IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

Case No.: 58755/2017

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
GABRIELLA ENGELS	Fourth Respondent
and	
THE TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST	First Amicus Curiae
THE COMMISSION FOR GENDER EQUALITY	Second Amicus Curiae
FREEDOM UNDER LAW	Third Amicus Curiae

HEADS OF ARGUMENT ON BEHALF OF THE FIRST AMICUS CURIAE: THE WOMEN'S LEGAL CENTRE TRUST

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INTRODUCTION

1. At the core of this matter lies questions as to the legality and lawfulness of the exercise of State power, a fundamental aspect of which relates to the rights of women and the State's obligations in protecting and enforcing those rights.

2. On 19 August 2017 the First Respondent ("**the Minister**") "decided to confer immunities" on Grace Mugabe ("**the impugned decision**").[1] The Women's Legal Centre Trust ("**the WLC**") submits that in so doing, the Minister acted unlawfully and/or irrationally.

3. We submit that in assessing the lawfulness and rationality of the impugned decision, this Court must determine:

   3.1. First, the legal basis on which the Minister conferred immunities on Grace Mugabe. On the evidence, it is alleged that in terms of international law, Grace Mugabe enjoys spousal immunity, by virtue of derivative immunity which has been recognised in international law; and in so far as was necessary and acting in terms of section 7(2) of the Diplomatic Immunities and Privileges Act No 37 of 2001 ("**DIPA**"), the Minister conferred such immunity.[2]

   3.2. Second, whether in having taken the impugned decision the Minister committed a reviewable irregularity.

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[1] AA; Vol. 2; M9; page 117.

[2] AA; Vol. 1; page 85; par 28.

4. In summary, the WLC's position in this litigation is as follows:

4.1. First, the Minister's reliance on both customary international law and section 7(2) of DIPO was confused and tainted the resultant decision. Simply put, the Minister was duty-bound to clearly identify the source of her power and to demonstrate compliance with the requisite criteria in invoking that power.

4.2. Second, section 7(2) of DIPO did not afford the Minister the *vires* to grant spousal immunity. The Minister had specifically sought legal advice on this issue from the Office of the Chief Law Advisor; she obtained such legal advice which was to the effect that inter section 7(2) of DIPO did not grant her the *vires* to take the impugned decision. This notwithstanding and in the absence of having identified any flaws in the reasoning of the Office of the Chief Law Advisor, in this matter, the Minister makes no disclosure of the advice that she received and persists in her reliance on section 7(2) of DIPO.

4.3. Third, the Minister may only rely on international law as the source of her *vires* for the impugned decision if either an international agreement or international customary law (as provided for in section 232 of the Constitution), empowered her to grant spousal immunity. To date, the Minister did not rely on international agreement; she placed reliance on international customary law. The Minister's *vires* must accordingly be approached on that basis.

4.4. Fourth, on the Minister's own version there was no definitive customary international law position in respect of spousal immunity; hence the Minister's reference to it "seems to be state practice". In addition, we advance further submissions as to why the Minister is simply wrong in her reliance on spousal immunity being part of international customary law.

4.5. Fifth and in any event, if contrary to our primary submission that spousal immunity does not form part of customary international law, this Court was to find otherwise, then we submit that at best if spousal immunity can be recognised under South African law only to the extent that it is consistent with the Constitution; this, of necessity requires the imposition of certain qualifications and limitations.

4.6. Finally, if notwithstanding all of the aforementioned arguments, this Court was to find that the Minister was entitled to rely on spousal immunity, then we submit that the Minister failed to have proper regard to the constitutional rights of women and the fundamental constitutional imperative of accountability in her application of the principle of spousal immunity.

5. Prior to addressing each of these issues in turn, we provide an overview of the relevant facts in brief, followed by the guiding constitutional and international law provisions that ought to inform this Court's adjudication of the matter.

6. We submit that the rights of women feature at two levels in this matter:

6.1. First, it is central to the question of whether spousal immunity forms part of customary international law in terms of section 232 of the Constitution.

6.2. Second, it is central to the Minister's consideration of whether spousal immunity finds application on the facts of this matter.

THE RELEVANT FACTS

7. The facts giving rise to the subject challenge may be broadly summarised as follows:

7.1. Grace Mugabe is the wife of former President Robert Mugabe of Zimbabwe.[3]

7.2. Grace Mugabe entered South Africa in or about August 2017.[4]

7.3. It is alleged that on 13 August 2017, at the Capital 20 West Hotel in Sandton, Johannesburg, Grace Mugabe assaulted three young South African women with an electrical extension cable; one of these women (Ms Engels) laid charges with the South African Police Services ("**SAPS**").[5]

[3] FA; Vol.1; page 12; par 26.1.

[4] FA; Vol.1; page 12; par 26.2.

[5] FA; Vol.1; page 13; par 26.4.

7.4. While it is common cause that Grace Mugabe left South Africa via the Waterkloof Airbase and returned to Zimbabwe, there is a dispute between the parties as to whether this was unlawful or not.[6]

7.5. The Minister made the impugned decision on 19 August 2017, granting Grace Mugabe diplomatic immunity in South Africa.[7]

THE STATE'S CONSTITUTIONAL OBLIGATIONS

8. We submit that South Africa's constitutional obligations ought to have guided the Minister and that at each stage of analysis, the constitutional rights and obligations at issue assume centre stage. It is that issue that we now turn to.

9. We submit that recognising Grace Mugabe's immunity from the criminal jurisdiction of the South African courts for an alleged assault to cause grievous bodily harm is inconsistent with the following provisions of the Constitution:

9.1. Section 9(1) and 9(2): Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. Section 9 finds application on the facts of this matter in that the effect of the spousal immunity, as applied by the Minister is that the vindication of a complainant's rights, irrespective of how egregious the harm is that she sustained, ultimately depends on whether the alleged perpetrator is deserving of immunity or not. Such an approach, we submit, is "whimsical", "arbitrary" and serves

[6] FA; Vol.1; page 13; par 26.7. AA; Vol.1; page 92; par 67.4.

[7] FA; Vol.1; page 13; par 26.8.

no legitimate government objective. Simply put, immunity will always be favoured in the interests of diplomatic relations; this notwithstanding the impact thereof on the constitutional rights of the complainant. By contrast, a person who is harmed by another person, who is not subject to immunity, is in a fundamentally different position. In **Sarrahwitz v Maritz NO** 2015 (4) SA 491 (CC) the Constitutional Court found that:

9.1.1. Differentiation is the centrepiece of the equality jurisprudence, including our constitutional right to equality.[8]

9.1.2. Mere differentiation requires of the state to act rationally at all times and not in an arbitrary or whimsical way. State action must always be designed to advance a legitimate governmental purpose in consonance with the rule of law and the very essence of constitutionalism. This attribute of equality compels the state to regulate its affairs in a rational and justifiable manner; it speaks to the core business of the state, which is equal treatment of its citizens and the pursuit of what redounds to the common good of all. [9]

9.1.3. A differentiation between people or classes of people will fall foul of the constitutional standard of equality, if it does not have a legitimate purpose advanced to validate it. If the legislation under attack lacks that rational connection, then it

[8] At par 51.

[9] At par 51.

violates the right to equal protection and benefit of the law as a result of the uneven conferment of benefits or imposition of burdens by the legislative scheme without a rational basis. This, according to the Constitutional Court:

> "would be an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, inasmuch as it breaches the rational differentiation standard set by s 9(1) thereof."

9.2. Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected. In **Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others** 2000 (3) SA 936 (CC) the Constitutional Court held:

> "[35] The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."

9.3. Section 12(1)(c): Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources and not to be treated or punished in a cruel, inhuman or degrading way.

9.4. Section 12(2)(b): Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.

9.5. In **Law Society of SA v Minister for Transport** 2011 (1) SA 400 (CC), the Constitutional Court held:

> "[58] … Section 12(1) of the Constitution is directed at protecting the physical integrity of a person. In its terms, everyone has the right to 'security of the person'. It is clear from s 12(1)(c) that the protection includes the right 'to be free from all forms of violence from either public or private sources'. It seems correct, as some commentators suggest, that the right is engaged whenever there is an 'immediate threat to life or physical security' deriving from any source.
>
> [59] Section 12(1)(c) does not have an obvious equivalent in international conventions. Some commentators suggest that this right is an innovation in our Bill of Rights. Woolman et al suggest that s 12(1)(c) draws its inspiration from article 5 of the Convention on the Elimination of all forms of Racial Discrimination (CERD). CERD imposes both negative and positive duties on State parties. The negative obligation entails protecting people from 'violence or bodily harm whether inflicted by government officials or by any individual, group or institution'.
>
> Affirmative obligations require state parties to prohibit, punish and discourage violence. These positive obligations require both legislative and executive action to combat violence. It must be explained that, although the Convention is directed at racially motivated violence, s 12(1)(c) of the Constitution aims to put a stop to all forms of violence that inevitably would violate the security of a person. Section 12(1)(c) too, requires the State to protect individuals, both negatively by refraining from such invasion itself, and positively by restraining or discouraging its

functionaries or officials and private individuals from such invasion."

9.6. Section 34: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

9.7. Section 7(2) imposes a duty on the State to "respect, protect, promote and fulfil" the rights in the Bill of Rights. This obligation accordingly applies to all of the rights in the Bill of Rights. The State's obligations under section 7 includes both a positive obligation to take steps to respect, promote and fulfil the rights[10] and a negative obligation not to cause or perpetrate violence[11].

10. There are several specific aspects of the State's obligations in relation to constitutional rights that are now well-entrenched in our constitutional jurisprudence. By way of example:

10.1. The State is obliged "directly to protect the right of everyone to be free from private or domestic violence";[12]

[10] S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC) at para 11; Christian Education SA v Minister of Education 2000 (4) SA 757 (CC) at para 47; Carmichele v Minister of Safety and Security 2001(4) SA 938 (CC) at paras 44 to 45; Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at para 20.

[11] K v Minister of Safety and Security 2005 (6) SA 419 (CC)

[12] Baloyi 2000 at para 11.

10.2. The State is obliged to "take appropriate steps to reduce violence in public and private life";[13]

10.3. The State is obliged in certain circumstances "to provide appropriate protection to everyone through laws and structures designed to afford such protection" which may imply "a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual".[14]

11. The WLC Trust submits that the State has a heightened constitutional obligation to ensure the prosecution of sexual offences against women and girl children. This, we submit, arises from the very high levels of violence against women, South Africa's international obligations to protect women and the constitutional principle of accountability.

12. The Constitutional Court in **F v Minister of Safety & Security & another (Institute for Security Studies & others as *amici curiae*) [2012] JOL 28228 (CC)** at par 57 stressed that the State bears the primary responsibility to protect women and children against the prevalent plague of violent crime.

13. The Constitutional Court has expressly recognised the way in which the criminal justice system and in particular the prosecution of criminal offences by the

[13] Christian Education at para 47.

[14] Carmichele at paras 44 to 45, citing with approval, Osman v United Kingdom 29 EHHR 245 at 305, para 115.

National Prosecuting Agency give effect to constitutional rights. The Court has held:

13.1. There is a "constitutional duty on the State to initiate criminal proceedings."[15]

13.2. The power to prosecute "enables the State to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens".[16]

13.3. Effective prosecution of crime is an important constitutional objective.

13.4. The constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework.[17]

14. In **S v Basson 2005 (1) SA 171 (CC)** at par 31 the Constitutional Court explained:

> "In our constitutional state the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The state must protect these rights through, amongst other things, the policing and prosecution of crime."

[15] S v Basson 2007 (1) SACR 566 (CC) at para 144.

[16] National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and another [2014] JOL 32401 (GP) at para 13.

[17] S v Basson 2005 (1) SA 171 (CC) at para 32.

15. The effect of spousal immunity as identified and applied by the Minister is that it sacrifices a range of constitutional rights of a complainant, irrespective of how heinous the alleged crime is or how serious its impact on the complainant is in that the alleged perpetrator is not in any way whatsoever held accountable for alleged criminal action, simply by virtue of the immunity afforded to such person.

SOUTH AFRICA'S INTERNATIONAL LAW OBLIGATIONS

16. The Constitutional Court has recognised South Africa's international law duty to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent a violation of those rights.[18]

The Convention on the Elimination of All Forms of Discrimination Against Women

17. South Africa is a signatory to a number of international human rights instruments, the most notable of which is the Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**").

18. CEDAW has been described as the definitive international legal instrument requiring respect for and observance of the human rights of women.[19] It is said

[18] Baloyi para 13; Carmichele at para 62; Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA) para 15.

[19] Kathree F 'Convention on the Elimination of all forms of discrimination against women' SAJHR (1995) 421 at 421.

to be “universal in reach, comprehensive in scope and legally binding in character”.[20]

19. The South African Government ratified CEDAW on 15 December 1995 and is therefore bound by the obligations created by it.

20. CEDAW itself contains no less than six articles that indirectly relate to violence against women.[21] General Recommendation No. 19[22] explicitly states that the general prohibition of gender discrimination includes

> “gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”.[23]

21. General Recommendation No. 19 further recommends that in order to fulfil their duties under the Convention, States must take all measures necessary to provide effective protection to women, including comprehensive legal, preventative and other measures.[24]

22. The principles underpinning CEDAW are also evident in the preamble to the Universal Declaration of Human Rights and article 4(d) of the Declaration on the Elimination of Violence Against Women.[25]

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[20] Cook R ‘Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women’ (1990) 30 Virginia Journal of International Law 643 at 643.

[21] Articles 2,3,6,11,12 and 16.

[22] U.N. Doc. HRI/GEN/1/Rev.1 at 84 (1994).

[23] Para 6.

[24] Para 24 (t).

[25] U.N. GAOR, 48th Sess., art. 1 UN.doc. A/Res/ 48/104 (1994).

The African Charter on the Rights of Women

23. The South African government ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("**the African Charter on the Rights of Women**") on 17 December 2004.

24. Article 3 of the African Charter on the Rights of Women guarantees that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights and requires state parties to:

> "adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence."

25. Article 4 states that "[e]very woman shall be entitled to respect for her life and the integrity and security of her person" and article 4(2) obliges the State to:

> "enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public".[26]

26. In the event of violation of women's rights in this Protocol, Article 25 provides that parties:

> "undertake to provide for appropriate remedies to any woman whose rights or freedoms, have been violated and ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.'"

[26] Article 4 (a).

United Nations Special Rapporteur on Violence Against Women

27. The vulnerable position of women in South Africa has also been recognised internationally. As recently as June 2016, the United Nations Special Rapporteur on Violence Against Women notes that the violence inherited from apartheid still resonates in South African society which remains dominated by deeply entrenched patriarchal norms and attitudes towards the role of women. This makes violence against women and children, especially in rural areas and in informal settlements, a way of life and an accepted social phenomenon.[27]

DOMESTIC LEGISLATION AND POLICIES

28. Cognizant of the widespread violence against women, a range of legislation and policies have been enacted from time to time to give effect to the rights of women to be free from violence. This is evident from the preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2017, the preamble of the Domestic Violence Act 116 of 1998, the National Crime Prevention Strategy, the White Paper on Safety and Security, the Service Charter for Victims of Crime in South Africa and the Minimum Service Standard for Victims of Crime (2004).

29. What is clear from the Constitution, the state's international obligations, domestic legislations and policies, is that the State has a constitutional duty to ensure that

[27] 'Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/32/42/Add.2 14 June 2016

all offences are prosecuted. This duty is heightened, we submit, in respect of offences of violence against women and girl children.

THE ALLEGED SOURCE OF THE MINISTER'S POWER TO CONFER IMMUNITIES ON GRACE MUGABE IS CONFUSED

30. In her answering affidavit, the Minister alleges two legal bases for spousal immunity, *viz*:

    30.1. That section 7(2) of DIPA "entitled" the Minister to confer immunity on Grace Mugabe.

    30.2. That in terms of international law, Grace Mugabe enjoys spousal immunity.

31. We submit in the first instance that the Minister has conflated (and with respect, misunderstood) the basis for recognising/conferring immunities and privileges on Grace Mugabe.

32. The Minister could not simultaneously source her power in legislation and international customary law, particularly when the criteria for the granting of immunity varied between both sources (as is apparent from the submissions we make hereunder).

33. This approach, we submit, in and of itself, renders the Minister's decision irrational and reviewable.

THE CONTENTION THAT THE SOURCE OF POWER LIES IN SECTION 7(2) OF DIPA

34. Section 7 of DIPA provides as follows:

> "7 Conferment of immunities and privileges
>
> (1) Any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the Gazette.
>
> (2) 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."

35. For the purposes, of these Heads of Argument, we do not address the applicability of section 7(2) of DIPA, save to emphasise the following:

35.1. First, the Minister specifically stated that Grace Mugabe is neither a diplomatic agent nor a special envoy or representative.[28]

35.2. Second, according to DIRCO although the impugned decision was taken by the Minister, "the type of immunity at stake and being conferred" on Grace Mugabe is not diplomatic immunity; diplomatic immunity, DIRCO recognises "is a special type of immunity, applicable only to accredited members of a diplomatic mission."[29]

[28] AA; Vol. 1; page 83 par 24 and 25

[29] AA; Vol. 2; MB2: 119 para 3 see also the advice from the Office of the Chief State Law Officer (International Law) annexed to Ms. Engels' Supplementary Affidavit in Case No. 58792/2017 (Pages 122-126, Annexure GE9).

35.3. Third, before the Minister determines the threshold of the "best interests of the Republic", the Minister is duty-bound to address the question of why "it is not expedient to enter into an agreement as contemplated in subsection (1)". This, the Minister has manifestly failed to do and for that reason alone, we submit section 7(2) of DIPA finds no application.

35.4. Fourth, section 7(2) of DIPO grants the Minister a discretion to determine that the conferment of immunities and privileges "on a person or an organisation" if "in the best interests of the Republic".[30] The constitutional rights at issue (as identified above) is central to this analysis.

36. In her reliance on section 7(2) of DIPA, the Minister fails to address the advice that she received through the Office of the Director-General from the Office of the Chief State Law Advisor, which was pursuant to a verbal request from her Department for legal advice from that Office. Significantly that advice was given by the Acting Principal State Law Advisor on 17 August 2017.

37. Yet, in her answering affidavit filed herein, the Minister:

37.1. Asserts that she "sought advice".[31] She does not disclose who this advice was sought from and nor does she disclose the nature of the advice received.

[30] M10 to AA; page 119; par 5.

[31] AA; Vol 1; page 82; par 16.

37.2. Fails to disclose the basis on which she disputes the merits of the advice given and precisely why, notwithstanding this advice, she proceeded to take the impugned decision.

37.3. Instead, relies on a range of factors and issues which she had already been advised by the Office of the Chief State Law Advisor did not constitute a basis for conferring immunity.

38. The Minister's conduct, as appears from the aforegoing underscores the patent irrationality of the impugned decision.

39. The irrationality of the impugned decision is also apparent when viewed against the legal advice given by the office of the Chief Law Advisor in respect of DIPO, the following aspects of which warrant emphasis:

> "3.1. Diplomatic immunities and privileges are conferred in terms of the Diplomatic Immunities and Privileges Act 37 of 2001 (the Act). In terms of the Act, diplomatic immunities and privileges may be extended to certain persons or groups, namely:
>
> i. Diplomatic missions, consular posts and members of such missions and posts (section 3);
>
> ii. Heads of state, special envoys and certain representatives (section 4);
>
> iii. The United Nations, specialised agencies and other international organisations (section 5);
>
> iv. International conferences or meetings convened in the Republic (section 6).
>
> 3.2. The above persons or groups recognised by the Act are also recognised by the Vienna Convention on Diplomatic Relations, 1961; the Vienna Convention on Consular Relations 1963; the Convention of the Privileges and Immunities of the Specialised

Agencies, 1947 (collectively referred to as “the Conventions”) which form part of the Act as Schedules annexed to the Act.

3.3. Since Mrs Mugabe is neither a Head of State nor a member of the diplomatic mission and/or consular post in South Africa she therefore does not qualify for immunity accorded in terms of section 3 and 4(1) of the Act. Similarly, Mrs Mugabe was not in South Africa as a special envoy and was not recognised as such by the Minister of International Relations and Co-operation (the Minister) as required by section 4(3) of the Act. Therefore, Dr Grace Mugabe does not qualify for immunity in terms of section 4 of the Act.

….

3.5. In terms of section 6 Mrs Mugabe would fall under the classification of “a representative of any state” since she cannot be classified as an official or expert of United Nations or any specialised agency of the United Nations. That means she cannot qualify for the immunity provided for in the Convention on the Privileges and Immunities of the United Nations, 1946, or the Convention on the Privilege and Immunities of the Specialised Agencies, 1947, however she may qualify for immunity that will be specifically provided for in an agreement entered into [between South Africa and SADC in this case] for that purpose [hosting of a SADC Conference / Summit] as required by section 6(1)(b). This means immunity should have been accorded in terms of an agreement entered.

3.6. The Office of the Chief State Law Advisor (IL) can confirm that there is no agreement that was entered into between South Africa and SADC on the hosting of the SADC Summit as required by the Act. The Office of the Chief State Law Advisor (IL) enquired from the SADC Desk (Desk responsible for the drafting and facilitation of of the Host Agreement for the SADC Summit) about the Host Agreement in an email dated 15 August 2017 and the Desk confirmed in an email that there was no Host Agreement and that the Desk used the SADC Minimum Standards for Hosting this Summit. The SADC Minimum Standards for Hosting Summits document has no provision on immunity for the attendees of SADC Conferences and even if it provided for immunity it would not be acceptable since it was not an international agreement or legal instrument that can be used to confer immunity.

…

3.10. The Minister has the power to confer immunities and privileges to a person or organisation in terms of section 7(2) if it is not expedient

to enter into an agreement as required by the Act and conferment of such immunities will be in the interests of the Republic.

3.11. In the current case, even if it may be decided that it is in the interest of the Republic for the Minister to confer immunities to Mrs Mugabe specifically, that conferment would not assist since it cannot be done retrospectively. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in terms of the act, or arises by necessary or distinct implication.…."

40. We reiterate, in her answering affidavit, the Minister sets forth no basis (factual or legal) on which to refute the advice sought and received from the Chief State Law Advisor. Instead, the Minister steadfastly clings to her contention that she conferred immunity to Grace Mugabe "in terms of section 7(2) of DIPA".[32] Such an approach, we submit is plainly irrational and ultra vires the powers of the Minister.

THE CONTENTION THAT THE SOURCE OF POWER LIES IN INTERNATIONAL LAW

Reliance on international law

41. The Minister is permitted to rely on international law as the basis for the impugned decision, only in one of two respects, viz:

41.1. An international agreement which allows her to confer spousal immunity, in which event such an agreement must comply with the prescripts of section 231 of the Constitution.

[32] AA; Vol. 1; page 83.

41.2. International customary law, only to the extent that it is not inconsistent with the Constitution or an Act of Parliament as contemplated by section 232 of the Constitution.

International agreements

42. Not unsurprisingly, the Minister does not rely on an international agreement as the source of her power to confer immunity. Had she sought to do so, the prescripts of section 231 of the Constitution would have found application. In particular, any international agreement:

42.1. Binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it falls within the purview of section 231(3); the latter provision plainly finds no application in this matter.[33]

42.2. 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. [34]

43. The Minister has placed no reliance on an international agreement. Accordingly, this cannot found the basis of her *vires* to have taken the impugned decision.

[33] Section 231(2) of the Constitution.

[34] Section 231(3) of the Constitution.

Customary international law

The facts

44. The Minister seemingly relies on a tentative principle customary law international law as the source of her power to confer immunity of Grace Mugabe.

45. This is apparent from DIRCO's letter to the Acting National Commissioner wherein, it is stated that there "seems to be state practice supporting the existence of this derivative immunity to the family of the Head of State."[35] In referring to three case, the Minister concludes that this "constitutes evidence of customary international law".[36]

Spousal immunity is not part of customary international law

46. The WLC Trust aligns itself with the contention that the principal of derivative spousal immunity has not achieved the status of customary international law.[37]

47. In support thereof, the WLC Trust advances the following further submissions:

    47.1. First, while the immunity extended to diplomats, consulate officials and officials sent on special missions is regulated by treaties on the subject[38], there is no treaty dealing with the immunity available to the Heads of

[35] AA; M10; page 121; par 10.

[36] AA; M10; page 121; par 11.

[37] Applicant's Heads of Arguments: 22-27 para 74-92.

[38] Vienna Convention on Diplomatic Relations, 1961; Vienna Convention on Consular Relations, 1963; Convention on Special Missions, 1969.

States. This is an area that has developed by State practice and has taken the form of customary international law.

47.2. Second, the International Law Commission, which is tasked with the taking stock of the present practice of States and elaborating general rules on various areas of customary international law:

47.2.1. In its 58th session in 2006, decided to include the topic of 'immunity of state officials from foreign criminal jurisdiction' in its long term programme of work. It appointed Mr. Roman A. Kolodkin as the Special Rapporteur for this project, who served from 2007- 2011.

47.2.2. In 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Roman Kolodkin. Both the Special Rapporteurs submitted reports on a near yearly basis which were considered by the Commission in its annual sessions.

47.2.3. At the sixtieth session, in 2008, the Commission had before it the preliminary report of the Special Rapporteur as well as a memorandum of the Secretariat of the United Nations General Assembly on the topic. The preliminary report briefly outlined the breadth of prior consideration, by the Commission and the Institute of International Law, on the question of immunity of State officials from foreign jurisdiction as well as the range and scope of issues proposed for consideration by the

Commission, in addition to possible formulation of future instruments. The Commission held a debate on the basis of this report which covered key legal questions to be considered when defining the scope of the topic, including the officials to be covered, the nature of acts to be covered and the question of possible exceptions.[39]

47.2.4. On the specific issue of families of heads of state, Mr. Kolodkin, after summarizing state practice on the issue, was of the view that while it was likely that immunity extended to spouses of heads of state, this was on the basis of comity between nations, rather than on the basis of customary international law. As it was on the basis of the comity, Mr. Kolodkin was of the view that the Commission should not look into topic any further.[40]

47.3. Third, the Memorandum by the UN General Assembly Secretariat, taking into consideration previous state practice, noted that there was no uniform practice amongst states regarding grant of immunity to family members of Heads of State, and in any case the immunity, if any flew from comity rather than obligations under customary international law.[41]

[39] http://legal.un.org/ilc/summaries/4_2.shtml

[40] Preliminary report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur, Document A/CN.4/601, [paragraphs 124-129], available at: http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_601.pdf&lang=ESX

[41] Memorandum by the Secretariat, Immunity of State officials from foreign criminal jurisdiction, Document A/CN.4/596, [paragraphs 114-117], available at: http://legal.un.org/docs/?symbol=A/CN.4/596

47.4. Fourth, the Commission was divided on the issue of whether or not to include the immunity available to families of officials, as is apparent from its debates in 2008.[42] However, none of the later reports (2010-2017) delve into this issue, save for the occasional mention that the first report of Mr. Kolodkin did not consider it necessary to deliberate on the issue of immunity available to families.[43]

47.5. Fifth, in 2013, Ms. Hernandez suggested a few draft articles for adoption by the Commission.[44] The Commission provisionally adopted Draft Articles 1, 3, and 4,[45] the relevant portions of which are extracted hereunder:

> **"Draft article 3**
>
> **Persons enjoying immunity ratione personae**
>
> Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction."

47.6. Significantly, the draft articles make no reference to the extension of the immunity to family members. In contrast, each of Article 37 of the Vienna Convention on Diplomatic Relations, Article 58 of the Vienna Convention on Consular Relations, and Article 39 of the Convention on Special

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[42] Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10), [paragraphs 277, 293 and 308], available at:

[43] http://legal.un.org/ilc/summaries/4_2.shtml

[44] Second report on immunity of State officials from foreign criminal jurisdiction by Concepcion Escobar Hernandez, Special Rapporteur, Document A/CN.4/661, [Annex], available at: http://legal.un.org/docs/?symbol=A/CN.4/661

[45] Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, Document A/CN.4/L.814, available at: http://legal.un.org/docs/?symbol=A/CN.4/L.814

Missions extends the immunities granted to a diplomat/consular officer/representatives of a State in a special mission, respectively, to the members of their families.

48. Accordingly, there is no established rule of customary international law recognising immunity from foreign criminal jurisdiction to members of families of Heads of States. This is buttressed by the absence in the draft articles adopted by the Commission.

The Minister's recognition of spousal immunity on an unqualified basis is unconstitutional

49. If notwithstanding our primary submission that spousal immunity does not form part of customary international law, this Court is to determine otherwise, we submit, in the alternative, that the Minister's unqualified adoption of spousal immunity is inconsistent with section 232 of the Constitution.

50. Section 232 of the Constitution provides for the recognition of customary international law as law in the Republic only to the extent that it is consistent with the Constitution or an Act of Parliament. We submit that an unqualified recognition of spousal immunity, places the constitutional rights of women at the altar of sacrifice in favour of diplomatic relations.

51. We emphasise that in international law too, there are limits to the immunity that is granted; it is by no means absolute. By way of example:

51.1. Heads of State enjoy *ratione personae* which is complete immunity from foreign criminal jurisdiction for all acts done, whether in their private or

official capacity. They enjoy this immunity only during the time they hold such post. [46]

51.2. On the other hand, *ratione materiae,* which extends to other State officials, only extends to acts done in their official capacity but has no temporal bar. There are certain recognized exceptions to this. The Commission, in 2017, adopted Draft Article 7,[47] recognizing an exception from *ratione materiae* for certain crimes:

Draft article 7

"Crimes under international law in respect of which immunity ratione materiae shall not apply

1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

   (a) crime of genocide;

   (b) crimes against humanity;

   (c) war crimes;

   (d) crime of apartheid;

   (e) torture;

[46] References to this can be found in the Second Report of Mr. Kolodkin, but more significantly the Fifth Report of the Special Rapporteur deals with the subject of exceptions to immunity in great detail. See Fifth report on immunity of State officials from foreign criminal jurisdiction by Concepcion Escobar Hernandez, Special Rapporteur, Document A/CN.4/701, available at: http://legal.un.org/docs/?symbol=A/CN.4/701

[47] Titles of Parts Two and Three, and texts and titles of draft article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session, Document A/CN.4/L.893, available at: http://legal.un.org/docs/?symbol=A/CN.4/L.893

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles."

51.3. What is of importance is that Ms. Hernandez, in her Fifth Report, recommended including the exception of 'territorial tort' from immunity *ratione materiae*. The territorial tort exception refers to crimes that cause harm to persons, including death and serious injury, or or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.[48] However, the draft article adopted by the Commission makes no mention of this exception.

52. In the present instance, the Minister accepted no qualification or limitation to the principle of spousal immunity. To this extent, we submit that the Minister's wholesale and unqualified adoption of spousal immunity was inconsistent with the Constitution.

53. We submit that in line with the prescripts of the Constitution and certain legislation, the Minister ought to have approached the matter on the basis that spousal immunity does not apply to certain categories of criminal conduct. In other words, spousal immunity can be recognised in terms of section 232 of the Constitution, unless the granting of such immunity arises from conduct which

[48] Supra note 9.

causes/d harm to persons, including death and serious injury, as well as any sexual offence in terms of the common law or statute.

54. Such a qualified recognition, we submit, would accord with the prescripts of section 232 of the Constitution in that it would recognise and give credence to *inter alia*, the rights to equality of women, the right to be free from all forms of violence and the right that complainants have to the recourse of the law.

THE APPLICATION OF THE PRINCIPLE OF SPOUSAL IMMUNITY

The principle

55. We submit that if the Court does not find favour with any of our primary submissions, viz: (a) that spousal immunity is not recognised in terms of section 7(2) of DIPA; (b) that spousal immunity does not form part of customary international law; (c) that, in any event, an unqualified recognition of spousal immunity is inconsistent with the prescripts of the Constitution and therefore not protected by section 232 of the Constitution, then, this Court must review the impugned decision on the basis that in having applied the principle of spousal immunity, the Minister failed to have regard, alternatively proper regard to the position of the complainant (Ms Engels) and the impact of: (a) the alleged harm that she suffered; (b) the spousal immunity granted. For this reason too, we submit that the Minister's resultant decision is tainted, and thereby reviewable.

The facts

56. In terms of Note 260/2017 dated 15 August 2017 from the Zimbabwean Embassy addressed to the DIRCO, inter alia the following is stated[49]:

> "Her Excellency Dr Grace Mugabe travelled to the Republic of South Africa on a Zimbabwe Diplomatic Passport. The Embassy wishes to invoke diplomatic immunity for the First Lady in the case opened against Her Excellency at the Sandton Police Station and requests protection from authorities in the Republic of South Africa against arrest and prosecution."

57. In a subsequent Note 261/2017 from the Embassy of Zimbabwe addressed to DIRCO and dated 15 August 2017 inter alia the following is stated[50]:

> "Mrs Mugabe travelled to South Africa on 13 August on flight SA29 as part of the Advance Team, of the Official Delegation of His Excellency Cde Robert Gabriel Mugabe, President of the Republic of Zimbabwe, to the South African Development Community (SADC) Summit from 11 to 20 August in Pretoria. Mrs Mugabe travelled on the same flight with Honourable Mike Bimha, Minister of Industry and Commerce of the Republic of Zimbabwe, who is attending the same conference. Mrs Mugabe travelled to South Africa on a Zimbabwean Diplomatic Passport.
>
> The Embassy, hereby invokes Diplomatic Immunity protection for Mrs Mugabe in the above-mentioned case and requests the Department to provide her the necessary protection from arrest and prosecution.
>
> By this Note the Embassy wishes to withdraw its previous Note No 260/2017 dated 15 August 2017 on the same issue."

58. On 16 August 2017, the DIRCO advised the Zimbabwe Embassy that "the request for diplomatic immunity in respect of the First Lady is under due consideration by the South African Government."[51]

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[49] AA; M2; Vol. 2; page 105.

[50] AA; M3; Vol. 2; page 106.

[51] AA; M4; Vol. 2; page 108.

59. On 18 August 2017, the DIRCO addressed correspondence to the Acting National Commissioner of Police ("**the National Commissioner**") advising *inter alia* as follows[52]:

59.1. That the Embassy of the Republic of Zimbabwe had invoked diplomatic immunity protection in favour of Grace Mugabe in respect of the criminal charges preferred against her at the Sandton Police Station on 14 August 2017.

59.2. In the consideration of the conferral of diplomatic immunity, DIRCO sought the following information from the National Commissioner:

59.2.1. The nature and seriousness of the allegations levelled against Grace Mugabe and the circumstances that gave rise to these allegations.

59.2.2. Whether a prima facie case exists against Grace Mugabe.

59.2.3. The status quo of the investigation.

59.2.4. Whether a decision has been made to institute criminal prosecution against Grace Mugabe.

[52] AA; M4; Vol. 2; page 113.

59.3. Noted that the SADC Summit "which is attended by Dr Mugabe as well as her husband HE Mr Robert Mugabe, President of the Republic of Zimbabwe, is scheduled to end on 20 August 2017 in Pretoria."

60. The Commissioner responded to DIRCO seemingly on the same date, advising *inter alia* as follows[53]:

60.1. That the complainant, Ms Engels alleges that on 13 August 2017 at about 9 p.m., she was with friends at the Capital Apartment, 20 West Street, Sandown where she and two friends we "severely assaulted" by Dr Grace Mugabe.

60.2. The suspect is Grace Mugabe.

60.3. The sons of Grace Mugabe were at the same premises but in a different room.

60.4. According to Ms Engels, Grace Mugabe assaulted her and her friend with an electrical cord.

60.5. Ms Engels sustained a "deep open wound to her forehead and scalp".

60.6. One of the friends, Ms Cindy Solomons was hit over her arm and back.

60.7. The other friend, Ms Teshane Valentine alleges that she was pulled by her hair and hit on the left arm with the cord.

[53] AA; M8; Vol. 2; page 115.

60.8. As regards the nature and seriousness of the allegations, the charge laid against Grace Mugabe is one of assault to cause grievous bodily harm; only Ms Engels had formally laid a charge but the two other ladies were also assaulted with the electrical cord, one with bruises on her back and one with bruises on her leg. Both had made affidavits in support of Ms Engels.

60.9. That according to the National Commissioner, a prima facie case does exist against Grace Mugabe and that this opinion was also expressed by the Prosecutor when an application was made for an arrest warrant. The warrant was not issued as a result of the pending immunity application by the Government of Zimbabwe on behalf of Grace Mugabe.

60.10. As regards the status quo of the investigations, the statements of four security guards at the hotel was outstanding as well as a statement by the duty-manager at the hotel. These witness statements were due to be obtained within the next few days, subject to the availability of the witnesses.

60.11. As regards the question of whether a decision to prosecute has been taken, that no decision could be made as the docket had not been submitted to the DPP. It was noted that Grace Mugabe's lawyer had undertaken to bring her Mugabe to the police station for a statement but that this did not realise. In any event, there was uncertainty about the status of the diplomatic immunity in respect of Grace Mugabe.

61. In response (and in undated correspondence) DIRCO advised the Zimbabwe Embassy inter alia as follows[54]:

> "The Department has the honour to inform the Embassy that after considering all the relevant facts and circumstances, the Minister has decided to confer immunities on the First Lady, Dr Grace Mugabe."

62. On 19 August 2017, DIRCO addressed correspondence to the National Commissioner, the following aspects of which warrant highlighting:

62.1. The Minister accepts that her discretion under section 7(2) of DIPO is not absolute and that she is duty bound to consider all facts and circumstances; that her decision must be reasonable, not arbitrary and rational.[55]

62.2. The Minister contends that she has considered "all the facts and circumstances at her disposal before coming to a determination". [56]

62.3. The facts and circumstances which the Minister considered were as follows:

62.3.1. First, "the importance of the rule of law and the need to ensure that citizens of the Republic are protected" and the need to ensure that the proper administration of justice "weighed heavily with the Minister". [57] There were

[54] AA; M9; Vol. 2; page 117.

[55] AA; M10; Vol 2; page 119; par 5.

[56] AA; M10; Vol 2; page 119; par 5.

[57] AA; M10; Vol 2; page 120; par 6.

countervailing concerns that the Minister had to take into account, viz, that Grace Mugabe is the First Lady of Zimbabwe and that "criminal prosecution against her would have serious implications for the relations between South Africa and Zimbabwe". Further, that criminal prosecution "may have serious implications for the relations between South Africa and other African States"; the international relations between South Africa and its neighbours militate against any enforcement action. [58]

62.3.2. Second, that "any enforcement action against the spouse of a head of state attending the SADC Summit, in the midst of the Summit, would cause chaos, collapse the Summit and impact very negatively on the reputation and international standing of the Republic. A failed Summit cannot be in the interest of the Republic of South Africa." [59]

62.3.3. Third, in addition to "these more political considerations", there are also legal considerations as Grace Mugabe is the spouse of a head of State and that as a matter of both international and domestic law, heads of state, heads of government and ministers of foreign affairs have immunity ratione personae, which immunity precludes any enforcement action against the holder. "Thus, the

[58] AA; M10; Vol 2; page 120; par 7.

[59] AA; M10; Vol 2; page 120; par 8.

President of Zimbabwe has, under international law and South African law, immunities from the reach of South African authorities."[60]

The legal threshold: rationality review

63. The following legal principles are relevant in relation to irrationality as a ground of review:

63.1. When considering a review challenge based on irrationality, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational.[61]

63.2. As held by the Constitutional Court in **Democratic Alliance v President of the Republic of South Africa and Others** 2013 (1) SA 248 (CC) at par 36:

> "The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."

[60] AA; M10; Vol 2; page 120; par 9.

[61] Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA) at par 20 and 21.

63.3. Rationality imposes a less onerous standard on the decision-maker than reasonableness.[62]

63.4. Rationality review is "about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved".[63]

63.5. In applying the rationality test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?[64]

63.6. The Constitutional Court has often warned that the State may not "regulate" in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose. In other words, wielders of public power - whether legislative, executive or administrative - are, at the very least, duty-bound to act rationally.

63.7. As to the purpose of the requirement of rationality in the exercise of public power, the Constitutional Court expressed itself in **Prinsloo v Van der Linde and Another** 1997 (3) SA 1012 (CC) at par 25 in the following terms:

> "This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's

[62] Bel Porto School Governing Body v Premier, Western Cape and Another 2002 (3) SA 265 (CC) at par 46; Khosa v Minister of Social Development 2004 (6) SA 505 (CC) at par 67.

[63] Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC) at par 69.

[64] Trinity Broadcasting (Ciskei) v ICASA 2004 (3) SA 346 (SCA). See, too, Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC) at par 37.

> celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification'."

The resultant decision was irrational because it failed to have regard to its impact on the rights of the complainant

64. We submit that the resultant decision was irrational because it failed to have regard to the:

64.1. The impact of the decision on the rights of the complainant.

64.2. The impact of the decision on the right to equality.

64.3. The impact of the decision on the right to be free from all forms of violence.

64.4. The impact of the decision on the well-entrenched principle of accountability.

65. The Minister's first contention in this regard seems to be her fear that prosecuting Grace Mugabe would lead to a collapse of the SADC summit that was being held in South Africa from the 10-20 August 2017.

66. This fear is wholly baseless as highlighted by the Applicant. In addition, specifically in the context of the SADC conference, the conferring of immunity on Grace Mugabe contradicts and undermines the objectives and goals of SADC.

66.1. One of the key strategic objectives of the SADC summit was the promotion of common political values, systems and other shared values through institutions that are democratic, legitimate and effective.[65]

66.2. The common political values of the SADC summit are reflected in the SADC Protocol on Gender and Development. Part Six of the SADC Protocol on Gender and Development[66] addresses gender based violence and it creates an obligation on state parties to enact and enforce legislation prohibiting all forms of gender based violence.[67]

66.3. Contrary to the Minister's claims, the failure to prosecute Grace Mugabe for assaulting a woman is what militates against the SADC's key objectives. The Minister's assertions that the prosecution of Grace Mugabe would lead to chaos and collapse of the SADC summit undermines the specific objectives of SADC and are wholly unfounded.

66.4. It is important to note that Grace Mugabe did not enjoy immunity under Section 6 of the DIPA also as there was no Host Agreement entered into between South Africa and SADC for hosting the SADC Summit. Further, the Minister did not recognise the SADC Summit by notice in the Gazette as required under Section 6(2).[68] In the absence of any agreement to this effect between SADC and South Africa, and subsequently any breach thereof by non-recognition/conferment of Grace Mugabe's

[65]AA; Vol. 2; MB1: 85 para 30.2; see also MB2: 103.

[66] South Africa has signed but not yet ratified the SADC Protocol on Gender and Development.

[67] Article 1 of SADC Protocol on Gender and Development.

[68] Pages 123-124, Annexure GE9, Case No. 58792/17, para 3.4-3.8; Page 127, Annexure GE10.

immunity, the Minister's argument that the SADC Summit would have collapsed is unsustainable.

67. In addition, WLC Trust submits that the interest of the Republic requires that its constitutional ideals, outlined elsewhere in this Heads of Argument, are fulfilled. Section 39(2) of the Constitution mandates that when interpreting any legislation, Courts must promote the spirit, purport and objects of the Bill of Rights.[69]

68. The Minister failed to take into account that the interest of the Republic requires that the Constitution and its principles are given prime importance. The phrase "interest of the Republic" as used in Section 7(2) of the DIPA must always be interpreted by the court to give dominion to constitutional ideals, in accordance with Sections 7(2) and 39 of the Constitution.

69. The second aspect of the Minister's reasoning that the decision to confer immunity was in the interest of the Republic was that prosecuting her would have serious implications for the relations between South Africa, Zimbabwe and other African States.[70] The Minister is of course entitled to take into account foreign policy considerations. However, the Minister has to balance these considerations with her constitutional obligations to fulfil the rights in the Bill of Rights. The Bill of Rights cannot be compromised in such instances.[71]

70. Any balancing exercise that the Minister had to undertake in weighing the comity between South Africa and Zimbabwe and upholding of constitutional ideals would

[69] Al Bashir, para 87 and 88.

[70] MB1: 86 para 31.1

[71] Kaunda and Others v President of the Republic of South Africa [2004] ZACC 5 para 267, 270.

have to tip the scales in favour of the latter. Ensuring that the rule of law and the constitutional principles are complied with must necessarily override any adverse impact on the relations between South Africa and Zimbabwe.

71. The WLC Trust submits that the Minister gravely erred in relegating the Constitution and her constitutional obligations under section 7(2) of the Constitution to a lower pedestal as compared to the relations between South Africa, Zimbabwe and other African countries. In so doing, we submit that the Minister acted irrationally and thereby rendered her resultant decision reviewable.

CONCLUSION

72. For all of the above reasons, the WLC Trust submits that the impugned decision is unconstitutional, invalid and must be set aside.

Karrisha Pillay

Bronwyn Pithey

First Amicus Curiae's Counsel

21 February 2018

Chambers, Cape Town

Women's Legal Centre

FIRST AMICUS CURIAE WOMEN'S LEGAL CENTRE TRUST LIST OF AUTHORITIES

LEGISLATION

1. Diplomatic Immunities and Privileges Act No 37 of 2001

CASE LAW

2. Bel Porto School Governing Body v Premier, Western Cape and Another 2002 (3) SA 265 (CC) at par 46; Khosa v Minister of Social Development 2004 (6) SA 505 (CC)
3. Carmichele v Minister of Safety and Security 2001(4) SA 938 (CC)
4. Christian Education SA v Minister of Education 2000 (4) SA 757 (CC)
5. Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)
6. F v Minister of Safety & Security & another (Institute for Security Studies & others as *amici curiae*) [2012] JOL 28228 (CC)
7. K v Minister of Safety and Security 2005 (6) SA 419 (CC)
8. Law Society of SA v Minister for Transport 2011 (1) SA 400 (CC)
9. Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC)
10. Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)
11. National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and another [2014] JOL 32401 (GP) at para 13
12. S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC)
13. S v Basson 2005 (1) SA 171 (CC)
14. Sarrahwitz v Maritz NO 2015 (4) SA 491 (CC)
15. Trinity Broadcasting (Ciskei) v ICASA 2004 (3) SA 346 (SCA). See, too, Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC)
16. Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA)

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22. Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10), [paragraphs 277, 293 and 308], available at: http://legal.un.org/ilc/summaries/4_2.shtml
23. Second report on immunity of State officials from foreign criminal jurisdiction by Concepcion Escobar Hernandez, Special Rapporteur, Document A/CN.4/661, [Annex], available at: http://legal.un.org/docs/?symbol=A/CN.4/661
24. Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, Document A/CN.4/L.814, available at: http://legal.un.org/docs/?symbol=A/CN.4/L.814
25. Fifth report on immunity of State officials from foreign criminal jurisdiction by Concepcion Escobar Hernandez, Special Rapporteur, Document A/CN.4/701, available at: http://legal.un.org/docs/?symbol=A/CN.4/701
26. Titles of Parts Two and Three, and texts and titles of draft article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session, Document A/CN.4/L.893, available at: http://legal.un.org/docs/?symbol=A/CN.4/L.893