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

Case Number: 27740/2015

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 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

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:

▪ 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

- 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;

1 the matter is postponed until 11:30 on Monday 15 June 2015;

2 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:

- Immunity from personal arrest or detention and from any official interrogation as well as from inspection or seizure of the personal baggage;

…

- 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. 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 5 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**

- The Convention on the Privileges and Immunities of the United Nations, 1946, applies to the United Nations and its officials in the Republic.
- The Convention on the Privileges and Immunities of the Specialised Agencies, 1947, applies to any specialised agency and its officials in the Republic.
- 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

- A head of state is immune from criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as –
- Heads of state enjoy in accordance with the rules of customary international law;
- 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
- May be conferred on such head of state by virtue of section 7 (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 special envoy or representative enjoys in accordance with the rules of customary international law;
- 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
- May be conferred on him or her by virtue of section 7 (2).
- 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 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?

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 from 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.

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JUDGE D MLAMBO
JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH

COURT, PRETORIA

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

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

Case number: 27740/15

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Date of Hearing: 14 – 15 June 2015
Date of Judgment: 23 June 2015 at 11:30