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

Case number: 27740/2015

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Applicant
AND ELEVEN OTHERS	Second to Twelfth Applicant
and	
SOUTHERN AFRICA LITIGATION CENTRE	Respondent

RESPONDENT'S HEADS ON LEAVE TO APPEAL

INTRODUCTION

1. The applicants apply for leave to appeal to the Supreme Court of Appeal against the order of the full bench of this court, granted on 15 June 2015, as follows:

> "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 Climinal Procedure Act, 51 oi 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."[1]

2. The respondent, SALC, opposes the application for leave on the basis that the applicants have no prospects of success on appeal. The matter has become moot and, in any event, order of the court, and the findings on which it was based, were properly made.

MOOTNESS

3. The order under appeal directed the applicants to arrest and surrender President Bashir to the International Criminal Court (*the ICC*), for prosecution for various alleged international crimes. It was sought and granted on the basis that President Bashir was in South Africa, and

---

[1] The order is recorded in para 2 of the judgment of 24 June 2015.

consequently subject to the jurisdiction of the South African courts and capable of arrest by South African authorities.

4. However, President Bashir left South Africa before the High Court's order could be given effect to. There is no reason to believe that he will return.

5. It means that the decision sought on appeal will have no practical effect or result for the parties. Whether the appeal succeeds or is dismissed, the result will be the same. President Bashir cannot and will not be arrested and surrendered to the ICC by South Africa.

6. Nor does the appeal raise questions of public importance that will affect matters in future.[2] There are currently no other serving heads of State against whom the ICC has pending arrest warrants or requests for surrender. Even if there were, there is no reason to believe that South Africa will invite or receive them into the Republic, or that they would come even if South Africa were willing to do so. Any claim that similar legal questions might arise in the future is speculative and unlikely to materialise.[3]

7. The matter is therefore moot and an appeal would be of academic interest only. Leave to appeal should be refused in those circumstances since:

> "Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to

---

2 A court may decide to determine an issue that is moot if it will benefit the larger public or achieve legal certainty: see Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another 2005 (4) SA 319 (CC) para 22; Van Wyk v Unitas Hospital and Another 2008 (2) SA 472 (CC) para 29.

3 A speculative claim that a legal question will arise again is not sufficient to warrant an appeal being heard in the public interest: see, for example, Ethekwini Municipality and Others v Combined Transport Services (Pty) Ltd and Others [2010] ZASCA 158 (1 December 2010) paras 11-18.

> pronounce upon abstract questions, or to advise upon differing contentions, however important."[4]

8. We submit that leave to appeal should be refused on the basis of mootness alone.

NO PROSPECTS OF SUCCESS

9. We also submit that there is no realistic prospect of the SCA overturning the High Court's order on appeal. The findings underpinning that order were plainly correct. The South African authorities were under a duty, in South African and international law, to arrest President Bashir.

The constitutional significance of international law

10. As the majority of the Constitutional Court recognised in **Glenister 2**,[5] the Constitution provides for international law to play a role in South African law in four distinct ways. First, it requires courts interpreting the Bill of Rights to consider international law in doing so.[6] Second, it provides for international agreements to bind the Republic if they are approved by Parliament, and to become law in the Republic if they are enacted into law by national

---

4 Geldenhuys and Neethling v Beuthin 1918 AD 426 at 441, quoted with approval in, for example, Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others 2013 (3) SA 315 (SCA) para 5 and Deutsches Altersheim Zu Pretoria v Dohmen and Others [2015] ZASCA (5 March 2015) para 4. The same principle has been endorsed by the Constitutional Court in, for example, National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) fn 18; Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another 2005 (4) SA 319 (CC) para 41.

5 Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) para 179.

6 Section 39(1)(b) of the Constitution

legislation.[7] Third, it provides that customary international law is *"law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*".[8] Finally, it provides that when interpreting legislation, every court must prefer a reasonable interpretation that is consistent with international law over any alternative interpretation that is not.[9]

11. International law thus enjoys protected status in our law. The majority in **Glenister 2** described it as follows:

> "our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the State's conduct in fulfilling its obligations in relation to the Bill of Rights."[10]

---

7 Section 231 provides:

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

88 Section 232 of the Constitution

9 Section 233

10 Glenister 2, para 178

12. South Africa is a signatory to and has ratified the Rome Statute of the International Criminal Court (*the Rome Statute*). Its obligations under that convention must be determined in light of these constitutional provisions.

The purpose of the ICC Act

13. The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (*the ICC Act*) gives domestic effect to the Rome Statute, and ensures its effective implementation.

14. This is clear from the following provisions:

    14.1. The long title of the ICC Act states unequivocally that it is designed to implement the Rome Statute in South Africa.

    14.2. The preamble to the Act describes the purpose of the ICC Act as being:

> "To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for cooperation by South Africa with the said Court; and to provide for matters connected therewith.

14.3. Section 3 of the ICC Act sets out its objects. They include creating a framework to ensure that the Rome Statute is effectively implemented in South Africa,[11] ensuring that anything done in terms of the ICC Act conforms with South Africa's obligations under the Rome Statute,[12] and enabling South Africa to cooperate with the ICC in the investigation and prosecution of people accused of committing international crimes in the event that the national prosecuting authority declines or is unable to contemplate such accused persons itself.[13] Section 3(e) expressly anticipates that such assistance may include enabling the ICC to make requests for assistance[14] and providing mechanisms, in South Africa, for the surrender to the ICC of persons within South Africa accused of having committed an international crime.[15]

14.4. Section 2(a) enjoins any South African court hearing a matter arising from the application of the ICC Act to consider and, where appropriate, apply conventional international law, particularly the Rome Statute.

15. It is clear that the ICC Act was enacted to give effect domestically to what the Rome Statute requires of South Africa as a State party. The question is then what obligations the Rome Statute itself imposes.

---

11 Section 3(a)

12 Section 3(b)

13 Section 3(e)

14 Section 3(3)(i)

15 Section 3(e)(ii).

South Africa's obligations under the Rome Statute

16. The Rome Statute established the ICC, and conferred jurisdiction on it to investigate and prosecute war crimes, crimes against humanity and genocide.[16]

17. Various provisions of the Rome Statute are designed to ensure that the ICC can effectively fulfil that role.

18. Article 27 of the Rome Statute provides for the prosecution by the ICC of state officials, including serving heads of state, by excluding any immunity from jurisdiction and criminal prosecution that they might otherwise have enjoyed. It provides:

> 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."

19. The Pre-Trial Chamber of the ICC may, on the request of the prosecutor, issue an arrest warrant against any person who it determines there are reasonable grounds to believe has committed a crime within the jurisdiction of the ICC and whose arrest is necessary, among others, to ensure his appearance at trial.[17] Once an arrest warrant has been issued, the ICC

---

16 Article 1 of the Rome Statute

17 Article 58(1)

may request the provisional arrest or the arrest and surrender of that person to the ICC by State parties.[18] A State party that receives a request for provisional arrest or arrest and surrender is obliged immediately to take steps to arrest the person in question, in accordance with its own laws and the procedures laid down in Part 9 of the Rome Statute.[19]

20. Similarly, the ICC is empowered to make requests to State parties for cooperation.[20] State parties are enjoined to comply with any request for cooperation made by the ICC. Where a State Party fails to do so and thereby prevents the ICC from exercising the functions and powers conferred on its by the Rome Statue, the ICC may make a finding against it and refer the matter to the assembly of parties or the Security Council (where the matter in question was referred to the ICC by the Security Council).[21]

21. The ICC may also request the arrest and surrender of any person by any State Party on whose territory that person is to be found, and request the cooperation by the State Party in the arrest and surrender of that person. State Parties have a duty to comply with requests for arrest and surrender in accordance with procedures provided under their national law.[22]

22. State Parties are obliged to cooperate fully with the ICC in its investigation and prosecution of international crimes,[23] and to ensure that there are

---

18 Article 58(5)
19 Article 59(1)
20 Article 87(1)
21 Article 87(7)
22 Article 89(1)
23 Article 86

procedures available under their national law for all forms of cooperation specified by the Rome Statute.[24]

23. In the present case, the ICC issued two warrants for Bashir's arrest. The first, issued in 2009, charged President Bashir with seven counts of war crimes and crimes against humanity.[25] The second, issued in July 2010, accuses him of three counts of genocide.[26] It also transmitted a request for the cooperation and for the arrest and surrender of President Bashir to all State parties, including South Africa.[27] Under international law, South Africa was bound to comply with, and give effect to, that request.

The ICC Act gives effect to these international obligations

24. The ICC Act gives domestic effect to each of the obligations imposed by the Rome Statute, and renders them domestically enforceable.

25. Section 2(a) of the ICC Act provides that any competent South African court hearing a matter arising out of the application of that Act must consider and, where appropriate apply, the Rome Statute.

26. Section 4(2)(a) of the ICC Act provides that serving heads of State, among others, have no immunity domestically from criminal prosecution, "*despite any other law to the contrary, including customary and conventional international law*". On its own terms, the provision prevails over any provision that may otherwise confer immunity on heads of State. It is

---

24 Article 88

25 FA para 15; annexure KRK9

26 FA para 16; KRK10

27 FA para 23

clearly designed to align with the requirements of article 27 of the Rome Statute.

27. Once a head of State lacks immunity from criminal prosecution for international crimes in South Africa, it must follow that he also enjoys no immunity from the jurisdiction of domestic courts. In any event, s 4(3) expressly provides for South African courts to have jurisdiction over any person accused of an international crime if that person "*after the commission of the crime, is present in the territory of the Republic*".[28]

28. As required by the Rome Statute, the ICC Act enacts a series of procedures to give effect to requests for cooperation by the ICC:

    28.1. Section 8(1) requires that any request for arrest and surrender of a particular person received from the ICC must be referred to the Central Authority (that is, the Director General of the Justice and Constitutional Development) who must immediately on receipt, forward the request and accompany documents to a magistrate.[29] In turn, the magistrate must endorse the warrant of arrest for execution in any part of the Republic.[30] The endorsed warrant must be in the form and executed in a manner as near as possible to that prescribed for arrest warrants under the national laws relating to criminal procedure.[31]

    28.2. In terms of s 10, a person who is detained under a warrant of arrest with a view to surrender to the ICC must be brought before a

---

28 Section 4(3)(c)

29 Section 8(1) of the ICC Act

30 Section 8(2)

31 Section 9(3)

magistrate within 48 hours.[32] The magistrate must hold an inquiry to ensure that the arrest warrant applies to the person in question,[33] that he was arrested in accordance with the procedures imposed by domestic law[34] and that his constitutional rights have been respected if and to the extent applicable.[35] If the magistrate is satisfied that each of these requirements has been met and that the person is liable for surrender to the ICC for prosecution, then she is obliged to order that he be surrendered to the ICC and committed to prison pending such surrender.[36]

29. Each of these provisions is framed in mandatory terms. The Director General may not refuse to apply for the endorsement of the arrest warrant. (There is, in the present case, no suggestion on the papers that she failed to do so.) A magistrate has only a very limited discretion to refuse to endorse a warrant or to order the surrender of an accused person, on the grounds enumerated in the ICC Act.

30. But crucially, s 10(9) unequivocally provides that a person cannot escape arrest and surrender on the basis that he is a serving head of State. It states:

> (9) The fact that the person to be surrendered is a person contemplated in section 4 (2)(*a*) or (*b*) does not constitute a ground for refusing to issue an order contemplated in subsection (5).

---

32 Section 10(1)

33 Section 10(1)(a)

34 Section 10(1)(b)

35 Section 10(1)(c)

36 Section 10(5)

In light of that provision, there can be no suggestion of any discretion on the part of the applicants to refuse to arrest and surrender an accused person merely on account on his status as a serving head of State.

31. It follows that the South African authorities were under a duty to procure the arrest and surrender President Bashir as soon as he entered South Africa. That obligation flows both from the requirements of the ICC Act, and from South Africa's international obligations under the Rome Statute. Their failure to do so violates the rule of law.

THE IMMUNITIES ACT

32. In the notice of appeal, the applicants invoke s 4, s 5(3) and s 6 of the Diplomatic Immunities and Privileges Act 37 of 2001 (*the Immunities Act*) to claim that President Bashir enjoyed immunity from arrest while in South Africa.[37]

33. We submit that the provisions of the ICC Act that exclude immunity prevail over those of the Immunities Act that might otherwise provide for it. That is so for three reasons. First, as outlined above, s 4(2) of the ICC Act expressly excludes immunity for serving heads of State "*despite any other law to the contrary*". On its terms, it trumps any contrary enactment. Second, the ICC Act is the more specific and later legislation. Its provisions supercede the more general sections of the earlier Immunities Act.[38]

---

[37] In their answering affidavit in the High Court, they only rely on s 5(3) (see AA p 7 para 3.11) and s 4 (see AA pp 9-10 paras 3.18) of the Immunities Act.

[38] It is a general principle of interpretation that a general provision must yield to a more specific provision. See, for example, Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal,

Finally, if the Immunities Act were allowed to prevail over the ICC Act, South Africa would be allowed to breach its obligations under the Rome Statute. Such interpretation would be inconsistent with the constitutional requirement to prefer a legislation interpretation that gives effect to international obligations over one that does not.[39]

34. We therefore submit that resort to the Immunities Act cannot assist the applicants. It does not apply in the context of this case.

35. However even if the Immunities Act could competently be invoked (which is denied), its provisions did not afford President Bashir any immunity. We address why that is so by examining each of the sections relied on by the applicants.

1996, 1996 (4) SA 1098 (CC) para 28. In general, a later enactment will apply in preference to the earlier one. The SCA has described the position as follows in Mankayi v Anglogold Ashanti Ltd 2010 (2) SA 137 (SCA) paras 39-40:

> "It is a general principle that where a later statute is irreconcilable with an earlier one, the latter must be regarded as having been impliedly repealed. However, the position may be different where the later statute is general, and the earlier one special. In such a case the earlier special statute remains in force. This presumption of construction is referred to as *generalia specialibus non derogant*, and it was contended that the appellant's interpretation of s 35(1) of COIDA accorded with it. But the maxim does not always find application, 'and the cardinal question is whether the legislature intended that its later general Act should alter its own earlier special enactment'. It was submitted that, because s 35(1) of COIDA did not repeal s 100(2) of ODIMWA expressly, it could not be construed as repealing or amending the latter section implicitly, so that it remained applicable. Section 100(2) of ODIMWA, however, does not give an employee a common-law right to claim damages from his employer. The question is not whether s 35(1) of COIDA impliedly repealed s 100(2) of ODIMWA, but whether s 35(1) of COIDA abrogated the common-law cause of action of employees who have a claim under ODIMWA.
>
> As I have said, the provisions of ODIMWA apply not specifically to 'employees', but to those persons performing 'risk work' in mines. COIDA is of more general application, applying to all 'employees'. Section 35(1) of COIDA was intended to protect all employers against common-law liability. In this sense it was 'meant to cover, without exception, the whole field or subject to which it relates', refuting the presumption created by the maxim *generalia specialibus non derogant*."

39 Section 233 of the Constitution

36. At the outset, we point out that each of those sections relates to immunities that arise in different circumstances. Section 4 deals with the immunity enjoyed by heads of State. Section 6 is concerned with the immunity that attaches to representatives, officials and heads of state participating in international conferences or meetings. Section 5 deals with the conferral of immunity on organisations. The provisions – and the immunities they confer – are distinct from one another.

Section 4

37. Section 4 provides:

> **Immunities and privileges of heads of state, special envoys and certain representatives.**—(1) A head of state is immune from the 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).

38. Section 7(2) provides:

> "The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*."

39. Section 4 thus confers immunity on heads of state to the extent provided under customary international law, by agreement between States, or by notice in the Gazette.

No agreement or notice

40. The applicants' answering affidavit does not suggest that South Africa concluded an agreement with Sudan to confer immunity on Bashir – nor has any agreement been put up. In terms of s 7(1) of the Immunity Act, any agreement to confer immunity must be recorded in writing and published in the Gazette.

41. Nor has any immunity been granted and notice published in terms of s 4(1)(c) of the Immunities Act. The only Notice conferring immunity was, on its terms, published in terms of s 5(3) of the Immunities Act. We return to its significance below.

42. It means that only s 4(1)(a) – the grant of immunity under customary international law – could possibly apply.

Immunity under customary international law

43. Under customary international law, serving heads of State enjoy immunity from the jurisdiction of domestic courts and immunity from arrest and prosecution in foreign States. That protection flows from the act of state doctrine, which demands that States respect one another's sovereignty and

allow their representatives to carry out their functions without fear of arrest or embarrassment.[40]

44. However, customary international law does not preclude the arrest, by South African authorities, of a serving head of State indicted for prosecution by the ICC. That is so for a number of reasons:

44.1. First, the immunity conferred by customary international law applies only to the extent that it is not excluded by statute. The ICC Act provides both that a domestic court has jurisdiction over a person accused of international crimes whilst they are in the Republic, and that their status as head of State will afford them no immunity from prosecution. Those provisions prevail over the rules of customary international law imported by the Immunities Act (which was enacted before the ICC Act and is thus subservient to it).

44.2. Similarly, a rule of customary international law may be overridden by the provision of a treaty. Article 27 of the Rome Statute, which expressly excludes head of State immunity from jurisdiction and from prosecution, thus applies.

44.3. It means that the prevailing statutory and treaty regime remove the any immunity from jurisdiction and from prosecution that Bashir might have enjoyed under customary international law (and consequently under s 4(1)(a) of the Immunities Act).

---

[40] See, for example, Case concerning the arrest warrant of 11 April 2000: Democratic Republic of Congo v Belgium, judgment of International Court of Justice, 14 February 2002 (Arrest Warrant case), paras 51, 54

44.4. But even if that were not so, customary international law has historically drawn a distinction between prosecution in domestic State tribunals and in international tribunals. Customary international law affords serving heads of State (among others) immunity from the jurisdiction of and prosecution in the former, but not the latter. As the International Court of Justice held in the 2002 **Arrest Warrant case**:

> "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal court, where they have jurisdiction. Examples include . . . the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar theCourt from exercising its jurisdiction over such person".[41]

Put differently, there is no rule of customary international law that affords serving heads of State immunity from surrender to, and prosecution by, an international tribunal for the commission of international crimes.[42] The ICC has expressly endorsed that finding.[43] Its findings on the scope of its jurisdiction are binding on State parties, including South Africa.[44]

44.5. But even if that were not so, the Security Council's referral of the Darfur conflict to the ICC for investigation included, in paragraph 2,

---

41 Arrest Warrant case, para 61

42 See also Prosecutor v Omar Hassan Ahmad Al Bashir, judgment of the Pre-Trial Chamber I of the ICC, 13 December 2011 (the Malawi case), paras 33-36

43 Ibid.

44 Article 119(2) of the Rome Statute

> a binding call on State parties to the Rome Statute to cooperate fully with the ICC and to provide any necessary assistance to it and its prosecutor.[45] That amounted to a waiver, under international law, of any immunity that an official might otherwise have enjoyed in relation to that conflict.[46]

45. It means that Bashir enjoys no immunity from jurisdiction or from prosecution, under customary international law, as a serving head of State. He consequently does not have immunity under s 4(1)(a) of the Immunities Act either.

Section 5(3)

46. The applicants expressly rely on s 5(3) as the source of the immunity granted in the Notice published in Government Gazette 38860 on 5 June 2015.[47] That appears both from the face of the Notice – in which the Minister of International Relations and Cooperation states that the Notice was published *"in accordance with the powers vested in [her] by section*

---

45 Paragraph 2 of Security Council resolution 1593 of 31 March 2005 states:

> "The Security Council
>
> . . .
>
> Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully".

46 Prosecutor v Omar Hassan Ahmad Al Bashir, judgment of the Pre-Trial Chamber II of the ICC, 13 June 2015 (annexure KRK16), para 9. See also Prosecutor v Omar Hassan Ahmad Al Bashir, judgment of the Pre-Trial Chamber II of the ICC, 9 April 2014 (the Congo case), para 29.

47 The Notice is annexure KRK15 to the SFA and annexure D to the AA.

5(3) of the Diplomatic Immunities and Privileges Act, 2001" – and from their answering affidavit filed in the High Court.[48]

47. Section 5(3) of the Immunities Act deals with the conferral of immunities only on organizations and their officials. It provides:

> "Any organisation recognised by the Minister for the 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)."

48. An "*organisation"* is defined in s 1 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*".

49. Section 5(3) thus provides for the conferral of immunities on organizations and their officials. It does not provide for immunity to be granted to heads of State (which is dealt with in s 4 of the Immunities Act) or State representatives attending an international conference or meeting (which is dealt with in s 6).

50. Congruent with that, an agreement in the present case was concluded between South Africa and the Commission of the African Union, which specifically provided for immunity from jurisdiction and arrest for the officials and staff of the AU and other organisations.[49] Article VIII of that Agreement afforded:

> "the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organisations attending the Meetings [of 7 to 15 June 2015]

---

48 AA p 7 para 3.11

49 Annexure A to the answering affidavit

> 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".

51. Paragraph 1 of the Notice published in the Government Gazette is in the same terms.

52. On a plain reading of article VII of the Agreement and paragraph 1 of the Notice, immunity was granted to:

    52.1. members of the Commission of the African Union;

    52.2. staff members of the Commission of the African Union;

    52.3. delegates of Inter-Governmental Organisations; and

    52.4. other representatives of Inter-Governmental Organisations.

53. Neither the Agreement nor the Notice conferred immunity on State delegates or State representatives. It means that the Agreement and the Notice do not confer immunity on heads of States. They did not need to because heads of State attending the AU meetings would ordinarily enjoy immunity from jurisdiction and prosecution under customary international law, and consequently under s 4(1)(a) of the Immunities Act. But as already discussed, those immunities do not avail President Bashir.

54. It follows that President Bashir did not enjoy immunity under s 5(3) of the Immunities Act.

Section 6

55. Section 6 of the Immunities Act deals with immunities and privileges conferred on delegates attending certain international conferences or meetings. It states:

> **6. Immunities and privileges pertaining to international conferences or meetings convened in Republic.**— (1) The officials and experts of the United Nations, of any specialised agency and of any organisation, and representatives of any state, participating in an international conference or meeting convened in the Republic enjoy for the duration of the conference or meeting such privileges and immunities as—
>
> (a) are specifically provided for in the Convention on the Privileges and Immunities of the United Nations, 1946, or the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, as the case may be, in respect of the participation in conferences and meetings;
>
> (b) are specifically provided for in any agreement entered into for this purpose; or
>
> (c) may be conferred on any of them by virtue of section 7(2).
>
> (2) The Minister must by notice in the Gazette recognise a specific conference or meeting for the purposes of subsection (1)."

56. Section 6(1)(a) provides for immunity automatically to be conferred on officials, experts and state representatives attending a conference or meeting organized by the United Nations and its related agencies, or by consular and diplomatic missions. These are the representatives that enjoy privileges and immunities under the Convention on the Privileges and Immunities of the United Nations, 1946, or the Convention on the Privileges and Immunities of the Specialised Agencies, 1947. President Bashir does

not qualify for immunity under either of those conventions, and therefore does not enjoy immunity under s 6(1)(a) of the Immunities Act either.

57. Nor was he conferred immunity in terms of either s 6(1)(b) or (c). No agreement or notice has been made or published under either of those provisions of the Immunities Act. As we have indicated, the only relevant Notice was, on its terms, published in terms of s 5(3). There is nothing in the Notice or in the applicants' answering papers to suggest that the Notice was also intended to confer the immunities provided for in s 6 of the Immunities Act.[50]

58. We therefore submit that President Bashir did not qualify for immunity under the Immunities Act at all.

Alternatively, the Agreement and Notice are invalid

59. If the Agreement and the Notice had conferred privileges and immunities on President Bashir, then they would have been unlawful and invalid to that extent.[51] That is because the Minister of International Cooperation and Development does not have the power to amend or override the provisions of the ICC Act through subordinate legislation.[52]

---

50 See, by analogy, Minister of Education v Harris 2001 (11) BCLR 1157 (CC) paras 16-18

51 SFA para 9

52 Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) paras 51-52; 62

60. The respondent, SALC, sought an order declaring them invalid and setting them aside to that extent, both in its supplementary founding affidavit[53] and in argument.[54]

Summation

61. For the reasons set out above, Bashir did not enjoy any immunity from jurisdiction or from prosecution under the Immunities Act or in terms of the Agreement or the Notice. Domestic law did not afford him any immunities as a sitting head of State.

62. That has the following implications for the applicants' grounds of appeal:[55]

    62.1. First, because no immunities were conferred on President Bashir under the ICC Act, no waiver of immunity was necessary at the domestic level – either in writing or at all. Section 8 finds no application in the context of this case.

    62.2. Similarly, s 15 of the Immunities Act did not apply. It would not have been an offence for SALC or any of the applicants to obtain or execute legal process against him.

    62.3. Moreover, article 98 of the Rome Statute is irrelevant to the present case. It states:

> *"1. The Court may not proceed with a request for surrender or assistance which would require the*

---

53 SFA para 9

54 Heads of argument, paras 21-24

55 See Notice of appeal, paras 6, 8 and 9

> *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.*
>
> *2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."*

62.4. Complying with the ICC's request for arrest and surrender of President Bashir did not require South Africa to contravene any of international law obligations. The jurisdictional prerequisites for the application of article 98 were consequently not met.

62.5. In any event, article 98 goes to the validity of the ICC's request for surrender and arrest. The validity of the ICC's request for the arrest and surrender of President Bashir has never been put in dispute.

63. The applicants' reliance on these provisions in their notice of appeal is therefore misplaced.

REMEDY

64. Finally, the applicants seek leave to appeal the remedy granted by the High Court, on the basis that the court purportedly failed to consider whether it

was just and equitable to order the arrest of President Bashir[56] and instead "*permitt[ed] its impression that the applicants had failed to comply with the interim order to enter its judgment and affect its orders"*.[57]

65. We submit that leave to appeal could not be granted merely to allow an appeal court to enquire into the correctness of the relief granted by the High Court. Remedies are crafted on the facts of the particular case. The question of what constituted appropriate relief in this case has plainly become academic.

66. But in any event, this ground of appeal could not prevail. This application concerned the unlawful and unconstitutional failure by the South African authorities to arrest and surrender President Bashir. Once the High Court determined that the applicants were under such obligation, it was enjoined to order them to comply with and fulfil it. It had no discretionary power to authorise them to avoid their statutory and international law duties. Such a discretion is anathema to the rule of law.

67. Moreover, it is not true that this Court's order was affected by its *prima facie* view that the applicants had breached its interim order. It could not have been. The Court had not yet been informed that Bashir had left the country when it granted its final order in the matter. That information was furnished in open court, immediately after the order had been handed down.

---

56 Notice of appeal, para 15

57 Notice of appeal, para 16

CONCLUSION

68. For all these reasons, it is submitted that the proposed appeal has no prospects of success. Leave to appeal should consequently be refused.

Wim Trengove C

Isabel Goodman

Chambers, Sandton

12 August 2015

TABLE OF AUTHORITIES

Deutsches Altersheim Zu Pretoria v Dohmen and Others [2015] ZASCA (5 March 2015)

Ethekwini Municipality and Others v Combined Transport Services (Pty) Ltd and Others [2010] ZASCA 158 (1 December 2010)

Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996, 1996 (4) SA 1098 (CC)

Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC)

Geldenhuys and Neethling v Beuthin 1918 AD 426

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)

Mankayi v Anglogold Ashanti Ltd 2010 (2) SA 137 (SCA)

Minister of Education v Harris 2001 (11) BCLR 1157 (CC)

National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)

Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others 2013 (3) SA 315 (SCA)

Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another 2005 (4) SA 319 (CC)

Van Wyk v Unitas Hospital and Another 2008 (2) SA 472 (CC)

International Cases

Case concerning the arrest warrant of 11 April 2000: Democratic Republic of Congo v Belgium, International Court of Justice, 14 February 2002 (the Arrest Warrant case)

Prosecutor v Omar Hassan Ahmad Al Bashir, judgment of the Pre-Trial Chamber of the ICC, 13 December 2011 (the Malawi case)

Prosecutor v Omar Hassan Ahmad Al Bashir, judgment of the Pre-Trial Chamber II of the ICC, 9 April 2014 (the Congo case)

Prosecutor v Omar Hassan Ahmad Al Bashir, judgment of the Pre-Trial Chamber II of the ICC, 13 June 2015 (the South Africa case)