REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

30 July 2018 — DATE

SIGNATURE

Case No.: 58755/17

In the matter between:

Democratic Alliance — **Applicant**

and

The Minister of International Relations and Co-operation — **First Respondent**

The President of the Republic of SA — **Second Respondent**

The National Director of Public Prosecutions — **Third Respondent**

Gabriella Engels — **Fourth Respondent**

And

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***

And:

Case No.: 58792/17

In the matter between:

Gabriella Engels — **First Applicant**

Afriforum **Second Applicant**

and

The Minister of International Relations and Co-operation **First Respondent**

Dr Grace Mugabe **Second Respondent**

JUDGMENT

Vally J

Introduction

[1] During 10 to 20 August 2017 South Africa hosted the 37th Southern African Development Community (SADC) Ordinary Summit of the Heads of State. The then President of the Republic of Zimbabwe (Zimbabwe) President Robert Gabriel Mugabe (President Mugabe), attended this conference. On Sunday 13 August 2017, the then First Lady of Zimbabwe, Dr Grace Mugabe[1] (Dr Mugabe), travelled to South Africa. On the same day, she was alleged to have assaulted three young South African women who were residing at a hotel in Sandton. One of those women, Ms Gabriella Engels (Ms Engels)[2], is said to have suffered severe facial and mental injuries as a result of the alleged assault. The alleged assault received widespread public exposure and extensive commentary in both the print and the digital media. Ms Engels laid a criminal charge of assault with intent to cause grievous bodily harm against Dr

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[1] Mr Robert Gabriel Mugabe is no longer the head of State of Zimbabwe. However, for the sake of readable convenience Dr Mugabe will be referred to as a spouse of a head of state, as opposed to spouse of a former head of state. This is so because the issues that call for determination in this case have to be adjudicated on the basis on the facts that prevailed at a time when she was the spouse of a head of state.

[2] Ms Engels is the first applicant in the case number 58792/17. She is the fourth respondent in case no. 58755/17.

Mugabe. It is this alleged assault and the subsequent complaint by Ms Engels of criminal conduct by Dr Mugabe which nucleated around the dispute that calls for resolution in this case.

Factual Matrix

[2] The public exposure and comment that followed the alleged assault intensified. The South African Police Services (SAPS) made attempts to contact Dr Mugabe. This included communications with her legal representatives in the hope that she would present herself to SAPS officers, but these bore no fruit and two days later, on 15 August 2017, she left South Africa. On the same day, the Embassy of Zimbabwe (Embassy) forwarded a *note verbale*[3] to the Department of International Relations and Co-operation (the Department) that Dr Mugabe travelled to South Africa on a Diplomatic Zimbabwean passport and that "(t)*he Embassy wishes to invoke diplomatic immunity for* [Dr Mugabe] *in a case opened against her at the Sandton Police Station and requests protection from authorities in South Africa against arrest and prosecution.*" Later that day the Embassy forwarded another *note verbale* to the Department. In this second note it informed the Department that it wished to withdraw the first one, provided slightly more details about the travel of Dr Mugabe, in particular, that, "*Mrs* [sic] *Mugabe travelled to South Africa on 13 August on flight SA29 as part of the Advance Team of the Official Delegation … to the [SADC] Summit from 11 to 20 August 2017*", and persisted with its call for the "*necessary protection from arrest and prosecution*" for Dr Mugabe. The

[3] A *note verbale* is an unsigned diplomatic correspondence that is written in the third person. It is less formal than a letter of protest but more formal than an *aide mèmoire.* An *aide mèmoire*, whose literal translation is "*memory aid*", is diplomatic parlance for a proposed agreement which is informally circulated amongst delegations for discussion.

crucial difference between the first and the second *note* is that in the latter the Embassy claimed that Dr Mugabe was visiting South Africa on official duties.

[3] The next day, 16 August 2017, the Department responded to the *note verbale*. It informed the Embassy that the request for diplomatic immunity for Dr Mugabe was receiving due consideration by the South African Government. On 17 August 2018, attorneys acting for the second applicant in Case No.: 58792/2017 wrote to the Minister[4] who as the political head of the Department is the person responsible for considering the request for diplomatic immunity. The attorneys informed her that they had been approached by the first applicant in that case, Ms Engels (she is also the fourth respondent in case no. 58755/2013), who claimed that she was assaulted by Dr Mugabe, and that they were informed that the Minister was considering the conferring of diplomatic immunity on Dr Mugabe. They made plain in the letter that in their view, granting Dr Mugabe diplomatic immunity would be inappropriate and irrational as:

> "a. [Dr] Mugabe was not in South Africa on any official visit. Her visit to South Africa was for business purposes and [sic] medical reasons;
> b. The reported allegation that [Dr] Mugabe will attend the imminent conference of SADC leaders in Pretoria together with her husband was an afterthought designed entirely to frustrate the criminal process and to abuse the principles of diplomatic immunity;
> c. Diplomatic immunity cannot be used as a shield to escape prosecution in instances were serious criminal acts were committed."

[4] The Minister is the first respondent in both cases. For ease of reference she will be referred to as "the Minister" throughout this judgment. The necessity for this is further borne out by, as will be seen later, the constant reference to her by her official designation in the various correspondence that was exchanged by the Department of International Relations and Co-operation (the department she heads) and various parties, not all of whom were involved in this case. The correspondence is crucial for a comprehensive understanding of the facts of this case, and relevant portions of it will, out of necessity, be quoted here.

[4] In the meantime, on the same day, the Department wrote to the Acting National Commissioner of SAPS (Acting National Commissioner) informing him that Dr Mugabe "*is Part [sic] of the delegation of HE President Robert Mugabe to the SADC Summit and that she arrived as part of the advance team.*" The next day, 18 August 2017, another letter was sent to the Acting National Commissioner by the Department informing him that as the Embassy had invoked diplomatic immunity protection in favour of Dr Mugabe, the Department was considering all legal issues "*in consideration of the conferral of diplomatic immunity as invoked*" (underlining added) and for that purpose it required certain information from him. In particular, it sought the following information:

> "4.1 The nature and seriousness of the allegations levelled against Dr Mugabe; and the circumstances that gave rise to these allegations;
>
> 4.2 Whether a prima facie case exists against Dr Mugabe;
>
> 4.3 The status quo of the investigation; and
>
> 4.4 Whether a decision has been made to institute criminal prosecution against Dr Mugabe."

[5] The Acting National Commissioner responded on the same day. He said that: (i) Ms Engels had laid a charge of assault with intent to cause grievous bodily harm; (ii) in the opinion of the SAPS a *prima facie* case existed against Dr Mugabe, which opinion was shared by "the Prosecutor"; (iii) the investigation was incomplete as statements from some potential witnesses were still outstanding; (iv) the Director of Public Prosecutions had not made a decision as to whether a prosecution of Dr Mugabe would ensue as no statement had been received from Dr Mugabe despite a promise from her legal representative that

she would make herself available to the SAPS for it to record her statement; and, (v) the issue as to whether she received diplomatic immunity remained unresolved.

[6] On 19 August 2017 the Department, through the office of the Director-General, informed the Embassy in writing that the Minister "*after considering all the relevant facts and circumstances*" had decided to "*confer immunities on the First Lady, Dr Grace Mugabe.*" Simultaneously, it wrote a lengthy letter to the Acting National Commissioner (the Letter) alerting him to the Minister's decision to confer on Dr Mugabe the privilege of diplomatic immunity from criminal prosecution. The Minister avers in her answering affidavit that the "*submissions, opinions and facts expressed in*" the Letter are correct. In other words, the Letter, though signed by the Director-General, was really an expression of her reasoning: it contained the rationale for her decision. The determination of the issues in this matter requires that the contents of the Letter be carefully scrutinised and for that reason it is necessary to quote liberally from it:

> "2. I am writing to inform you of the decision of the Minister to bestow, in accordance with section 7(2) of the Diplomatic Immunities and Privileges Act of 2001[5] [DIPA], immunities on Her Excellency, the First Lady of the Republic of Zimbabwe, Dr Grace Mugabe. As you are aware, this is a complicated and sensitive matter with potentially far reaching consequences on a number of issues. The purpose of this letter is therefore to inform you of the decision of the Minister, the reasons for the decision and the steps to be taken by the Minister in the execution of this decision.

[5] Section 7(2) of DIPA reads:

> "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*"

3. It is necessary, before delving into the decision, to correct certain misconceptions that have been raised in the media and by numerous persons. Although the decision that has been taken by the Minister is taken under the [DIPA], the type of immunity at stake and being conferred on the First Lady is *not* diplomatic immunity. Diplomatic immunity is a special type of immunity, applicable only to duly accredited members of a diplomatic mission.

4. [Refers to and quotes s 7 of DIPA]

5. This section, as the Minister reads it, grants her the discretion to determine that the conferment of immunities and privileges "on a person or organisation" is "in the interest of Republic." If she makes such a determination, then she may confer such immunities and privileges on such a person or organisation. It is important to emphasise, however, that the discretion given to the Minister is not absolute. It requires the Minister to consider all the facts and circumstances and that her decision must be reasoned. In other words, her decision cannot be arbitrary; it must be rational. This is the test for the proper exercise of discretion in matters of foreign affairs (rationality). The Minister has accordingly considered all the facts and the circumstances at her disposal before coming to a determination.

6. An important consideration that the [Minister] took into account was the importance of the rule of law and the need to ensure that the citizens of [South Africa] are protected. The need to ensure the proper administration of justice weighed heavily on the Minister.

7. There were, however, counterveiling concerns that the [Minister] had to take into account in her capacity as the Minister responsible for the execution of South Africa's foreign policy. First, Dr Grace Mugabe is the First Lady of a neighbouring country, Zimbabwe. Criminal prosecution against her would have serious implications for the relations between South Africa and Zimbabwe. Indeed, such action 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.

8. Second, South Africa has taken over the chair of SADC and these events unfold at the time when South Africa is hosting a SADC Summit. SADC is the preeminent body in the sub-region and a central pillar of South Africa's foreign policy. 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 the [sic] interest of the Republic of South Africa.

9. Finally, in addition to these more political considerations, there are also legal considerations, Dr Mugabe is the spouse of a head of State. As you know, as a matter of both international and domestic law, heads of State, heads of government and ministers for foreign affairs (the so-called "troika") have immunity *rationae personae,* which immunity precludes any enforcement action against the holder, including for any act whether committed before or during the period that he or she holds office. While our Supreme Court of Appeal have identified some exceptions to this rule, this applies only to specific crimes which are *not* at issue in the current case. Thus, the President of Zimbabwe has, under international law and South African law, immunities from the reach of South African authorities.

10. The question that the Minister has had to consider, however, is whether there is some sort of derivative immunity for the spouse of a head of State. There seems to be state practice supporting the existence of this derivative immunity for the family of the head of State. The only question appears to be whether this immunity extends to the whole family or only the spouse. But there seems to be little doubt that the spouse of a head of State is entitled to this derivative immunity. The Swiss Federal Tribunal in *Marcos and Marcos v Federal Department of Police*, for example, has held that "customary international law has always granted to heads of State, *as well as to members of their family* ... visiting a foreign State, the privileges of personal inviolability and immunity from criminal jurisdiction." This principle has been recognised in other cases involving spouses of heads of State for example in India and Hong Kong (incidentally in respect of Dr Mugabe). There is similarly legislation to this effect in several States. In the United Kingdom, for example, section 20(1)(b) of the State Immunity Act provides that "members [of a sovereign or other head of State] forming part of his (sic) household" enjoy the same immunities as he or she does. Similarly, section 36(1) of the Australian Foreign States Immunities Act of 1985 provides that Immunities and privileges from criminal jurisdiction apply to (a) "*the head of a foreign State*" and (b) "*the spouse of the* head of a foreign State".

11. I have referred to the aforegoing for two reasons. First it constitutes evidence of customary international law. Second, it

> indicates the approach of other democratic societies in the balancing act that the exercise of discretion in Section 7(2) of [DIPA] requires.
>
> 12. Taking into account all of these, the Minister of International Relations and Cooperation has decided to confer immunities on Dr Grace Mugabe.
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> 13. ...
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> 14. The Minister has been at pains to express that the issue of the rule of law and the need for justice must also be accounted for in her execution of this determination. She has thus mandated the Department to expand all energies to secure the cooperation of the Zimbabwean government and the first lady in the current matter, including post the Summit, to determine possible remedies.
>
> 15. I trust that this letter will assist you in executing your mandate." (underlining added, otherwise quote is verbatim)

[7] The contents not only explained her rationale but also ensured that the SAPS cease with its efforts to investigate the alleged offence committed by Dr Mugabe. This result, no doubt, was foreshadowed in paragraph 15 of the Letter.

[8] On 20 August 2017 the Minister published the decision in the Government Gazette. The decision was conveyed in a Minister's Minute (the Minute) as well as a Government Notice (the Notice). Both unreservedly indicated that the Minister relied on her powers derived from s 7(2) of DIPA, and that the immunities and privileges conferred upon Dr Mugabe were in terms of international law. The Minute reads:

> "In accordance with the powers vested in me by section 7(2) of the [DIPA] and acting in the interest of the Republic of South Africa, I hereby recognise the immunities and privileges of the First Lady of the

> Republic of Zimbabwe, Dr Grace Mugabe, In [sic] terms of International Law and as set out in the attached Notice." (Underlining added.)

The Notice reads:

> "It is hereby published for general information that the Minister of International Relations and Cooperation has, in terms of section 7(2) of the [DIPA] recognised the immunities and privileges of the First Lady of the Republic of Zimbabwe in terms of International Law." (Underlining added.)

[9] Three days later, on 23 August 2017, the applicant in case no. 58755/17 launched one of the present applications wherein it impugned the decision on the grounds that it is unconstitutional and unlawful. The application asks for a declarator to that effect, for the decision to be reviewed and set aside and for a costs order against the Minister.

The *amici*

[10] On 30 October 2017 the Women's Legal Centre Trust (WLC), the Commission for Gender Equality (Commission), and the Freedom under Law (FUL) each applied to be admitted as *amicus curiae* with the right to present written as well as oral submissions in the matter. Their applications were successful.

[11] All three *amici* support the relief sought by the applicants. However, they rely on different grounds from that of the applicants and from each other for the relief. The Commission is a Chapter 9 institution[6] whose function is to promote "*respect for gender equality and the protection, development and attainment of gender equality.*" The Commission as well as the WLC contended that the

[6] It is established in terms of Chapter 9 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution)

decision violated the Minister's obligation in s 7(2) of the Constitution to "*respect, protect, promote and fulfil*" the rights of women, and that it violated South Africa's international obligations concerning violence against women. FUL contends that the decision is unconstitutional as it fails to appreciate that s 232 of the Constitution pronounces that any customary international law that is inconsistent with Constitution is invalid. To this end it contends that the decision offended ss 7, 8, 9 10 and 12(1)(c) of the Constitution and for that reason, whether it was based on a rule of customary international law or not, remained unlawful and unconstitutional.

The Minister's Answer

[12] The Minister answered these charges with two contentions: (i) Dr Mugabe automatically qualified for immunity from prosecution by virtue of her status as a spouse of a head of state, and: (ii) it was in the national interests of South Africa that such immunity be conferred upon her in terms of s 7(2) of DIPA. This was the approach adopted by her in the Letter, the Minute and in the answering affidavit deposed to by herself in this matter. In her answering affidavit she averred:

> "30. Insofar as it was necessary for me to confer immunity in terms of s 7(2), this sub-section empowers me to do so if it is in the interest of the Republic. I did so consider and my decision was gazetted as envisaged in s 7(2). In this regard:
>
> 30.1 ... the SADC summit was scheduled to commence on 10 August 2017, and was in progress during the relevant period. It ended on 20 August 2017.
>
> 30.2 The SADC summit is an important meeting of Heads of State of countries in the Southern African region. It had key strategic objectives which included:

...

31. As set out in the letter from the Director-General to the Acting National Commissioner of Police[7], I took into account, *inter alia*, the following:

31.1 Dr Mugabe is the first lady of a neighbouring country, Zimbabwe;

31.2 Criminal prosecution against her would have serious implications to the relations between South Africa and Zimbabwe;

31.3 Any such action might have serious implications for relations between South Africa and other African states:

31.4 The international relations between South Africa and its neighbours militated against any enforcement action;

31.5 South Africa had taken over the Chair of SADC and these events unfolded at a time when South Africa was hosting the SADC summit;

31.6 SADC is the permanent body in the sub-region and a central pillar of South African foreign policy;

31.7 Any enforcement action against the spouse of the Head of State attending the SADC summit, in the midst of the summit would cause chaos, collapse the summit and impact negatively on the reputation and international standing of South Africa;

31.8 A failed summit would not be in the interests of the Republic of South Africa;

31.9 Dr Mugabe enjoyed derivative spousal immunity. I considered this issue as set out in paragraphs 10 and 11 [of the Letter]

31.10 I also fully considered the interests of [Ms Engels] and her allegations, ... as well as her Constitutional rights.

[7] The pertinent contents of the Letter is quoted above at [6]

31.11 I concluded that I had no option but to recognise Dr Mugabe's immunity." (Underlying added, otherwise quote is verbatim.)

The issues

[13] The two issues that emerge from the facts, and in particular from the reasons proffered by the Minister for awarding the immunity of Dr Mugabe are:

a. Does Dr Mugabe enjoy immunity for the alleged unlawful act perpetrated against Ms Engels by virtue of being a spouse of a head of state?

b. If not, was the decision of the Minister to confer or grant immunity to Dr Mugabe constitutional and lawful?

[14] If the answer to the first question is in the affirmative, then *caedit questio*. If not, then the second question would call for an answer.[8] The first question really focusses on whether customary international law provides for automatic immunity for a spouse of a head of state, whereas the second one focuses on compliance of the conferment[9] of immunity on Dr Mugabe by the Minister with our constitutional prescripts and principles.[10] If she automatically enjoyed the immunity, then there was no need to confer it upon her. However, the relevant portions of the Letter and answering affidavit, quoted above, reveal that the Minister took particular care to frame her decision in a manner that

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[8] The controversy on this aspect is no longer alive in this dispute as Mr Epstein, during his oral submissions, conceded that the Minister's decision to confer immunity on Dr Mugabe was unconstitutional. See [42] below

[9] If Dr Mugabe enjoyed automatic immunity, then the decision of the Minister to "*confer*" (her word, see paragraph 12 of her Letter quoted above in [6]) is inexplicable.

[10] At this point it is important to note that as President Mugabe is no longer the head of state he has lost his immunity *rationae personae* and by extension so has Dr Mugabe (assuming she had it by dint of the operation of customary international law), which raised the issue as to whether the application has become moot. This was canvassed at the hearing. In my judgment given the facts of this case the application is not moot. I deal with it in more detail in [41] below.

ensured that both bases were covered, namely: (i) Dr Mugabe enjoyed automatic immunity from prosecution by virtue of being the spouse of a head of state; and, (ii) it was in the national interests of South Africa that she be granted the immunity.

[15] While relying on both bases, the Minister does not provide any elucidation that would allow a reader to establish whether the two bases are to be treated as complementary, or if the second one (it being in the national interest of South Africa that immunity be conferred) was constructed in the alternative to the first. A clarificatory question to this effect was put to her counsel, Mr Epstein, during his oral submissions. In response, he disavowed any reliance on the second base. He stated that the Minister "*recognised*" the immunity that Dr Mugabe automatically enjoyed by virtue of her status. The Minister did no more. The submission is peculiar. It is noteworthy that he refused to use the word "*confer*", which as we know from the quoted sections of the Letter and the answering affidavit is one the Minister has no difficulty in utilising. In any event, the submission would, of course, only make sense if paragraphs 7 and 8 of the Letter[11], as well as her averments in paragraph 31 of her answering affidavit[12], were completely ignored. If that were to be, then the question which poses itself is: why did she raise it at all? The second basis it will be remembered was constructed by the Minister prior to the launching of these two applications and was, therefore, part of the reason she issued the Minute. The Minister also relied on it in her affidavit answering the two applications to defend the decision. It must be remembered that the first basis

[11] Quoted in [6] above
[12] Quoted in [12] above

(that Dr Mugabe enjoyed automatic immunity) was itself carefully thought out. It was not a case of the Minister merely stenographing the state of customary international law. The Minister, with great effort, undertook an analysis of that law and based on that analysis came to the conclusion that Dr Mugabe enjoyed automatic immunity by virtue of her status. Once arriving at that conclusion the Minister could have left the matter there and merely informed the Acting National Commissioner of the conclusion, but instead she went further and explained that she also scrutinised the issue through the lens of "*the interest of the Republic*" provided to her by s 7(2) of DIPA.[13] This is what she states in both the Letter and the answering affidavit. She was conscious of the power bestowed upon her office by the s 7(2) of DIPA and elected to utilise it. The second basis was therefore, not an afterthought. It was carefully thought through and deliberately so. It was part of a perfectly legitimate and laudable objective to ensure that the decision was immunised from challenge. For these reasons, it cannot be ignored or simply wished away. In the light thereof the submission by Mr Epstein that the Minister did no more than "*recognise*" the immunity Dr Mugabe already enjoyed is dislocated from the objective facts, inconsistent with the reasoning upon which the decision was grounded, and contrary to the very stance adopted by the Minister in response to these applications. The submission was, as will be seen later, not without consequence.

Customary International Law

[13] Section 7(2) of DIPA is quoted in n5

[16] The law concerning relations between nations is made up of treaties and customs. It is the latter that concerns us here. A custom or customary norm is a recognised well-established practice that nation-states adhere to in their dealings with each other. The basic premise of customary law is that rules and practices which can be derived from custom should be and are accepted as legal obligations by states. Therefore, in principle an international custom or rule assumes the mantle of a law. This principle is as old as the existence of states themselves. More recently the principle has been enshrined in Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), which provides that international custom is accepted "*as evidence of a general practice accepted as law.*"[14] However, for the rule or practice to achieve the status of a legal obligation it has to be firstly, a settled practice (*usus*) that is widespread and extensive and be recognised by a majority of states and, secondly, the action must occur out of a sense of legal obligation, i.e. it has to be carried out as a binding *opinio juris.*[15] Both elements have to be present.[16]

[17] The immunity is not for the personal benefit of the official but there to ensure that states function effectively and that there is a well-ordered workable system of international relations where peace and harmony can exist between states. It is a consequence of a simple idea, now recognised as a principle, and captured in the phrase, "*par in parem imperium non habet*".[17] However, it is a

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[14] *Statute of the International Court of Justice.* International Court of Justice (U.N.). See: http://www. icjcij.org/documents/index.php?p1=4&p2=2&p3=0> Accessed 14 May 2018.
[15] *Opinio Uris*, is an acceptance of a practice as a legal obligation. In other words, the practice is a necessity not a choice.
[16] *Germany v Denmark, Germany v Netherlands (North Sea Continental Shelf Cases)*, 1969 ICJ Reports 3 at paras 71 – 74 and para 77
[17] Translated it reads: "equals have no jurisdiction over one another."

derogation from another fundamental principle that each state shall enjoy supreme sovereignty over the operation of its laws.

[18] In terms of the customary international law officials of a state enjoy immunity from civil and criminal jurisdiction. The immunity takes two forms: immunity based on the functions they perform (functional immunity or immunity *rationae materiae*); and, immunity granted to certain officials because of the office they hold (personal immunity or immunity *rationae personae*).[18] The former concerns immunity for acts performed in an official capacity. The immunity is functional to the work of the official of the state; it attaches to the function and not the individual. The immunity *rationae personae* on the other hand, is given to individuals by virtue of the position they hold, such as heads of state, heads of government or ministers of foreign affairs, while in office. It is these three officials only that enjoy this immunity. This immunity attaches to the individual. The immunity *rationae personae* covers acts committed prior to and while the official holds office. It is temporary: it takes effect as soon as the official takes office and ceases as soon as s/he leaves office. A more fundamental difference between the two is that immunity *rationae personae* applies to both official and private acts of the person enjoying this immunity.[19] The ICJ articulated this principle in the following terms:

> "The Court accordingly concludes that the functions of the Minister for Foreign Affairs [this applies to a head of state as well as to a head of government] are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protects the

[18] *Rationae materiae* refers to subject matter jurisdiction while *rationae personae* refers to personal jurisdiction

[19] *Democratic Republic of Congo v Belgium (Arrest Warrant Case)*, ICJ Reports 3 at para 55

> individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties." [20]

[19] The law of immunity is procedural in nature. It is focussed on and regulates the question of jurisdiction of the court but does not deal with the question of the lawfulness or otherwise of the action, for that is an issue of substantive law.

[20] The question that consumes our attention for the moment is: is the immunity *rationae personae* extended to the spouse of the head of state? According to her Letter and her answering affidavit the Minister, after canvassing three cases, concluded that it is so extended. The applicants and the *amici,* relying on two cases as well as the opinion expressed in a memorandum of the Secretariat of the International Law Commission of the United Nations (the ILC) and a resolution adopted by the *Institut de Droit International* (the Institute)[21], arrived at the opposite conclusion.

[21] The Minister acknowledges that for it to be accepted that the spouse of a head of state enjoys the said immunity it has to be found that there exists a settled practice which is widespread and extensive (i.e. recognised by a majority of states) (the *usus*) and that the practice occurs out of a sense of a legal obligation by the states (the *opinion juris*). To this end, the Minister contends that all she has to do is draw attention to "*the evidence of what other*

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[20] *Id.* at para 54

[21] Translated the name reads: The Institute of International Law. It is an organisation made up of prominent public international lawyers whose members include judges of the ICJ, the international Tribunal for the Law of the Sea and the International Criminal Court. It commissions studies with the primary objective of developing the public international law with a focus on the respect for human rights and the encouragement of peaceful resolution of disputes between states. The resolution is captured in a quotation at [33] below

states have done when faced with claims of immunity from criminal prosecution of spouses of heads of state." She relies on a *dictum* in *Petane* which basically reminds us that it is important to look at "*what States have done on the ground in the harsh climate of a tempestuous world*"[22] if we wish to establish what the custom is. The *dictum*, however, does not detract from the fact that the custom has to be found in the co-existence of the *usus* and the *opinio juris*. Absent judicial pronouncements, evidence of what states have done on the ground may sometimes only demonstrate the existence of an *usus* but not necessarily that of an *opinio juris*. The latter understandably is much more difficult to establish. However, the Minister cannot escape the duty to demonstrate the co-existence of both if she is to succeed in her claim that she simply "*recognised*" the immunity *rationae personae* of Dr Mugabe. Expressed differently, proof of the existence of an *usus* is a necessary but insufficient condition for the establishment of a custom. The Minister must go beyond simply identifying a practice (*usus*).

[22] The Minister relies, amongst others, on a judgment of the Swiss Federal Tribunal in 1989 as authority for her submission that public international law accords Dr Mugabe the immunity *rationae personae*. According to the Tribunal:

> "Customary international law has always granted to Heads of State, as well as to the members of their family and their household visiting a foreign State, the privileges of personal inviolability and immunity from criminal jurisdiction. This jurisdictional immunity is also granted to a Head of State who is visiting a foreign State in a private capacity and also extends, in such circumstances, to the closest accompanying family members as well as to the senior members of his household staff. Accordingly, such persons cannot be the subject of criminal proceedings or even of a summons to appear before a court. Customary public international law grants such privileges *ratione*

[22] *S v Petane* 1988 (3) SA 51 (C) at 61D

> *personae* to Heads of State as much to take account of their functions and symbolic embodiment of sovereignty as by reason of their representative character in inter-State relations."[23]

[23] These *dicta* pronounce that heads of state and their family members enjoy immunity *rationae personae* at all times. It regards the immunity as absolute and holds that it is a customary norm. Understandably, the Minister places great emphasis on them. But, the Minister also relies on two authorities from the United States of America, viz, *Kline v Kaneko*[24] and *Kilroy v. Windsor (Prince Charles, the Prince of Wales) and Others*[25] to support her conclusion. In *Kline* the court observed that:

> "[u]nder general principles of international law, heads of State and immediate members of their families are immune[26] from suit. The United States follows that rule and implements it by the filing of a suggestion of immunity"[27]

[24] The *dictum* in the first sentence in *Kline* quoted above clearly echoes the *dictum* to the same effect in *Marcos*. The *dictum* is wide-ranging. It covers everyone that is part of the family of the head of state. This is manifest in the second case relied upon by the Minister, *Kilroy*, where the court concluded that it was bound to accept the immunity granted to Prince Charles on the grounds that he was the son of the head of state, the Queen of the United Kingdom. The view articulated in the first sentence however is not accepted by at least two other national courts. A Belgian Civil Court in *Mobutu v. SA Cotoni*[28] declined to follow this *dictum.* In this case the Court adopted the view that as the children

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[23] *Marcos and Marcos v Federal Department of Police* 102 ILR 198 Federal Tribunal (Switzerland, 1989) at 201 (footnotes omitted)
[24] 141 Misc. 2d 787 (1988) at 788
[25] 1978 ILR, Vol 81, p 605-607
[26] The immunity referred to here is immunity *rationae personae*
[27] *Kline,* n 23, at 788
[28] *ILR*, vol. 91, 259 (1988)

of the President of Zaire had at the time of suit already attained their majority they were thus "*distinct from their father and cannot in any case benefit from the same immunity as he is entitled to benefit from*".[29] The other case is *W. v. Prince of Liechtenstein*, where the Austrian Supreme Court concluded that the sister and two brothers of the head of state of Liechtenstein did not enjoy immunity as they were not part of his household and therefore not entitled to immunity under customary international law.

[25] Of the four authorities relied upon by the Minister the only one in point is *Kline.* It was the only case where the immunity was invoked on behalf of the spouse of the head of state. Nevertheless, a crucial factor that needs to be borne in mind about that case is that it fell within the jurisdiction of the United States where the courts tend to show extensive, if not absolute, deference to the decision of the executive to grant immunity to the official or spouse of the official from the sending state. The principle was established as long ago as 1882 by the United States Supreme Court in *Lee*[30]. It has been succinctly captured in a subsequent case where the same Court noted:

> "Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.

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[29] Supreme Court, Judgment of 14 February 2001, 7 Ob 316/00x. The judgment is in German. The summary herein is drawn from the report of the then Special Rapporteur, Roman Anatolevich Kolodin, to the *ILC* titled: *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur [*29 May 2008*] document A/CN.4/601, para 126

[30] *United States v. Lee* 106 U.S. 196 (1882)

> It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."[31]

[26] It is this principle that underlines the decision in *Kline*. This is manifest in the second sentence of the *dictum* quoted in [23] above. It is furthermore made explicit in a further *dictum* where it clearly indicates that it is the "*duty*" of the court to "*surrender*" jurisdiction upon the motion by the executive that the court lacks jurisdiction as it (the executive) saw fit to grant the person immunity. The *dictum* reads:

> "Courts are bound by suggestions of immunity submitted by the executive branch because they are a "conclusive determination by the political arm of the Government". Since the judiciary "must be sensitive to the overriding necessity that courts not interfere with the executive's proper handling of foreign affairs" logic mandates that courts be bound by the State Department's recommendation. Thus, upon a filing of a suggestion of immunity, it becomes the "court's duty" to surrender jurisdiction."[32]

[27] The process of "*surrendering*" jurisdiction commences with a "*suggestion of immunity letter*" from the Justice Department. Typically, the pertinent part of the letter would read:

> "The United States has an interest and concern in this action against President Aristide insofar as the action involves the question of immunity from the Court's jurisdiction of the head-of-state of a friendly foreign state. The United States' interest arises from a determination by the Executive Branch of the Government of the United States, in the implementation of its foreign policy and in the conduct of its international relations, that permitting this action to proceed against President Aristide would be incompatible with the United States' foreign policy interests."[33]

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[31] *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) at 34 (citations omitted)
[32] *Kline*, n24, at 789
[33] *Lafontant v Aristide* 844 F Supp 122 (EDNY 1994) at 131

[28] It is the contents of this letter that defines the approach of the court. Thus the decision of the court is not necessarily a reflection or pronouncement of the customary law. The position is succinctly captured in the judgment of the appeal court in *Noriega*:

> "16 Generally, the Executive Branch's position on head-of-state immunity falls into one of three categories: the Executive Branch (1) explicitly suggests immunity; (2) expressly declines to suggest immunity; or (3) offers no guidance. Some courts have held that absent a formal suggestion of immunity, a putative head of state should receive no immunity. In the analogous pre-FSIA [Foreign States Immunity Act], foreign sovereign immunity context, the former Fifth Circuit accepted a slightly broader judicial role. It ruled that, where the Executive Branch either expressly grants or denies a request to suggest immunity, courts must follow that direction, but that courts should make an independent determination regarding immunity when the Executive Branch neglects to convey clearly its position on a particular immunity request."[34]

[29] The courts in the United States refused immunity to General Noreiga of Panama even though he was a head of state. The United States government did not recognise him being the head of state. The district court when confronted by his claim to immunity noted that the executive had denied him the "*privilege*" of immunity and referred to him as the "*de facto*" head of state only (whatever that means). The court said that "*the grant of immunity is a privilege which the United States may withhold from any claimant*" and that General Noriega was not entitled to immunity if there was no explicit recognition from the executive arm of government that he was a head of state upon whom it chose to bestow the immunity.[35]

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[34] *United States v. Noriega*, 117 F.3d 1206 (1997) at para 16

[35] *United States v Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) at 1520. The appeal court affirmed the ruling.

[30] Hence, the decision in *Kline* cannot be said to be based on a customary norm (where both the *usus* and the *opinio juris* was established). This would be true as well for the other cases from the Unites States jurisdictions which the Minister relies upon. The decisions taken whether to grant of refuse state immunity is not taken solely on the basis of following a rule of customary international law, but rather reflects domestic choices made for policy reasons. Thus in all the cases the decision of the executive to grant or refuse immunity is determinative as the courts treat this as a matter that falls exclusively within the preserve of the executive arm of state. This is not the law in South Africa. Here the executive is constrained by the Constitution and by national legislation enacted in accordance with the Constitution. In terms of the Constitution the executive can only grant immunity *rationae personae* to an official from a foreign state if such immunity is derived from (i) a customary norm that is consonant with the prescripts of the Constitution or (ii) the prescripts of an international treaty which is constitutionally compliant or (iii) national legislation which is constitutionally compliant.[36] A decision to grant immunity to a foreign state official that does not fall into one of the three categories will not withstand the test of legality, rationality or reasonableness. That is our law.[37]

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[36] Section 232 of the Constitution provides that "*customary international law is part of our domestic law insofar as it is not inconsistent with the Constitution or an Act of Parliament.*"

[37] Sections 1(c) of the Constitution reads:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) ...
> (c) Supremacy of the constitution and the rule of law.

And section 2 thereof reads:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

See: *The Speaker of the National Assembly v Patricia De Lille and Others* 1999 (4) SA 863 (SCA) at [14] (and the authorities cited therein) for a succinct summation of our law since the enactment of the Constitution.

[31] Thus the authorities from the United States are not very helpful in establishing whether there exists a customary norm to the effect that a head of state or a spouse of a head of state enjoys immunity *rationae personae,* and are therefore not of great assistance to our concern in the present case.

[32] The *dictum* from the Swiss Federal Tribunal in *Marcos* has not been followed by the Belgian court in *Mobutu.* It therefore is of no assistance to the Minister's case that there exists a customary norm to the effect that family members of a head of state enjoy immunity from criminal prosecution. I am mindful of the fact that *Mobutu* is distinguishable from *Marcos* on the basis that the latter dealt with a spouse of the head of state whereas the former with other family members. But this, too, does not advance the Minister's case for it must be remembered that in *Marcos* the Tribunal explicitly revealed that its decision was based on an understanding that customary law "*has always*" granted "*members of (the) family*" of heads of state immunity[38] and as we know this is not entirely supported or followed in other jurisdictions.

[33] The ILC called on its Special Rapporteur to conduct an investigation into the subject of immunity of state officials from foreign criminal jurisdictions. He reported that there was a marked lack of homogeneity in the judgments of various national courts dealing with the issue of immunity of family members of a head of state. He also observed that this division in opinion permeated the commentary on the subject by various learned authors. His observation was that:

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[38] See quote in [22] above

> "(t)he doctrine reflects the various viewpoints. It is noted in *Oppenheim's International Law* that a comparison of the status of members of the family of a Head of State with the position of the family of a diplomatic agent indicates that members of the family of a Head of State forming part of his household enjoy immunity from the jurisdiction of the host State. The fact that members of the family of a Head of State and Head of Government are protected by immunity is also acknowledged by P. Gully-Hart. In the view of A. Watts, the immediate family of a Head of State may enjoy immunity, but on the basis of comity and not of international law. This view is endorsed by S. Sucharitkul. The view that, if the members of the family of a Head of State are also granted immunity, it is on the basis only of international comity and not of international law was supported in the resolution of the Institute of International Law."[39]

[34] Consequently, the Secretariat of the ILC came to the conclusion that:

> "The granting of immunity *rationae personae* under international law to the family members and members of the entourage of a head of State remains an uncertain matter. .... National case law (mostly in civil proceedings) is limited and remains inconclusive, both because tribunals in different forums have taken divergent views on the matter and because the family members concerned have often held an official position of their own."[40]

[35] Accordingly, in my judgment, the evidence is too contradictory to support the definitive finding in *Marcos* and in *Kline* that immunity *rationae personae* is extended to the family members of a head of a foreign state. Where such immunity was granted it was on the basis of international comity rather than on the basis of a finding that it is a principle of international customary law.

[36] Having come to the conclusion that there is no customary norm to the effect that the spouse of a head of state enjoys immunity from prosecution for

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[39] Report by the then Special Rapporteur Kolodin, n29, at para 128 references omitted. The final sentence in this quote refers to the resolution of the Institute. The Institute is referred to in [20] and in n21 above

[40] ILC, Sixtieth session, *Immunity of State Officials from foreign criminal jurisdiction*, Memorandum by the Secretariat, at para 114 (references omitted), https://undocs.org/A/CN.4/596, accessed on 27 July 2018

the offence that Dr Mugabe is alleged to have committed, it is unnecessary for me to engage with the submissions of the *amici* that the customary law of spousal immunity, if found to exist, has not been incorporated into our domestic law as it is inconsistent with the prescripts of our Constitution.[41]

[37] It is now necessary to examine the national legislation that speaks specifically to this issue of head of state immunity, for it has a bearing on the issue of spousal immunity. The national legislation in question is the Foreign States Immunities Act (FSI).

The FSI

[38] The customary international law provides the contextual background for the enactment of the FSI.[42] The legislature must therefore be understood to have had knowledge of the existing customary international law when enacting it. Its object is, "*(t)o determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic; and to provide for matters connected therewith*", and to give effect and some meaning to international customary law. In this regard it was clearly intended to expound, with as much precision as was possible at the time of its enactment, the parameters of immunity from the jurisdiction of our courts that foreign states enjoy. And, a "*foreign state*" according to one of its provision includes a reference to "*the head of state ... in his capacity as such head of state, and to the government of that foreign state.*"

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[41] Section 232 of the Constitution, n36
[42] See: *Alcom Ltd v Republic of Colombia* [1984] 2 All ER 6 (HL) at 12j-13a

[39] The FSI commences with a broad sweeping injunction that a "*foreign state shall be immune from the jurisdiction the courts of the Republic except as provided in this Act or in any proclamation issued thereunder,*"[43] which is then qualified with a list of specified exceptions. An exception which for our present purposes is very important is one that is spelt out in s 6(a). It reads:

> "A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to—
> (a) the death or injury of any person;"

[40] In terms of s 6(a) former President Mugabe would not have enjoyed the immunity *rationae personae* had he been the one accused of perpetrating the alleged assault on Ms Engels, for such immunity has specifically been withdrawn by the section. In this regard our law has parted company with the customary international law and s 232 of the Constitution allows for this. Thus even if the Minister was correct in her analysis that customary international law accorded immunity to Dr Mugabe for the alleged unlawful conduct of causing personal injury to Ms Engels, her conclusion that this immunity has been extended to our law is incorrect. Her error lies in her failure to take note of and give effect to the provisions of the FSI, which in the unambiguous terminology of s 6(a) makes crystal clear that Dr Mugabe's spouse, former President Mugabe, did not enjoy the said immunity. Bearing in mind the conclusion arrived at by the Minister that Dr Mugabe enjoyed "*derivative immunity*"[44], it has to be said that Dr Mugabe was not clothed with any immunity. This is so because it is a matter of plain logic that "*derivative immunity*" cannot exist if the

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[43] Sub-section 2(1) of the FSI. The immunity referred to is undoubtedly both immunity *rationae materiae* and immunity *rationae personae*
[44] Paragraph 31.9 of her answering affidavit quoted above in [12]

primary immunity is non-existent. Hence, as former President Mugabe would not have enjoyed the immunity, neither could his spouse.

Mootness

[41] Before closing on this subject it is necessary to attend to an issue that was raised at the hearing but which arose long after the pleadings had closed. It is common cause that as Mr Mugabe is no longer the head of state Dr Mugabe's immunity has ceased. Mr Epstein contended that (i) as a result the matter is moot; and (ii) this Court should refrain from attending to the main dispute and if Dr Mugabe returns to this country and the Director of Public Prosecutions elects to pursue a prosecution against her the issue should, if Dr Mugabe wishes to rely on the Minute, be dealt with by the court invested with that case. I must say that in my view he did not press the contention with great conviction. The applicants and the *amici* resisted the contention. Unanimously, they pointed out that even though in terms of customary law Dr Mugabe has lost her immunity she is still entitled to rely on it as it has been conferred upon her by an administrative act, which remains in place until set aside. Their contention is doubtlessly unanswerable. It is now established law that an administrative act remains in force until set aside by a competent court even if such act was illegal or improper *ab initio* or became illegal or improper in due course. The law was established in the renowned case of *Ouderkraal*[45] and has come to be referred to as the Ouderkraal principle. Hence the matter is not moot and, accordingly, the invitation from Mr Epstein to desist from making a determination on the main issue has to be declined. There is another more

[45] *Oudekraal Estates (Pty) Ltd v City of Cape Town* & others 2004 (6) SA 222 (SCA) at [26]. See also: *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at [65], [66] and [88] – [90]

practical reason to decline the invitation. The application was launched many months ago. Full papers were submitted by six parties (two applicants, one respondent and three *amici*). The parties have patiently awaited their turn on the court roll. The Court had the benefit of robust written and oral argument from the six parties. The oral argument took place over a period of two days. Collectively, the parties made available an authorities bundle consisting of some 8000 pages. This Court is therefore not only well placed to make a determination on the issue but is duty bound to do so. In these circumstances leaving the matter for the criminal court, should Dr Mugabe be prosecuted, would be a most inefficient use of scarce judicial resources. It has to be deprecated. Further, should the prosecution of Dr Mugabe proceed there is no guarantee that it would occur in the High Court, which is the court competent to review and set aside the decision of the Minister. In which case the criminal proceedings would be delayed pending a determination in the High Court on the very issue that this Court could have and should have made a determination on in the first place. In a word, the issue is not moot and the invitation to defer the matter to another court is declined.

Conclusion

[42] By "*recognising*" the said immunity the Minister committed an error of law. The error, as Mr Epstein conceded, is fundamental and fatal. Accordingly, the decision expressed in the government gazette, i.e. to "*recognise*" the immunity of Dr Mugabe, has to be reviewed and set aside in terms of the common law.[46] The common law apart, the error is envisaged in s 6(2)(d) of

[46] *Hira v Booysen* 1992 (4) SA 69 (A) at 93F-I

Promotion of Administrative Act 3 of 2000 (PAJA) enacted in terms of s 33 of the Constitution as one that is susceptible to being reviewed and set aside. However, as mentioned above, while the Minute only make mention of "*recognising*" the immunity of Dr Mugabe it has to be read in conjunction with the Letter and the answering affidavit. Therefrom it becomes clear that the Minister did not merely "*recognise*" the immunity of Dr Mugabe, she conferred immunity on Dr Mugabe. That the Minister has the power to confer immunity on Dr Mugabe is neither doubtful nor debateable. Section 7(2) of DIPA empowers her to do so. She, however, has to exercise this power in a manner that is constitutional and lawful. Having regard to the contents of the Letter as well as her answering affidavit there is no doubt that, after careful and anxious consideration of the matter, she came to the conclusion that it was in the national interests of South Africa that Dr Mugabe be clothed with the immunity. However, Mr Epstein not only disavowed any reliance on her decision to confer the immunity, but contended that she did no more than "*recognise*" it. He chose not to defend the decision and instead conceded that the decision to "*confer*" immunity on Dr Mugabe did not withstand the scrutiny of lawfulness. The consequence is that once I hold, as I do, that the decision to "*recognise*" the immunity was unlawful an order consistent with this finding has to follow. There is no need for me to engage in an analysis of the issue referred to in [13]b above.

[43] On the basis of the reasoning outlined above I conclude that Dr Mugabe is not immune from the jurisdiction of our courts and the Minister's decision to "*recognise*" or "*confer*" immunity upon her was unconstitutional and unlawful.

The Notice therefore stands to be set aside so that our courts' power to administer justice in the matter is not constrained by any procedural bar.

Costs

[44] The *amici* sought costs. They maintain that they were protecting the interests of an important social grouping, women, to be free from violence. They contend further that given the Minister's decision to oppose the application in circumstances where the constitutional rights of women were prejudicially affected, they were obliged to enter the fray and therefore should be granted their costs. Their stance was that they were duty-bound to draw attention to the legal consequence of the decision of the Minister which in their view violated, *inter alia*, the constitutional prohibition of gender based discrimination.

[45] While there was certainly considerable overlap in the contentions of each of the *amici* as well as that of the *amici* and the applicants, it has to be said that each of their focus during their oral submissions was specific and direct to the issues they raised.[47] They also provided significant assistance on the general issue of immunity of state officials. Their contribution in my view has been very valuable. I take this opportunity to thank them for their assistance. I believe that it would be only fair in the circumstances that they be compensated in part for their costs.

Order

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[47] These are outlined in [11] above

[46] The following order is made:

1 It is declared that the decision of the Minister of 19 August 2017, in terms of s 7(2) of the Diplomatic Immunities and Privileges Act 37 of 2001 to recognise Dr Grace Mugabe immunities and privileges as published in the Minister's Minute in the Government Gazette of 20 August 2017, No 41056 Notice 850 (the decision) is inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996.

2 The decision is reviewed and set aside.

3 The Minister is to pay the costs of the applicants in both cases which costs are to include those occasioned by the employment of two counsel.

4 The Minister is to pay the costs of one counsel for each of the *amici*.

Vally J

Dates of hearing:	10, 11 May 2018
Date of judgment:	30 July 2018
For the Applicant:	Anton Katz SC with David Simonsz
Instructed by:	Minde, Schapiro & Smith Attorneys
For the Minister:	Hilton Epstein SC with Lerato Maite and Simphiwe Tshikila
Instructed by:	State Attorney
For the First *Amicus Curiae*:	Karisha Pillay with Bronwyn Pithey

Instructed by:	Womens Legal Centre
For the Second *Amicus Curiae*:	Micheal Bishop with Lerato Zikalala
Instructed by:	Commission for Gender Equality
For the Third Amicus Curiae:	Max du Plessis with Andreas Coutsoudis and Jubu Thobela-Mkhusili
Instructed by:	Nortons Inc