

ANNEX A

PUBLIC

Answering Affidavit of Director-General of Justice and Constitutional Development before the High Court of South Africa (North Gauteng High Court, Pretoria), 15 June 2015

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

CASE NUMBER:

In the matter between:

THE SOUTH AFRICA LITIGATION CENTRE

APPLICANT

and

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

FIRST RESPONDENT

**THE DIRECTOR-GENERAL OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

SECOND RESPONDENT

THE MINISTER OF POLICE

THIRD RESPONDENT

THE COMMISSIONER OF POLICE

FOURTH RESPONDENT

**THE MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION**

FIFTH RESPONDENT

**THE DIRECTOR-GENERAL OF
INTERNATIONAL
RELATIONS AND COOPERATION**

SIXTH RESPONDENT

THE MINISTER OF HOME AFFAIRS

SEVENTH RESPONDENT

**THE DIRECTOR-GENERAL OF
HOME AFFAIRS**

EIGHTH RESPONDENT

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

NINTH RESPONDENT

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

TENTH RESPONDENT

**THE HEAD OF THE DIRECTORATE FOR
PRIORITY CRIMES INVESTIGATION**

ELEVENTH RESPONDENT

**THE DIRECTOR OF THE PRIORITY
CRIMES LITIGATION UNIT**

TWELFTH RESPONDENT

ANSWERING AFFIDAVIT

I, the undersigned,

TERRESA NONKULULEKO SINDANE

do hereby make oath and state as follows:

1.

I am the Director-General: Justice and Constitutional Development (*"the Second Respondent"*) and the Central Authority as defined in section 1 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (*"the ICC Implementation Act"*). In view of the fact that this matter relates to the provisions of the ICC Implementation Act, I am duly authorised to depose to this affidavit. In addition hereto and in view of the undue time constraints set by the Applicant, I have also been authorised by all the other Respondents cited herein to depose to this affidavit on their behalf as well.

2.

The facts contained in this affidavit are within my own personal knowledge, unless otherwise stated or indicated and are to the best



of my knowledge and belief true and correct. Insofar as I make legal submissions in this affidavit, I do so as a result of advice received from Respondents legal representatives.

3.

I have read the founding and supplementary affidavits deposed to by **KAAJAL RAMJATHAN-KEOGH** and intends to answer thereto *ad seriatim*. However and before doing so, I am advised to refer the Court to the following:

- 3.1 On or about January 2015, the Republic of South Africa agreed to host an African Union ("AU") Summit during June 2015.
- 3.2 In order to facilitate the hosting of the AU Summit, the Republic of South Africa was required to enter into an agreement with the Commission of the AU, specifically relating to the material and technical organization of the meetings (hereinafter referred to as "*the host agreement*"). The host agreement was concluded on or about 4 June 2015. I refer the Court to a copy of the host agreement annexed hereto as **Annexure "A"**.




- 3.3 The preamble to the host agreement, *inter alia*, records the following:

"These Meetings which are provided for in the Constitutive Act of the African Union, the Rules of Procedures of the Assembly, the Executive Council and the Permanent Representatives' Committee as well as in decisions of the African Union policy organs will be held in Pretoria, Republic of South Africa, from 7 to 9 June, and from 10 to 13 June and on 14 to 15 June 2015 in Johannesburg, respectively, at the invitation of the Government.

Accordingly, the Commission is charged with the exclusive responsibility of organising, conducting and managing the Meetings, while the Government will, on its part, provide all the necessary facilities and assistance to ensure the success and smooth running of the Meetings."

- 3.4 I should immediately interpose to state that although the preamble to the host agreement contains the phrase "*at the invitation of the Government*", the Republic of South Africa was in no manner whatsoever involved or responsible for extending invitations to any or all of the delegates or attendees of the AU Summit.

- 3.5 The preamble to the host agreement clearly provides that the Commission of the AU is charged with the exclusive responsibility of organising, conducting and managing the meetings. I therefore reiterate that the Republic of South Africa merely agreed to ~~host~~ the AU Summit, whilst the Commission of the AU was solely responsible for inviting all the delegates and attendees of the AU Summit.
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3.6 It is apparent from the contents of the host agreement that most of the terms contained therein relates to the provision of the necessary facilities and assistance rendered by the Republic of South Africa to ensure the success and smooth running of the AU Summit.

3.7 However, the provisions of Article VIII of the host agreement is of singular importance. This Article specifically provides for privileges and immunities. Clause 1 of Article VIII record that the Republic of South Africa shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organisations attending the Meetings the privileges and immunities set forth in Section C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU (*"the OAU Convention"*). I refer the Court to a copy of this Convention annexed hereto as **Annexure "B"**.

3.8 I deem it necessary to refer the Court to Section C, Article V(1)(a) and (g) of the OAU Convention, which read as follows:


- "1. Representatives of Member States to the principal and subsidiary institutions, as well as to the Specialized Commission of the

Organization of African Unity, and to conferences convened by the Organization, shall, while exercising their functions and during their travel to and from the place of meetings, be accorded the following privileges and immunities;

- (a) Immunity from personal arrest or detention and from any official interrogation as well as from inspection or seizure of the personal baggages;
- (g) ^{...} Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of the personal baggage) or from exercise duties or sales taxes."

3.9 The aforesaid provisions are indeed contained in the Vienna Convention on Diplomatic Relations, 1961 (*"the Vienna Convention"*), which has the force of law in terms of section 2 of the Diplomatic Immunities and Privileges Act 37 of 2001 (*"the DIPA"*). I refer the Court to a copy of this Act annexed hereto as **Annexure "C"**.


3.10 More particularly, Article 29 of the Vienna Convention specifically provides that the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.



3.11 Accordingly and in order to give effect to the provisions of the host agreement, the Fifth Respondent on 5 June 2015 and in terms of the provisions of section 5(3) of DIPA read with section 231(4) of the Constitution, published Article VIII of the host agreement under *Government Gazette* No 38860 and thereby incorporated the privileges and immunities accorded delegates and attendees of the AU Summit as provided for in the host agreement, as domestic law in South Africa. I refer the Court to a copy of this *Government Gazette* annexed hereto as **Annexure "D"**.

3.12 I am therefore advised that the provisions of Article VIII of the host agreement are specific privileges and immunities extended by the AU to all its delegates and attendees of the AU Summit, which the hosting country of an AU Summit, the Republic of South Africa in this Instance, is required to uphold.

3.14 I respectfully submit that the Court should take cognizance of the fact that the provisions of the host agreement (**Annexure "A"** hereto) read with the contents of *Government Gazette* No 38860 (**Annexure "D"** hereto) are only effective for the duration of the AU Summit in South Africa, provided that the host agreement specifically provides for its termination 2 days



after conclusion of the AU Summit. By necessary Implication, the provisions of Article VIII will therefore cease to be effective after the expiration of the aforesaid period.

3.14 It is common cause that during 2009 and 2010, the International Criminal Court ("*the ICC*") issued two (2) warrants of arrest in respect of the President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir ("*President Bashir*"). In terms of Article 59 of the Rome Statute, South Africa as a State Party was requested by the ICC to arrest President Bashir in the event that President Bashir is in the Republic of South Africa.

3.15 During 2009, President Bashir was invited by South Africa to attend the inauguration of President Zuma in South Africa. However and as a result of the 2009 warrant of arrest issued by the ICC and South Africa's obligation to give effect thereto, President Bashir declined South Africa's invitation to attend the inauguration.

3.16 After having agreed to host the AU Summit during June 2015, the Government of South Africa, through the appropriate diplomatic channels received confirmation from the Republic of



Sudan that President Bashir will attend the AU Summit, with a concomitant request by the Republic of Sudan that President Bashir shall be granted the necessary privileges and immunities as provided for in Article VIII of the host agreement.

3.17 I am aware that the Executive Authority of the Republic of South Africa discussed and reviewed the aforesaid request received by the Republic of Sudan. I am however not privy to the contents or resolutions taken by Cabinet in respect of this issue and refer the Court to the affidavit of Dr Cassius Reginald Lubisi, the Secretary of Cabinet and Director General of the Presidency, in this regard.

3.18 In the event that the Applicant may argue that section 4(2) of the ICC Implementation Act removes the immunity and privileges of President Bashir, to the extent that the Respondents are obliged to arrest President Bashir, such an argument is misconceived for the following reasons:

3.18.1 I am advised that sections 4(2)(a) and (b) of the ICC Implementation Act read with subsection 4(2)(i) addresses criminal responsibility, as opposed to



Immunity, by providing that the fact that a person, *inter alia*, is or was a head of state or a member of a security service or armed force, is not a defence to a crime as defined in the ICC Implementation Act.

3.18.2 It is in this regard pertinent to note that the Applicant has indeed recognised the aforesaid distinction in paragraph 19 of its founding affidavit and by implication does not proffer an argument relating to immunity on this issue.

3.18.3 I am further advised that sections 4(2)(a) and (b) of the ICC Implementation Act read with subsection 4(2)(ii) addresses the fact that a person who has been found guilty may not rely on their status in order to mitigate their sentence. It is therefore unrelated to any immunity issue.

3.18.4 I am in any event advised that section 4(2) of the ICC Implementation Act does not apply to matters of co-operation with the ICC but is rather concerned with matters relating to prosecution before South African courts.



3.19 In view of the above, I am advised that the immunities and privileges referred to in Article VIII of the host agreement (which is law in South Africa) prevents the Respondents from arresting President Bashir during the duration of the AU Summit and an additional two days after the conclusion of the AU Summit.

3.20 In the premises, the Applicant is therefore not entitled to any relief claimed in the notice of motion. Wherefore the Court should dismiss the application based on the aforesaid, with costs consequent upon the employment of two counsel.

4.

I will now turn to answer the allegations raised by the Applicant in its founding and supplementary affidavits.

AD FOUNDING AFFIDAVIT

5.

AD PARAGRAPHS 1 and 2 THEREOF:

I note the contents hereof.



6.

AD PARAGRAPH 3 THEREOF:

Save to deny that the contents of the affidavit are true, I note the remainder hereof.

7.


AD PARAGRAPHS 4, 5 and 6 THEREOF:

I have no personal knowledge of the contents hereof, but do not dispute these allegations for purposes of this application.

8.

AD PARAGRAPH 7 THEREOF:

I admit the contents hereof insofar as it refers to past litigious matters, more particularly the Constitutional Court ruling made in 2014 pertaining to the obligations on the South African police service to investigate alleged crimes against humanity committed in Zimbabwe in 2005. However, it will become apparent hereunder that the blanket allegation made in this paragraph by the Applicant cannot be applied to the facts in the present matter.



9.

AD PARAGRAPHS 8 and 9 THEREOF:

I have no personal knowledge of the contents hereof and I am therefore in no position to admit or deny same, does however not admit it.

10.

AD PARAGRAPH 10 THEREOF:

Save to deny that the Applicant is entitled to any of the relief sought in the notice of motion, I note the contents hereof.

11.

AD PARAGRAPH 11 (including 11.1 to 11.6) THEREOF:

I have no personal knowledge of the contents hereof and I am therefore in no position to admit or deny same.

12.

AD PARAGRAPH 12 THEREOF:

I admit the contents hereof.

13.

AD PARAGRAPH 13 THEREOF:

I deny the veracity of the last sentence of this paragraph and note that the Applicant merely list 10 Respondents herein, whilst the heading of the Applicant's papers cites 12 Respondents.

14.

AD PARAGRAPH 14 THEREOF:

I note the contents hereof.

15.

AD PARAGRAPHS 15 and 16 THEREOF:

I admit the contents hereof.

16.

AD PARAGRAPH 17 THEREOF:

Save to admit that President Bashir is being accused of having committed a variety of criminal acts under the Rome Statute, I am



not in a position to comment on his criminal responsibility for the criminal acts mentioned herein.

17.

AD PARAGRAPH 18 THEREOF:

I admit the contents hereof.

18.

AD PARAGRAPH 19 THEREOF:

I admit the contents hereof insofar as it relates to the provisions of Article 27 of the Rome Statute. However, I am advised that the same rules do not necessarily extend to proceedings in South African courts.

19.

AD PARAGRAPH 20 THEREOF:

Save to admit that the ICC has issued a first warrant of arrest for President Bashir, I have no personal knowledge of the remainder hereof and I am in no position to either admit or deny same.



20.

AD PARAGRAPHS 21 and 22 THEREOF:

I admit the contents hereof insofar as it accords with the warrants issued by the ICC annexed to the founding affidavit as **Annexures "KRK9" and "KRK10"**.

21.

AD PARAGRAPH 23 THEREOF:

I note the contents hereof.

22.

AD PARAGRAPH 24 THEREOF:

I admit that the South African officials confirmed that they would arrest President Bashir should he arrive in the country during May 2009. However, I should immediately interpose and confirm that the aforesaid undertaking by the South African officials transpired exclusively as a result of an invitation extended by the South African Government for President Bashir to attend the inauguration of President Zuma. The facts in this matter are however not supportive of a similar undertaking by South African officials in this instance, for



the simple reason that the African Union invited President Bashir to attend an African Union Summit which is simply being hosted in South Africa.

23.

AD PARAGRAPHS 25, 26 and 27 THEREOF:

I admit the content hereof.

24.

AD PARAGRAPH 28 THEREOF:

I deny that the applicable "national law" in South Africa is the Criminal Procedure Act 51 of 1977 (*"the CPA"*). I repeat that the promulgation of Article VIII of the host agreement also constitutes applicable national law in this instance.

25.

AD PARAGRAPH 29 THEREOF:

I note the contents hereof.

26.

AD PARAGRAPHS 30 through 36 THEREOF:



I admit the contents hereof insofar as it conforms to the specific provisions of the ICC Implementation Act referred to herein.

27.

AD PARAGRAPH 37 THEREOF:

I do not dispute the contents hereof. However and in view of what I have already stated in paragraph 3 above, I respectfully submit that the Respondents are not in violation of the rule of law in this instance.

28.

AD PARAGRAPHS 38 to 40 THEREOF:

I repeat what I have stated in the immediate preceding paragraph and confirm that there is no basis for the Court in this matter to resort to the provisions of section 172(1)(a) or (b) of the Constitution.

29.

AD PARAGRAPHS 41 to 42.3 THEREOF:



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I deny the contents hereof for all the reasons stated in paragraph 3 above.

30.

AD PARAGRAPH 43 THEREOF:

I deny that the Respondents have failed in their legal duties as alleged herein. In this regard, I reiterate and repeat that the Commission of the AU invited President Bashir to attend an AU Summit which is hosted by South Africa. Moreover, I confirm that the Respondents are precluded from arresting President Bashir whilst he is in attendance of the AU Summit under the specific privileges and immunities extended by Article VIII of the AU.

31.

AD PARAGRAPHS 44 to 44.3 THEREOF:

I deny that the Applicant is entitled to claim the relief listed herein for all the reasons already proffered above.

32.

AD PARAGRAPHS 45 and 46 THEREOF:



I deny the contents hereof and specifically state that the Applicant clearly fails to acknowledge or appreciate the specific terms and conditions upon which the Republic of South Africa is hosting the AU Summit.

33.

AD PARAGRAPHS 47 to 52 THEREOF:

I deny that this matter is by its nature urgent. It is clear from the contents of paragraph 3 above that President Bashir will attend the AU Summit under the auspices of the specific terms and conditions of the AU, more specifically the privileges and immunities accorded to President Bashir as an invitee of the AU. Accordingly, there can be no room for the allegation that South Africa will have failed in any of its duties to the ICC in the event that President Bashir is not arrested whilst attending the AU Summit.

34.

AD PARAGRAPHS 53 to 58 THEREOF:

Save to note the Applicant's standing in this matter, I deny the remainder hereof for the reasons already proffered hereinabove.

35.



AD PARAGRAPHS 59 to 62 THEREOF:

I deny the contents hereof and repeat what I have already stated hereinbefore regarding the issues raised herein. More particularly, I deny that the Applicant is entitled to any relief claimed in the notice of motion. Wherefore I respectfully request this Honourable Court to dismiss the application with costs consequent upon the employment of two counsel.

AD SUPPLEMENTARY AFFIDAVIT

36.


AD PARAGRAPH 1 THEREOF:

I note the contents hereof but however deny the correctness of the Applicant's allegation made in respect of the further documentation listed herein.

37.

AD PARAGRAPHS 2 to 6 THEREOF:

I note the correspondence referred to in to in these paragraphs. The said correspondence could not take the matter any further because



President Al-Bashir was together with the other African Head of State granted diplomatic immunity.

38.

AD PARAGRAPHS 7, 8 and 9 THEREOF:

38.1 I reiterate and repeat what I have already stated above in respect of the promulgation of Article VIII in Government Gazette No 38860 (**Annexure "D"** hereto).

38.2 In addition, I confirm that the promulgation and publication of **Annexure "D"** hereto transpired uncontested and there was no objections received consequent upon its publication.

38.3 Moreover, the Applicant clearly fails to appreciate the purpose and effect of **Annexure "D"** hereto. I accordingly deny that the publication and promulgation of **Annexure "D"** is unlawful and invalid. The applicant has brought no application to set aside the notice. Until it does so, the notice is for all intents and purposes valid and lawful and it must be enforced.

39.



AD PARAGRAPHS 10 and 11 THEREOF:

39.1 I deny that **Annexure "KRK16"** to the supplementary affidavit constitutes an urgent judgment by the ICC Pre-Trial Chamber. Full legal argument will be made on this issue during the hearing hereof.

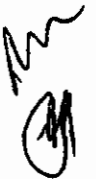
39.2 In any event, I have already indicated above that South Africa will not breach any of its obligations towards the ICC if President Bashir is not arrested whilst attending the AU Summit.

39.3 I deny that the Applicant is entitled to any relief set out in the notice of motion.

WHEREFORE I respectfully ask for an order dismissing the relief sought in the notice of motion with costs consequent upon the employment of two counsel.



Deponent



Signed and sworn before me at **PRETORIA** on this **15th** day of **JUNE 2015** after the Deponent declared that she is familiar with the contents of this statement and regards the prescribed oath as binding on her conscience and has no objection against taking the said prescribed oath. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).

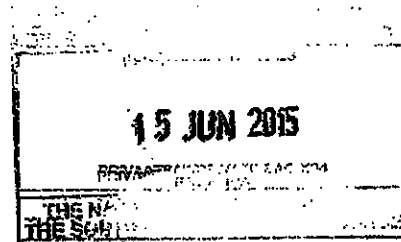
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