation from the African Union to President Bashir to attend

the AU Summit and that the President indeed confirmed his attendance. Dr Lubisi also confirms that Cabinet was alive to the fact that the Republic of South Africa is a State Party to the Rome Statute and therefore obliged to give effect to any request by the ICC pertaining to a warrant of arrest; that accordingly and as a result of the two warrants of arrest issued by the ICC and the concomitant hosting of the AU Summit, Cabinet deemed it prudent and necessary to deliberate and discuss the issue on whether the Republic of South Africa was required to arrest President Bashir whilst attending the AU Summit; that during early June 2015 Cabinet requested advice from the Chief State Law Advisor and deliberated on this issue at length; that during the said discussions, Cabinet was apprised of the host agreement with the AU together with the intention of promulgating Article VIII of the host agreement as well as the implications thereof regarding the immunities and privileges enjoyed by President Bashir as head of a member state of the AU; that Cabinet collectively accepted and decided that the South African Government as the hosting country was first and foremost obliged to uphold and protect the inviolability of President Bashir in accordance with the AU terms and conditions and to consequently not arrest him in terms of the ICC arrest warrants whilst attending the AU Summit, and that in addition to the above, Cabinet collectively appreciated and acknowledged that the aforesaid decision could only apply for the duration of the AU Summit.

22.

The assertions made by the Director General and Dr Lubisi formed the essence of the submissions made on behalf of the Respondents by Adv Mokhari SC. The primary basis of the argument being essentially that the promulgation of the notice by the 5th Respondent, which embodied the terms of the host agreement and which, in its terms, made provision for the immunity of heads of AU member states whilst engaged in AU business, provided the requisite reprieve to South Africa not to comply with its ICC obligations of arresting President Bashir during his attendance of the Summit.

23.

S. C.M.

Applicant's Argument:

Against this background, and articles 86, 87 (1) and 89 of the Rome Statute, Ms Goodman argued that where the ICC has made a request for the arrest and surrender of a person within a State party's jurisdiction, the State party must comply with the request. South Africa, by virtue of its enactment of the ***Implementation Act***, is bound by each of those obligations both under international law and at the domestic level. She submitted that in the present context South Africa became liable to arrest and surrender President Bashir as soon as he entered the country. She further submitted that the only basis on which the State Respondents could avoid their obligation to arrest and surrender President Bashir would be if he enjoyed some kind of diplomatic immunity from arrest, or from this Court's jurisdiction.

24.

International Law and the Constitution:

In ***Glenister v The President of the Republic of South Africa and Others 2011 (3) SA 347 at par. 97***, Ngcobo CJenunciated the significance of International Law to the Constitution:

> "Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, In particular international human rights law... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution".

In ***South African Human Rights Centre v National Director of Public Prosecutions and others [2012] 3 All SA 198 (GNP), (Zimbabwe decision),*** this court (per Fabricius J) found that in line with South Africa's duties and obligations as a signatory to the Rome Statute but more importantly arising from the ***Implementation Act***, the South African Police Service was obliged to investigate certain human rights violations committed in Zimbabwe.

25.

This matter was taken on appeal but the Supreme Court of Appeal, in ***National Commissioner of the South African Police Service vs Southern African Human Rights Litigation Centre*** (para 10 *supra*) confirmed the finding made by Fabricius J. In a further appeal to the Constitutional Court, in ***National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another 2014 (12) BCLR 1428 (CC)*** that court strongly asserted South Africa's duties and obligations arising in international law and especially the Rome Statute and the ***Implementation Act***. The Constitutional Court said at par. 23 that the legislation must be interpreted purposely in accordance with international law and referred to s. 231 (4) of the Constitution which provided for the domestication of international law through national legislation.

26.

It must be stated at this juncture that the ***Implementation Act*** as mentioned earlier is such national legislation, and the State is bound to implement it. By way of its enactment, the legislature complied with its obligations as a state party to the Rome Statute to take measures at national level and to ensure national criminal jurisdiction over the crimes set out in the Rome Statute. This is clear from the long title of the Act and the preamble also gives good insight into its motivation. Note should also be taken of ss. 3 (a) and (b) which define the objects of the Act, which mainly are, in the present context, to ensure that anything that is done in terms of this Act conforms with the obligation of the Republic in terms of the Statute. The decisions of the SCA (supra) at par. 43 – 46 and the Constitutional Court (supra) at para 23 are binding legal authority that must be followed when considering disputes regarding the duties of this country arising from international law.

27.

The Constitutional Court decision actually dispels any doubt about the duties of South Africa in line with the ***Implementation Act***. Crimes against humanity are referred to in *Part 2 of Schedule 1* of the ***Implementation Act*** and include those referred to in the first warrant of arrest issued against President Bashir. Another case in point on South Africa's duties in terms of and arising from International law is *S v Okah 2013 JDR 0219 (GSJ)*. In that matter a Nigerian national resident in South Africa was convicted on 13 counts of terrorist acts committed in Warri and Abuja Nigeria by the Gauteng Local Division of the High Court.The prosecution was based on the ***Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004***. This Act had domesticated a number of international instruments and a Security Council resolution aimed at combating, prosecuting and punishing acts of international terrorism. The South African security agencies and prosecution authorities had clearly acted in keeping with South Africa's duties in terms of international instruments in which the country was a party.

28.

Claims to immunity:

Diplomatic immunity is governed, as mentioned by the Director General of Justice and Constitutional Development earlier, under South African law, by the ***Diplomatic Immunities and Privileges Act 37 of 2001 (Immunities Act)***:

28.1 Section 2 of the Immunities Act ratifies and domesticates the 1946 and 1947 United Nations Conventions on Privileges and Immunities, and the 1961 and 1963 Vienna Conventions on Consular and Diplomatic Immunity. The former confer immunity broadly on United Nations staff and officials, and experts or organizations acting on their behalf. The latter confer immunity on consulates and their staff, and diplomatic missions and their staff.

28.2 Section 4 of the Immunities Act recognises that heads of state are immune from civil and criminal jurisdiction to the extent afforded to them under customary international law, or as agreed to between South Africa and the relevant State party, or as are conferred on them

by the Minister of International Relations.

28.3 The remaining sections of the Act afford the Minister of International Relations and Cooperation discretion to confer immunity and privileges on various categories of people.

28.4 The Immunities Act does not domesticate the General Convention on the Privileges and Immunities of the OAU (the OAU Convention). It is therefore not binding in South Africa, and the structures, staff and personnel of the AU consequently do not automatically enjoy privileges and immunity in South Africa.

28.5 However, acting in terms of s 5 (3) of the Immunities Act, the Minister has agreed with the African Union Commission on Material and Technical Organisation (the AU Commission) to grant privileges and immunity to "Members of the Commission and the Staff Members, [and] the delegates and other representatives of Inter-Governmental Organisations" attending the present African Union Summit. That agreement was published in the Government Gazette on 5 June 2015 – just two days before the first AU meetings were due to commence ("the June agreement").

28.6 The only grounds on which President Bashir could conceivably be alleged to enjoy immunity would be as a head of state or in terms of the June agreement. But in fact, neither basis confers immunity on him. Significantly however the notice promulgated by the 5th Respondent makes no reference to section 4 of the Immunities Act.

28.7 The June agreement does not confer immunity on heads of state. President Bashir could thus only claim head of state immunity based on customary international law.

28.8 However, the Rome Statute expressly provides that heads of state do not enjoy immunity under its terms. Similar provisions are expressly included in the Implementation Act. It means that the immunity that might otherwise have attached to President Bashir as head of state is excluded or waived in respect of crimes and obligations under the Rome Statute.

28.9 Indeed, the Pre-Trial Chamber of the ICC has expressly confirmed that "the immunities granted to President Bashir under international law

and attached to his position as Head of State have been implicitly waived by the Security Council", and that South Africa is consequently under an obligation to arrest and surrender him.

28.10 Clearly and as submitted by Adv Goodman, the provisions of the June agreement do not confer any immunities or privileges on President Bashir:

28.10.1 On its terms, that agreement confers immunity on members and staff of the AU Commission, and on delegates and representatives of Inter-Governmental Organisations. It does not confer immunity on Member States or their representatives or delegates.

28.10.2 Congruent with that, the June agreement was concluded under s 5 (3) of the Immunities Act, which provides:

"(3) Any organisation recognised by the Minister for purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7 (2)."

28.10.3 The provision only deals with the conferral of immunity and privileges on an organisation, which is defined in s. 1 of the Immunities Act as "an intergovernmental organisation of which two or more states or governments are members and which the Minister has recognised for the purposes of this Act". It does not deal with, or confer a power to grant immunity on, a head of state, envoy or other representative.

28.11 It follows that the June agreement also does not confer immunity on President Bashir, and cannot serve to exclude this Court's jurisdiction.

28.12 The Immunities Act, at its highest, confers discretion on the Minister to grant immunities and privileges on persons of her choosing. But she must exercise that discretion lawfully, in accordance with South Africa's domestic and international law obligations. She cannot lawfully exercise the discretion where the effect will be to prevent the arrest and

surrender of a person subject to an ICC warrant and request for surrender.

28.13 Nor can the State Respondents rely on the African Union's Convention or decisions to defend the validity of the June agreement. Neither of them can trump South Africa's obligations under the Implementation Act and the Rome Statute, for the following reasons:

28.13.1 The Rome Statute gives effect to international human rights law and enables the prosecution of customary international law crimes. As such, its provisions enjoy pre-eminence in our constitutional regime. Moreover, it has been domestically enacted. Its binding status is clear.

28.13.2 By contrast, the OAU Convention has not been domestically enacted. Despite the Immunities Act having been passed after the adoption of the OAU Convention, it was not ratified. That represents a clear choice by the Legislature not to confer blanket immunity on AU bodies, meetings and officials that attend them.

28.13.3 Decisions of the African Union also cannot trump South Africa's obligations under the Rome Statute. That is because their status in domestic law is persuasive, at best.

29.

The Government Notice of 6 June 2015 issued by the Fifth Respondent in Gazette No. 38860 reads as follows:

"Minute

In accordance with the powers vested in me by section 5 (3) of the diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), I

hereby recognize the "Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organization of the Meetings of the 30th Ordinary Session of the Permanent Representatives Committee from 7 to 9 June 2015; the 27th Ordinary Session of the Executive Council from 10 to 12 June 2015 and the 25th Ordinary Session of the Assembly on 14 to 15 June 2015 in Pretoria (7 and 8 June 2015) and Johannesburg (10 to 15 June 2015), Republic of South Africa" for the purposes of granting the immunities and privileges as provided for in the Agreement between the Government of the Republic of South Africa and the Commission of the African Union as set out in the Notice."

It was issued in terms of the provisions of s 5 (3) of the Immunities Act. It "recognizes" the mentioned Agreement between the Republic and the "Commission of the African Union on the Material and Technical Organization of the Meetings ..."

Section 5 of the Immunities Act reads as follows:

"Immunities and privileges of United Nations, specialised agencies and other international organisations

(1) The Convention on the Privileges and Immunities of the United Nations, 1946, applies to the United Nations and its officials in the Republic.

(2) The Convention on the Privileges and Immunities of the Specialised Agencies, 1947, applies to any specialised agency and its officials in the Republic.

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(3) Any organization recognised by the Minister for the purposes of this section and any official of such organization enjoy such privileges and immunities as may be provided for in any agreement entered into with such organization or as may be conferred on them by virtue of section 7 (2)."

30.

It is clear that neither the Minute, nor s 5 (3) refers to a Head of State. Nor does Article VIII of said Agreement which per clause 1 reads as follows:

"The Government shall accord the Members of the Commission and Staff Members, the delegates and the representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU."

The Agreement is between the Republic and the AU Commission and this is recognised by the said Minute of 5 June 2015. Article VIII does not refer to a Head of State but to Members of the Commission and other Inter-Governmental Organizations. It is also clear from the Preamble to the Agreement that the Commission is charged with the exclusive responsibility of organizing, conducting and managing the meetings. No head of state has this responsibility and no such submission was advanced before us. Furthermore, whilst the Fifth Respondent relied on s 5 (3) of the Immunities Act and issued the Minute in terms thereof, it is clear that s 4 of that Act specifically deals with 'Immunities and Privileges of heads of state, special envoys and certain representatives. It reads as follows:

"Immunities and privileges of heads of state, special envoys and certain representatives

(1) A head of state is immune from criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as –

(a) Heads of state enjoy in accordance with the rules of customary international law;

(b) Are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or

(c) May be conferred on such head of state by virtue of section 7 (2).

(2) A special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as –

(a) A special envoy or representative enjoys in accordance with the rules of customary international law;

(b) Are provided for in any agreement entered into with a state, government or organisation whereby immunities and privileges are conferred upon such special envoy or representative; or

(c) May be conferred on him or her by virtue of section 7 (2).

(3) The Minister must by notice in the Gazette recognize a special envoy or representative for the purposes of subsection (2).

It cannot be argued that Section 5 applies to a Head of State according to the basic principles of interpretation nor can s 4 (1) (a) be used to confer immunity

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on the President, as he does not enjoy immunity in accordance with the rules of customary international law. We have already pointed out above that the 5th Respondent did not rely on this section in any way in her notice.

31.

The Respondents' reliance on these documents is therefore ill-advised and ill-founded. They could not possibly "trump" the international agreement, the Rome Statute *i.e*, and the subsequent ***Implementation Act***. In any event the ***Implementation Act*** enjoys legislative authority, having passed through Parliament, and it cannot be displaced by a notice promulgated by a Minister nor by a Cabinet decision. Finally, the decision of the ICC Pre Trial Chamber ***On the Cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and Surrender to the Court No ICC 02/05-01/09*** dated 9 April 2014 bears mention. The facts in that matter bear a striking resemblance to the facts in the matter we are dealing with. In that matter President Bashir had attended a Common Market for Eastern and Southern Africa (COMESA) meeting hosted by the Democratic Republic of the Congo (DRC) in Kinshasa. The ICC had issued a request to the DRC as a signatory to the Rome Statute to arrest President Bashir. This did not happen as the DRC stated that as a signatory to the Rome Statute on the one hand and a member of the AU on the other, it had been placed in a difficult situation and that time constraints rendered it materially impossible to take a decision to arrest the President especially considering that the President had left the country early in the morning. The DRC had also contended that President Bashir enjoyed certain immunities as a result of his position as Head of a Member State of the AU and further that the AU had decided on 12 October 2013 that no serving Head of State or Government shall be required to appear before any international court or tribunal during their term of office.

32.

The DRC had further argued that the request to arrest and surrender

President Bashir became inconsistent with its obligation to respect the immunities attached to his position as Head of State. The ICC jettisoned this argument on the basis of article 27(2) as providing an exception to the personal immunities of Heads of State and that such immunities did not bar the Court from exercising jurisdiction over such Head of State. As to the alleged difficulty arising because of the Court's assertion of jurisdiction on the one hand and the AU's stance on the other, the Court referred to Security Council Resolution 1593 (2005) as well articles 25 and 103 of the UN Charter. The essence of these provisions boils down to the fact that Members of the UN agree to accept and carry out the decisions of the Security Council. Further that in the event of a conflict in the obligations of members of the UN under the UN Charter and their obligations under any other international agreement their obligations under the Charter would prevail. For these reasons the ICC Pre Trial Chamber dismissed the DRCs reasons for failing to arrest President Bashir. The ineluctable conclusion borne out by this ruling is that the Respondents' argument based on immunities provided for in the host agreement and on AU membership are misguided.

33.

One last important aspect deserves mention: The Respondents' argument was solely founded on the relevant Statutes and legislative documents. Neither in the Answering Affidavits nor during argument, was any question of necessity raised, namely that the government of South Africa was justified in disobeying the order of 14 June 2015, or ignoring its domestic and international obligations in terms of the ***Implementation Act,*** in order to preserve international relations, or relations between AU members. Having regard to the principle of separation of powers between the executive, legislative and judicial arms of the State, it is in any event clear that this Court would not have concerned itself with policy decisions which in their nature fall outside our ambit. As a court we are concerned with the integrity of the rule of law and the administration of justice.

See: ***National Treasury vs Opposition to Urban Tolling Alliance 2012 (6)***

SA 223 CC at par. 63 - 67.

34.

We are further impelled to state that as a court of law we are obviously the wrong forum for the ventilation of regional and international policy considerations, which as we say above, were not ventilated before us. We however find it prudent to invite the ICC to take cognisance of the issues that arise in this matter. As we demonstrate in this judgement, South Africa is not the only Rome statute signatory that has failed to carry out its duties in terms of that statute when it could have done so based on a conflict between its regional affiliation on the one hand and its broader international obligations on the other.

35.

For all the aforegoing reasons the order was granted on 15 June 2015, with all members of the Full Court agreeing.

36.

The departure of President Bashir despite an order prohibiting this.

We dealt with the departure of President Bashir earlier in the face of an order of this court handed down on Sunday 14 June 2015 which prohibited such departure. Perhaps the questions that can be asked about the apparent non-compliance with this court's explicit order of Sunday 14 June are:

36.1 how was it possible that President Bashir would, with his whole entourage, travel from Sandton to Waterkloof Airbase, without any of the Respondents' knowledge?

36.2 how was it possible that the Sudanese plane would take off from the airbase without the Respondents knowing whether the President was on board or not?

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36.3 how would that plane be able to land in Sudan by late afternoon if it had not departed at about noon that same day?

37.

The answers suggest themselves, and without intending to pre-empt the proceedings that may follow once the affidavit this court has ordered is received, it is necessary, in the interests of justice and the rule of law to say the following:

37.1.

The Respondents are quite aware of the provisions of ss 1 and 2 of the Constitution which declare that the State is founded on the supremacy of the Constitution and the rule of law. They are also aware of the constitutional enjoinder that international agreements bind the Republic, especially those that have been ratified (s. 231). They are obviously bound to comply with domestic legislation and obviously the Implementation Act. They must also be aware of s. 165 of the Constitution, which reads as follows:

"165 Judicial Authority

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist

and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

37.2.

At this stage, on a common sense approach, there are clear indications that the order of Sunday 14 June 2015 was not complied with. It is in this reason that we are moved to state that:

A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by Court orders. A Court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by Court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.

38.

In the context of s. 165 of the Constitution of South Africa, the Constitutional Court has also confirmed that principles of the rule of law are indispensible cornerstones of our constitutional democracy.

See: ***Justice Alliance of South Africa v The President of the Republic of South Africa 2011 (5) SA 388*** at par. 40. The emphasis must be on "indispensible". Where the rule of law is undermined by Government it is often done gradually and surreptitiously. Where this occurs in Court proceedings, the Court must fearlessly address this through its judgments, and not hesitate to keep the executive within the law, failing which it would not have complied with its constitutional obligations to administer justice to all persons alike without fear, favour or prejudice.

39.

We stated earlier that the departure of President Bashir form this country before the finalisation of this application and in the full awareness of the explicit order of Sunday 14 June 2015, objectively viewed, demonstrates non-compliance with that order. For this reason we also find it prudent to invite the NDPP to consider whether criminal proceedings are appropriate.

JUDGE D MLAMBO
JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

JUDGE A P. LEDWABA
DEPUTY JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

JUDGE H. J. FABRICIUS
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Case number: 27740/15

Counsel for the Applicant:	Adv I. Goodman
Instructed by: Webber Wentzel Inc Johannesburg	
Counsel for the Respondents:	Adv I. Ellis on 14 June 2015
	Adv Mokhari SC on 15 June 2015
	with Adv I. Ellis
Instructed by: The State Attorney	

Date of Hearing: 14 – 15 June 2015

Date of Judgment: 23 June 2015 at 11:30

" F "

CASE NO: 27740/15

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

PRETORIA 15 JUNE 2015

BEFORE THE HONOURABLE MR JUSTICES MLAMBO JP, LEDWABA DJP AND FABRICIUS J

In the matter between:

THE SOUTHERN AFRICA LITIGATION CENTRE	APPLICANT
And	
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	1ST RESPONDENT
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2ND RESPONDENT
THE MINISTER OF SAFETY AND SECURITY	3RD RESPONDENT
THE DIRECTOR-GENERAL OF SAFETY AND SECURITY	4TH RESPONDENT
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	5TH RESPONDENT
THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION	6TH RESPONDENT
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	7TH RESPONDENT
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	8TH RESPONDENT
THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATIONS	9TH RESPONDENT
THE DIRECTOR OF THE PRIORITY CRIMES LITIGATION UNIT	10TH RESPONDENT

HAVING HEARD counsel(s) for the party(ies) and having read the documents filed of record

IT IS DECLARED AND ORDERED:

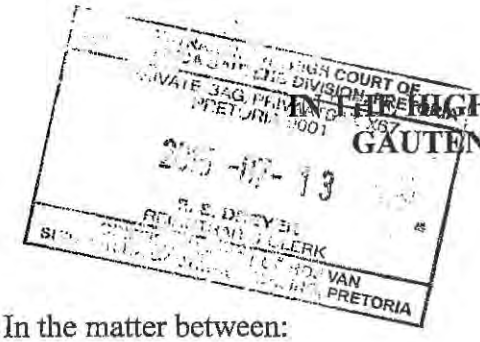
1. THAT the conduct of the Respondents, to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir ("President Bashir"), is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;
2. THAT the Respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40 (1) (k) of the Criminal Procedure Act, 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;
3. THAT the Applicant is entitled to the costs of the application on a pro-bono basis.

BY THE COURT

REGISTRAR

S. C. M.

"G"



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second applicant
MINISTER OF POLICE	Third applicant
COMMISSIONER OF POLICE	Fourth applicant
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fifth applicant
DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION	Sixth applicant
MINISTER OF HOME AFFAIRS	Seventh applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Tenth applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	Eleventh applicant
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	Twelfth applicant

and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

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TAKE NOTICE that the applicants (the first to twelfth respondents in the original application) intend to apply for leave to appeal against the whole of the judgment and all of the orders granted by the Full Bench of this Court (comprising Judge President Mlambo, Deputy Judge President Ledwaba and Mr Justice Fabricius, sitting as a court of first instance) on 24 June 2015.

TAKE NOTICE FURTHER that the application will be made on a date and at a time to be arranged in conjunction with the Registrar and the attorneys for the respondent.

THE APPLICATION is based on the ground that there is a reasonable prospect that another court may reach a different conclusion, for any one or more of the following reasons:

1. The Court erred and misdirected itself in formulating the question for consideration. It is not "whether a Cabinet Resolution coupled with a Ministerial Notice are capable of suspending this country's duty to arrest a head of State" (para 1 of the judgment). It is whether a duty to arrest a serving head of State exists under South African law; and, if so, whether any countervailing duties exist, and how any mutually-inconsistent legal duties are to be resolved.

2. The Court erred and misdirected itself in ordering the arrest of a serving head of another State (para 2.2 of the judgment). The Court should have held that:

   2.1 Sections 4(1) and 6 of the Diplomatic Immunities and Privileges Act 37 of 2001 ("the Immunities Act") precludes this relief, and that there is no provision in the Implementation of the Rome Statute of the International

Criminal Court Act 27 of 2002 ("the Implementation Act") which imposes a legal duty to act contrary to these sections.

2.2 Alternatively to para 2.1 above, the Court should have held that:

2.2.1 the notice published by the Minister in Government Gazette no 38860 ("the ministerial notice") in terms of section 5(3) of the Immunities Act constituted an executive decision under the Immunities Act to confer certain privileges and immunities on persons who fell within the ambit of that notice;

2.2.2 the decision by the Minister was not impugned by the respondent and continued to have legal effect and legal consequences;

2.2.3 to the extent that the decision was not set aside by a court of law, it precluded the relief sought by the respondent given that

2.2.3.1 the decision conferred immunity and privileges on delegates attending the AU Summit; and

2.2.3.2 President Bashir was such a delegate.

3. The Court consequentially erred in granting the application and making a costs award in favour of the respondent (para 2.3 of the judgment). The Court should have dismissed the application and made no costs order.

4. The Court erred in construing the Implementation Act as enjoining, without qualification, South African authorities to cooperate with the ICC to effect the arrest of a person (para 11 of the judgment). The Court should have held that immunity (either *ratione personae* or otherwise granted under domestic law) precludes the endorsement and execution of a warrant.

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5. The Court's recordal of the Director-General of Justice and Constitutional Development as having been advised that the Host Agreement enjoyed legal status in South Africa and that Article VIII of this agreement precluded the arrest (para 20 of the judgment) is inconsistent with the Court's formulation of the question for consideration (as regards which see para 1 above). Having accepted that the answering affidavit constitutes the proper departure point for a judicial evaluation of the current proceedings (para 13 of the judgment), the Court should have held that the question for consideration was not whether a Cabinet resolution or ministerial notice could trump law, but whether the ministerial notice, published under the Immunities Act, was legally valid and had legal consequences until set aside by a Court of law. Alternatively whether the effect the notice intended to create (immunity for a head of State) was otherwise conferred by law. The Court should have answered these questions by applying section 4(1), section 5(3) and section 6(1) of the Immunities Act in favour of the applicants.

6. Whether President Bashir "enjoyed some kind of diplomatic immunity from arrest, or from this Court's jurisdiction" was, the Court recorded (para 23 of the judgment), material to the respondent's argument. This is because the respondent conceded that no obligation to arrest existed in such circumstances. The Court erred by failing to give proper consideration to the effect of this concession. Had it done so, the Court should have held that even if section 5 of the Immunities Act was not properly invoked, section 4 of the same Act nonetheless confers immunity on a serving head of State. The Court should accordingly have held that section 4 of the Immunities Act suspends any duty to arrest, that section 15 of the Immunities Act indeed criminalises

arresting a serving head of State, and that the applicants are thus precluded from arresting a serving head of State. This legal position operates as a matter of national law and is reinforced by international law, the Court should have held. The Court should further have held in this context that because articles 86 and 89 of the Rome Statute are internally qualified (rendering them subject to other provisions of the Statute or to Part 9 of the Statute, respectively), a request by the ICC which would require South Africa to act inconsistently with the immunity of Sudan's President may not be made by the ICC "unless the [ICC] can first obtain the cooperation of [Sudan] for the waiver of the immunity" (article 98(1) of the Rome Statute).

7. The Court erred by failing to interpret the Implementation Act "in accordance with international law", as it correctly held the Constitutional Court's judgment in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* requires (para 25 of the judgment). International law recognises the inviolability of serving heads of State, and the Court should have given effect to this recognition.

8. The Court erred by effectively equating jurisdiction and the duty to arrest (para 27 of the judgment). The Court should have held that the former is a necessary requirement for the latter, but not a sufficient requirement, in that immunity *ratione personae* excludes both the power and the duty to arrest. The Court further erred by invoking as authority for its ruling the judgments in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* and *S v Okah* when neither judgment deals with the immunity of a head of State. Had the

Court applied the correct principles, it would have held – as the International Court of Justice has confirmed – that jurisdiction does not eliminate immunity.

9. The Court erred by incorrectly replicating the relevant part of section 4 of the Immunities Act (para 28.2 of the judgment). Had the Court correctly reproduced the text of section 4(1) of the Immunities Act, it would not have construed the immunity to which President Bashir is entitled as being subject to either "the June agreement" or customary international law (paras 28.6 and 28.7 of the judgment; repeated in para 30 of the judgment). Instead, the Court would have held that immunity exists as a matter of domestic law, as provided for in the first clause of section 4(1) of the Immunities Act. In that event the Court would not have concluded that immunity attaching to a serving head of State "is excluded or waived in respect of crime and obligations under the Rome Statute" (para 28.8 of the judgment). The Court erred, moreover in reaching this conclusion when it is inconsistent with article 98 of the Rome Statute itself. The Court should have held that article 98 expressly gives effect to immunity. The Court furthermore erred in finding that immunity was waived. Had it applied the correct legal position, it would have held that only a sending State may waive immunity. The Court moreover erred as regards the facts. Had the Court considered the facts correctly, it would have held that Sudan had expressly invoked immunity in respect of its head of State (para 3.2 of Dr Lubisi's supporting affidavit).

10. The Court erred in seeking support for its finding of waiver in the ruling by the Pre-Trial Chamber of the ICC (para 28.9 of the judgment). The Pre-Trial Chamber construed an implicit waiver by the Security Council of head of State immunity of President Bashir. The Court should have found that neither the Security Council's

decision nor the Pre-Trial Chamber's judgment forms part of South African law, whereas section 8 of the Immunities Act does. The Court should have taken into account that section 8(3) provides that "waiver [of immunities] must always be express and in writing", and that section 8(2) contemplates that a waiver must be effected by the State "in question".

11. The Court erred in holding that "[t]he Immunities Act, at its highest, confers [a] discretion on the Minister to grant immunities and privileges of her choosing" (para 28.12 of the judgment). The Court should have held that the Immunities Act, at its lowest, confers immunity on a head of State, and that no discretion to disregard this immunity exists.

12. The Court erred in attributing "pre-eminence" to the Rome Statute (para 28.13.1 of the judgment). The Court should have held that immunity subsists even in the context of international human rights law and customary international law crimes, as the International Court of Justice has held. The Court should therefore have applied the Immunities Act.

13. The Court erred by finding support for its conclusion on immunity in the ICC Pre-Trial Chamber judgment in *On the Cooperation of the DRC regarding Omar Al Bashir's arrest and Surrender* (paras 31-32 of the judgment). The Court should have held – as the ICC Pre-Trial Chamber itself did in that judgment – that article 27(2) of the Rome Statute deals with the ICC "exercising its jurisdiction", not with immunity before a domestic court. The Court further erred by failing to consider that the judgment it invoked itself sought "to make clear that it is not disputed that under

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international law a sitting head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court" (para 25 of the Pre-Trial Chamber's judgment). The Court further erred by failing to reflect in its reasoning that the ICC Pre-Trial judgment itself accepted that the application of "article 27(2) of the Statute should, in principle, be confined to those State Parties wh[ich] have accepted it" (para 26 of the Pre-Trial Chamber's judgment).

14 The Court erred in ordering that the respondents should prepare to arrest President Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act, 51 of 1977. The Court ought to have held that:

14.1 The peremptory requirements laid down in the Implementation Act for the valid endorsement and execution of the warrant were not met;

14.2 Alternatively, in terms of section 9(3) of the Implementation Act there is no unqualified duty under South African law to enforce a warrant.

15. The Court in any event failed to consider the application of section 172(1)(b) of the Constitution as to whether it was just and equitable to order the arrest of President Bashir in the circumstances of the matter.

16. The Court erred and misdirected itself by permitting its impression that the applicants had failed to comply with the interim order to enter its judgment and affect its orders. The Court misdirected itself by making factual assumptions based on media reports of which the Court purportedly took judicial notice (para 8 of the judgment). The Court

erred by failing to ensure that it did not "pre-empt" any enquiry as regards the applicants' compliance with the interim order – despite having identified the risk of pre-emption (para 37 of the judgment). Instead, the Court proceeded to find "clear indications that the order of Sunday 14 June 2015 was not complied with" (para 37.2 of the judgment) and that the departure of President Bashir "objectively viewed, demonstrates non-compliance with that order" (para 39 of the judgment). The Court should have awaited the filing of the explanatory affidavit before making any such finding. Furthermore, these findings fail to consider that the respondent itself recognised that "the [applicants] will, as a practical reality, need a number of hours or perhaps even days to carry out the arrest" (para 50 of the founding affidavit).

TAKE FURTHER NOTICE that it will be contended that the Supreme Court of Appeal is the appropriate court to hear the appeal, for the following reasons:

(a) The court of first instance consisted of more than one judge. In such circumstances section 16(1)(a)(ii) of the Supreme Court Act 10 of 2013 provides for an appeal to the Supreme Court of Appeal. Moreover and in any event, the matter involves exclusive questions of law warranting an appeal to the Supreme Court of Appeal.

(b) The interpretation and application of the legal instruments of international and domestic law raise particularly important questions of law, and the issues involved continue to apply generally and have practical effect to matters beyond the present case. This was – with respect, correctly – recognised in paragraph 3 ("this judgment remains relevant in view of the important constitutional and international law principles at stake") and paragraph 7 ("the importance of the matter especially having regard to South Africa's constitutional and international legal obligations" warranted

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constituting a Full Bench comprising the Judge President, the Deputy Judge President and a senior High Court judge) of this Court's judgment.

(c) The administration of justice requires – both generally and in this particular case – that the matter be considered by the Supreme Court of Appeal, because

(i) the Republic of South Africa's legal position in respect of executing an arrest warrant issued by the ICC is *res nova*;

(ii) it requires consideration by a court of appeal which is, unlike the court of first instance, afforded an opportunity to deliberate on the matter without the severe time-constraints operating *a quo*, after hearing full argument, and after analysing all the relevant authorities – a number of which were not cited before the court *a quo* and are not considered in its judgment;

(iii) Government's legal obligations under domestic and international law are a matter of wide public interest both in South Africa and beyond, hence an authoritative interpretation and application of South African domestic law is of fundamental importance for South Africa's international relations with *inter alia* other States, the African Union, the United Nations and the International Criminal Court – the latter two of which may themselves require or benefit from an authoritative interpretation of South African law (as para 34 of this Court's judgment recognises); and

(iv) especially in the urgent circumstances in which the matter was adjudicated, it is in the interests of justice that these issues be considered by the Supreme Court of Appeal before the Constitutional Court may be in a proper position to considers the issues fully and definitively.

(d) The same course was followed – with apparent approval by all courts concerned – in a comparable previous matter progressing from this Court under NGHC case

no. 77150/2009 to the Supreme Court of Appeal under case no. 485/2012, and reaching the Constitutional Court under case no. 02/2014: *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre.* The evident benefit of the appeal process via the Supreme Court of Appeal is demonstrated by this Court's judgment (at para 10), quoting dicta from the Supreme Court of Appeal's judgment.

DATED AT PRETORIA ON THIS 13TH DAY OF JULY 2015

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SERVICE BY E-MAIL AS PER ARRANGEMENT

"H"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 27740/2015

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

15/9/15

SIGNATURE DATE

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	1ST APPLICANT
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2ND APPLICANT
THE MINISTER OF POLICE	3RD APPLICANT
THE COMMISSIONER OF POLICE	4TH APPLICANT
THE MINISTER OF INTERNATIONAL	

RELATIONS AND COOPERATION	5TH APPLICANT
THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION	6TH APPLICANT
THE MINISTER OF HOME AFFAIRS	7TH APPLICANT
THE DIRECTOR-GENERAL OF HOME AFFAIRS	8TH APPLICANT
THE NATIONAL COMMISIONER OF THE SOUTH AFRICAN POLICE SERVICE	9TH APPLICANT
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	10TH APPLICANT
THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	11TH APPLICANT
THE DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	12TH APPLICANT (RESPONDENTS *A QUO*)

And

THE SOUTHERN AFRICA LITIGATION CENTRE	RESPONDENT (APPLICANT A QUO)

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

The Court

1.

The Applicants herein filed an application for leave to appeal identifying 16 respects in which our judgment of 24 June 2015 was reasonably liable to a different conclusion by another Court, as it was put. Before the hearing we were provided with detailed Heads of Argument, which we gratefully received and considered.

2.

It is clear from Applicants' written argument that the grounds of appeal overlap in a number of instances. In other respects they deal with our reasoning and contend that it was erroneous in certain instances. The essence of this reasoning is that we erred by finding that a Cabinet Resolution coupled with a notice issued by the 7th Respondent did not trump the provisions of the *Implementation of the Rome Statute*

of the International Criminal Court Act 2002[1] (***the Implementation Act***). It will be recalled that the notice was issued in terms of the *Diplomatic Immunities and Privileges Act*[2] (***the Immunities Act***) and it was sought thereby to immunise any delegate attending the African Union summit in this country from arrest. The reasoning advanced by the applicants boils down to a conclusion that this country was under no obligation to effect the warrant of arrest against President Bashir during his visit to this country.

3.

We do not intend to traverse these grounds again, inasmuch as all relevant issues were fully dealt with in our judgment. There is no point in merely repeating or confirming them again. It must however also be remembered that an appeal is solely aimed at an order of a Court, and not its reasoning.

4.

With those remarks as background, we deem it prudent to first discuss the legal

[1] Act 27 of 2002
[2] Act 37 of 2001

framework within which we should consider the application before us. Our view is that the issues raised in the application at hand, are best decided with reference to ***s. 16 and 17 of the Superior Courts Act***[3] (the Act). Section 17 deals specifically with applications for leave to appeal and of relevance to us is subsection (1) which provides –

> "(a) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
>
> (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

In turn Section 16 (2) (a) provides –

> "(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed

[3] Act 10 of 2013

on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

5.

Section 16 (2) (a) has to do with matters where the practical effect of the appeal sought to be pursued features. This is an issue raised squarely by the respondent. Mr Trengrove SC for the respondent, whose Heads of Argument we also gratefully received and studied, submitted that because President Bashir had left South Africa, the issues between the parties had become academic and that any order by the Supreme Court of Appeal, the court to which leave to appeal is sought, would have no practical effect or result. It is prudent to dispose of this issue at the outset.

6.

Section 17 (1) (b) is clear that we should not grant leave to appeal should we be of the opinion that the appeal will have no practical effect (See section 16 (2) (a)). The argument made by the respondent is that "*The order under appeal directed the applicants to arrest and surrender President Bashir to the International Criminal Court, for*

prosecution for various alleged international crimes. It was sought and granted on the basis that President Bashir was in South Africa, and consequently subject to the jurisdiction of the South African courts and capable of arrest by South African authorities." The argument is further that the order was not given effect to as President Bashir had left the country and that the appeal will have no practical effect whether it succeeds or fails. Mr Gauntlett SC, for the applicants, argues that section 16 (2) (a) does not apply *in casu*. The argument is that the appeal will indeed have practical effect as it will deal with the issue whether a sitting head of state enjoys immunity under international law and South African law or is subject to arrest in this country, which will affect future international events in this country. The second basis advanced by Mr Gauntlett SC is that this court retains the discretion in the same manner as the court of appeal to which leave is sought, to entertain an appeal even though the appeal will have no practical effect between the parties. The argument in this regard is that the matter at hand raises important questions of public international law arising from the interpretation of the Implementation and Immunities Acts. On this basis Mr Gauntlett SC urged us to exercise the discretion and grant leave.

7.

Our courts have on numerous occasions stated that a matter is moot "if it no longer presents an existing or live controversy requiring resolution, which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law"[4]. In *Janse van Rensburg NO & Another v Minister of Trade & Industry &another NNO*[5] the Constitutional Court stated – "This Court has held that an issue is moot if it does not present an existing or live controversy; such an issue is not justiciable." The facts before us are clear that there is no longer any live controversy between the parties. We are further of the opinion that the appeal will therefore have no practical effect between the parties. For this reason this application must fail on the basis of section 17 (1) (b) of the Act. As we show in the following paragraph we can find no merit in Mr Gauntlett SC's argument that section 16 (2) (a) is not applicable to this matter.

8.

Mr Gauntlet SC has argued as stated earlier that the matter raises important questions of public law. This argument is based on a reading of section 17 (1) (a)

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[4] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)] at footnote 18

[5] 2001 (1) SA 29 (CC) par 9; See also JT Publishing (Pty) Ltd v Minister of Safety & Security 1997 (3) SA 514 (CC) par 15

B. C. M.

referred to above. In the first place we do not hold the opinion that the appeal has reasonable prospects of success at all. The traditional approach which our courts have followed in the past when confronted with applications of this nature is to determine whether there is a reasonable prospect that another court may come to a different conclusion[6]. This approach has been altered by the Act as we show hereunder.

9

Section 17 (1) (a) (i) provides that leave to appeal may only (our emphasis) be given where the Court concerned is of the opinion that the appeal would have a reasonable prospect of success. We are not of that opinion and for the reasons stated in our judgment President Bashir enjoyed no immunity from arrest or from prosecution under customary international law as a serving Head of State. The essence of the case made out by the applicants is that South Africa's duty to arrest President Bashir in terms of the Implementation Act simply takes a back seat even when a known fugitive Head of State, of the International Criminal Court is in the

[6] See Commissioner of Inland Revenue v Tuck1989 (4) SA 888 (T) at 890B

country. The high water mark of this argument boils down to the following - that when domesticating the **Rome Statute** through the ***Implementation Act***, this country's legislature deliberately created a situation relegating South Africa's obligations in terms thereof in favour of the ***Immunities Act***. We have not been directed to such provision. In our view, had this been the intention it would have been expressly provided as the ***Immunities Act*** was already in operation when the ***Implementation Act*** was promulgated. Our view is that it is clear that the provisions of the ***Implementation Act*** prevail over the rules of customary international law imported by the ***Immunities Act***, and are subservient to it. **Article 27 of the *Implementation Act*** applies and is clear in its terms. It expressly excludes head of State immunity from jurisdiction and from prosecution. Article 27 provides -

"Irrelevance of official capacity

(1) This statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official, shall in no case exempt a person from criminal responsibility under this statute, nor shall it in, and of itself, constitute a

ground for reduction of sentence.

(2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person."

10.

Also, the Constitutional Court has conclusively decided in ***National Commissioner of the South African Police Service vs South African Human Rights Litigation Centre***[7] that the South African Government is bound by the provisions of the ***Implementation Act***, and must implement its provisions. It has enacted this domestic legislation and is obviously bound by it.

11.

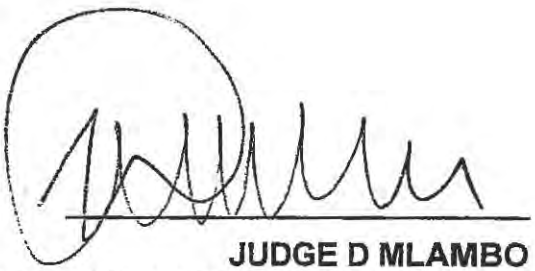
One further aspect deserves mention herein. Mr Gauntlett SC submitted that even if we were of the view that the matter was moot, and also doubted that there were prospects of success on appeal, we were entitled, by the exercise of our discretion,

[7] 2015 (1) SA 315 CC

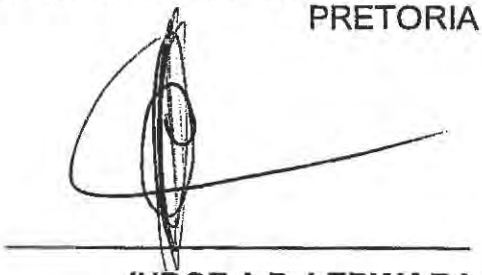
to nevertheless grant leave, having regard to the importance of the matter and its precedent-setting effect. We do not agree. Nothing contained in the provisions of s. 16 and 17 of the Act grants us such discretion as contended by Mr Gauntlett SC. To the contrary: section 17 (1) specifically prohibits the exercise of any discretion in this context and clearly states when, and only when, leave to appeal may be granted.

12.

Accordingly the application for leave to appeal is dismissed with costs, including costs of two Counsel.



JUDGE D MLAMBO
JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA



JUDGE A P. LEDWABA
DEPUTY JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

JUDGE H. J. FABRICIUS
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

S. C. M.

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case no.
HC case no. 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second applicant
MINISTER OF POLICE	Third applicant
COMMISSIONER OF POLICE	Fourth applicant
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fifth applicant
DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	Sixth applicant
MINISTER OF HOME AFFAIRS	Seventh applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Tenth applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	Eleventh applicant
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	Twelfth applicant

and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

CONFIRMATORY AFFIDAVIT

S. C. M.

I, the undersigned,

JAKOBUS MEIER

do hereby make oath and state as follows:

1. I am an attorney of the High Court of South Africa, employed in the office of the State Attorney, Pretoria at SALU Building, 316 Thabo Sehume Street, Pretoria. I am the attorney of record representing the applicants. I have acted in this capacity throughout the proceedings giving rise to this application.

2. The facts to which I depose are within my own knowledge, or derived from documents under my control. They are true and correct.

3. I have been present at the proceedings to which reference is made in the founding affidavit of Terresa Nonkululeko Sindane. I have read the founding affidavit and confirm its contents, particularly all facts regarding the proceedings *a quo*.

4. As will be apparent from the founding affidavit, it attaches *inter alia* the judgment by the court *a quo* dismissing the application for leave to appeal. The judgment comprises annexure "H" to the founding affidavit. The order dismissing leave to appeal is recorded in the final paragraph of annexure "H".

5. I have attended on 29 September 2015 at the general office of the court *a quo* to enquire as regards the existence of an executed version of this order. I

have been informed that because the order is reflected in the judgment which had already been handed down, a separate order does not exist. It is for this reason impossible to append as separate annexure a copy of this order. As noted, the order made by the court *a quo* is incorporated in the last paragraph of its judgment on leave to appeal, already attached as annexure "H" to the founding affidavit.

JAKOBUS MEIER

I certify that the deponent acknowledged to me that he knows and understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on his conscience; that the deponent thereafter uttered the words, I swear that the contents of this declaration are true, so help me God; and signed this declaration in my presence at PRETORIA on this 30th day of SEPTEMBER 2015.

SOUTH AFRICAN POLICE SERVICE
VISPO 1
2015 -09- 30
PRETORIA CENTRAL
SOUTH AFRICAN POLICE SERVICE

COMMISSIONER OF OATHS

Full names:
Designation:
Area: