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Revisiting personal immunities for incumbent foreign heads of state in South Africa in light of the *Grace Mugabe* decision

*Ntombizozuko Dyani-Mhango**

Professor, Department of Jurisprudence, Faculty of Law, University of Pretoria, South Africa

<https://orcid.org/0000-0001-6073-600X>

Summary: *In the Grace Mugabe decision in which the conclusion was arrived at that Grace Mugabe was not entitled to spousal immunity by virtue of being the wife of the then incumbent foreign head of state, Vally J remarked that the late former President Mugabe would not have been entitled to immunity had he been accused of committing the assault. This article analyses this remark and its potential negative impact on South Africa's relationship with other African states. The analysis is valuable as South Africa has positioned itself as being a human rights state that strives to play a significant role in peace making in Africa and consistently has argued that removing customary international law immunity, to which foreign heads of state are entitled, may undermine these intentions. The article examines South Africa's position on personal immunity for foreign heads of state in customary international law against the backdrop of the Mugabe decision. It argues that as it currently stands South African law recognises absolute personal immunity for foreign heads of state in cases not relating to the perpetration of international crimes.*

* LLB LLM (Western Cape) SJD (Wisconsin); ntombizozuko.dyani-mhango@up.ac.za. A draft of this article was presented at the Law and Society Association annual meeting held as a virtual conference on 27-31 May 2020. I am grateful for the questions and comments from the participants. I also am grateful to Mtende Mhango for his willingness to listen and at times for re-directing my half-baked arguments during the earlier stages of drafting this article. Usual disclaimers apply.

Key words: *Grace Mugabe; personal immunities; foreign heads of state; state immunity; customary international law; Foreign States Immunities Act; Diplomatic Privileges and Immunities Act; separation of powers*

1 Introduction

The scenario I imagine is as follows: Kaavia James, an incumbent head of an African state, visits South Africa with her family on holiday. During an excursion, recklessly driving a rented car, Kaavia James causes the death of a person. This incident attracts widespread reporting in South Africa and internationally. At the same time the incident is the cause of a political and foreign relations nightmare for the executive in South Africa. Opposition political parties and civil society organisations put pressure on the police to investigate the incident before James returns home. Under pressure the police initiate an investigation for possible culpable homicide charges against Kaavia James. Before any substantial progress has been made the Minister of International Relations and Cooperation exercises her power under South African law to grant Kaavia James immunity from criminal investigation and possible prosecution before the South African courts. The Minister claims that an incumbent head of state is entitled to customary international law personal immunity in South Africa by virtue of their office. The opposition political parties and civil society organisations apply to the High Court in a challenge to the Minister's decision as irrational and unconstitutional and argue that in accordance with South African law Kaavia James is not entitled to immunity before the South African courts because she caused the death of a person. The Court agrees with the applicants. The Court reasons that although customary international law immunity for foreign incumbent heads of state is recognised in South African law, an exception exists when a head of state causes an injury to or the death of a person. The Court orders Kaavia James to be investigated for possible criminal charges and grants an interdict which prevents her from leaving the territory of South Africa until the matter reaches a conclusion. The South African government is faced with a political backlash in other African states as a result of this court order.

The above scenario is imaginary. A cursory reading of Vally J's judgment in the *Mugabe* decision¹ suggests that an incumbent foreign head of state accused of committing a crime while visiting South Africa loses their claim to personal immunity and may be

¹ *Democratic Alliance v Minister of International Relations and Co-operation & Others; Engels & Another v Minister of International Relations and Co-operation & Another* 2018 (2) SACR 654 (GP) (*Mugabe* decision).

brought before the national courts. This imaginary case reflects the status of customary international law and the immunity of heads of state, as does the remark of Vally J in the *Mugabe* decision, although that case related to whether Grace Mugabe was entitled to immunity in South Africa as a spouse of a foreign head of state. Vally J remarked:²

In terms of s 6(a) [of the Foreign States Immunities Act 87 of 1981] former President Mugabe would not have enjoyed the immunity *ratione 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 [section] 232 of the Constitution [of the Republic of South Africa, 1996] allows for this.

This article focuses on the implications of this remark, which has the potential of affecting the status of foreign heads of state's customary international law immunities in South Africa. The question is posed: Was Vally J correct in reaching the conclusion that an incumbent foreign head of state is not entitled to customary international law immunity before national courts if he or she causes an injury to a person in the territory? The focus of this article is to exclude a discussion of whether Vally J is correct in finding that Grace Mugabe was not entitled to derivative spousal immunity. The possibility of a customary international law rule on the derivative immunity of spouses of foreign heads of state is not relevant to the discussion. In any event, the question of Grace Mugabe's immunity is moot as her husband had ceased to hold office and had died. She remains a criminal suspect in South Africa.

Various reasons aroused my taking an interest in this *Mugabe* decision. First, the South African courts³ increasingly have been criticised by academics for their interpretation and application of international law.⁴ The *Mugabe* decision is an example of a case that was criticised, including for its interpretation of South African domestic law. Second, remarks made by judges in their judgments have the potential to being taken as binding law, for example the

² Para 40.

³ See, eg, *Law Society of South Africa & Others v President of the Republic of South Africa & Others* 2019 (3) SA 30 (CC); *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA); *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP).

⁴ See, eg, AK Zouapet & MA Plagis 'Braamfontein encroaching? An internationalist reading of the South African Constitutional Court judgment on the SADC Tribunal' (2020) 35 *South African Journal on Human Rights* 378 (arguing that 'the Constitutional Court's use of international law has endangered its own decision, as its positions are not defensible within the discipline of public international law'); D Tladi 'The interpretation and identification of international law in South African courts' (2018) 135 *South African Law Journal* 708, criticising the Constitutional Court's interpretation and application of international law.

remarks made by Mogoeng CJ in *My Vote Counts II*⁵ which were invoked by litigants in a subsequent case, *New National Movement*,⁶ as the sole reason for the applicants' case. Madlanga J refused to categorise the remarks as an obiter dictum, although submissions in this regard were made by the parties.⁷ I submit that Vally J's remarks have the potential to be harmful to South Africa's diplomatic and foreign relations, considered an achievement of the executive.⁸

The article discusses the facts, question of law and the judgment in the *Mugabe* decision. Then the article deals with the following issues: first, it examines the status of heads of state personal immunities in general; second, it scrutinises the status of foreign heads of state personal immunities for criminal jurisdiction in South Africa by examining relevant provisions of the three pieces of legislation that deal with immunities of heads of state in South Africa – the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act);⁹ the Diplomatic Immunity and Privileges Act 32 of 2001 (DIPA);¹⁰ and the Foreign States Immunities Act (FSIA);¹¹ and, lastly, it investigates whether Vally J by his remark in the *Mugabe* decision was incorrect. I make three arguments: (i) that current South African law recognises absolute immunity for incumbent heads of state before the national courts in criminal proceedings except for international crimes; (ii) that the applicable statute in the *Mugabe* decision was the DIPA and not the FSIA; and (iii) that Vally J exceeded his authority when he made that remark and applied the FSIA in this case, deciding on an issue that was not brought before the court.

Before exploring these arguments, I present an overview of Vally J's judgment in the *Mugabe* decision as it forms the basis of this discussion.

5 *My Vote Counts NPC v Minister of Justice and Correctional Services & Another* 2018 (5) SA 380 (CC) para 29. See also *New Nation Movement PPC & Others v President of the Republic of South Africa & Others* 2019 (5) SA 533 (WCC) paras 11 and 22, where Desai J observed that the applicant relied solely on Mogoeng CJ's remark.

6 *New Nation Movement NPC & Others v President of the Republic of South Africa & Others* (CCT110/19) [2020] ZACC 11 (11 June 2020).

7 *New Nation Movement PPC* (n 5) para 100, where Madlanga J pronounced that 'it is unnecessary to enter that debate for that matters not in the circumstances'.

8 H Woolaver 'Domestic and international limitations on treaty withdrawal: Lessons from South Africa's attempted departure from the International Criminal Court' (2017) 111 *American Journal of International Law Unbound* 453 (arguing, in relation to treaty withdrawal, that '[t]he executive, often with the legislature's input, is best placed to undertake these decisions').

9 Act 27 of 2002.

10 Act 32 of 2001.

11 Act 87 of 1981.

2 The *Mugabe* decision

2.1 The facts

Grace Mugabe, the spouse of the late former President of Zimbabwe, Robert Mugabe, was accused while visiting South Africa of having committed assault with intent to do grievous bodily harm against Ms Engels.¹² The Minister of International Relations and Cooperation (Minister) decided to confer immunity on Grace Mugabe in terms of section 7(2) of the DIPA.¹³ The Minister conferred the immunity in terms of a minister's minute and a government notice. The government notice reads as follows:¹⁴

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.

One of the issues considered by the Minister was that international and domestic law recognise personal immunity for heads of state, heads of government and ministers of foreign affairs, which 'precludes any enforcement action against the holder'.¹⁵ The Minister acknowledged that there are exceptions to this rule in relation to specific crimes but argued that this was not an issue in the current case.¹⁶ The Minister had to consider whether Grace Mugabe was entitled to derivative immunity as the spouse of an incumbent foreign head of state. Referencing the domestic law of states such as Switzerland, India, Hong Kong, the United Kingdom and Australia, the Minister argued that state practice supported the notion of derivative immunity for spouses of sitting foreign heads of state.¹⁷ The Minister referred to these examples as constituting evidence of customary international law, and as the basis for her exercise of discretion in terms of section 7(2) of DIPA.¹⁸

12 See, eg, eNCA 'Grace Mugabe assaulted me: Joburg woman' 14 August 2017, <https://www.enca.com/africa/grace-mugabe-assaulted-me-claims-joburg-woman> (accessed 7 November 2019); K Motau 'DA: Grace Mugabe must hand over passports as she remains a massive flight risk' EyeWitnessNews 18 August 2019, <https://ewn.co.za/2017/08/18/da-grace-mugabe-must-hand-over-pass-ports-as-she-remains-a-massive-flight-risk> (accessed 7 November 2019).

13 Para 8. This provision states: '[t]he 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*'.

14 Para 8.

15 Para 6.9.

16 As above.

17 Para 6.10 and paras 22-24.

18 Para 6.11.

The Democratic Alliance (DA), the main opposition political party in South Africa, challenged the Minister's decision to confer diplomatic immunity on Grace Mugabe before the High Court on the basis that it was unconstitutional and unlawful. Three *amici curiae*, the Commission for Gender Equality (CGE), the Women's Legal Centre Trust (WLC) and the Freedom Under Law (FUL), in supporting the relief sought by the DA relied on different grounds. The CGE and the WLC argued that the Minister's decision 'violated [her] obligation in [section] 7(2) of the Constitution to "respect, protect, promote and fulfill" the rights of women, and that it violated South Africa's international obligations concerning violence against women'.¹⁹ FUL argued that the Minister had failed 'to appreciate that [section] 232 of the Constitution pronounces that any customary international law that is inconsistent with the Constitution is invalid';²⁰ the Minister's decision violated various provisions of the Constitution and that, therefore, it was unlawful and unconstitutional irrespective of whether or not it was based on customary international law.

Vally J was called upon to deal with the following issues:²¹

- (a) Does [Grace] Mugabe enjoy immunity for the alleged unlawful act perpetrated against Ms Engels by virtue of being a spouse of a [HoS]?
- (b) If not, was the decision of the Minister to confer or grant immunity to [Grace Mugabe] constitutional and lawful?

Below is Vally J's response to these questions.

2.2 Vally J's judgment

Vally J examined both customary international law and South African statute law to determine whether Grace Mugabe enjoyed personal immunity in South Africa. On customary international law, he confirmed that in order for the foreign head of state spouse to enjoy immunity it had 'to be found that there exists a settled practice which is widespread and extensive (ie, recognised by a majority of states) (the *usus*) and that the practice occurs out of a sense of legal obligation by the states'.²² The Court correctly stated that the Minister bore the burden to prove both elements of a customary

¹⁹ Para 11.

²⁰ As above.

²¹ Para 13.

²² Para 21; see also art 38 of the Statute of the International Court of Justice, United Nations, *Statute of the International Court of Justice* 18 April 1946, <https://www.refworld.org/docid/3deb4b9c0.html> (accessed 18 April 2020), which defines customary international law 'as evidence of a general practice accepted as law'.

international law rule as the Minister 'must go beyond simply identifying a practice (*usus*)'.²³

Vally J rejected the authorities upon which the Minister relied on the following grounds:²⁴

A crucial factor that needs to be borne in mind about that case is that it fell within the jurisdiction of the [US] 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 [US] Supreme Court in [United States v Lee 106 US 196 (1882)]

Vally J explained that the US position on immunities '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"'.²⁵ Based on this reasoning, Vally J held that the decisions of the US courts did not reflect customary international law rule but 'domestic choices made for policy reasons'.²⁶ Accordingly, Vally J found that this did not reflect the law in South Africa as 'the executive is constrained by the Constitution and by national legislation enacted in accordance with the Constitution'.²⁷ In this regard and, according to Vally J, the Constitution permitted the executive to grant personal immunity if such immunity is derived from one of the three categories: '(i) a customary norm that is consonant with the precepts of the Constitution, or (ii) the precepts of an international treaty which is constitutionally compliant; or (iii) national legislation which is constitutionally compliant'.²⁸

Vally J relied upon the International Law Commission (ILC) Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction to reject the Minister's argument that personal immunity for the family member or spouse of a foreign head of state acquired the status of customary international law (the Minister had argued that 'customary law "has always granted members of the family" of [a foreign incumbent head of state] immunity').²⁹ Vally J found that the ILC Special Rapporteur observed that 'there was a marked lack

23 Para 21.

24 Para 25. In *Lee* it was held that 'every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government ... 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.'

25 Para 26.

26 Paras 28-30.

27 Para 30.

28 As above.

29 Para 33.

of homogeneity in the judgments of various national courts dealing with the issue of family members of a [foreign incumbent] head of state'.³⁰ Therefore, 'the granting of [personal immunity] under international law to the family members of the entourage of a head of state remains an uncertain matter'.³¹ Vally J also noted that there were differing opinions among scholars on the issue of spouses' immunity under customary international law.³² He then concluded that

the evidence is too contradictory to support the definitive finding ... that [personal immunity] 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.³³

In order to determine whether derivative spousal personal immunities exist in domestic law, Vally J examined the FSIA, which provides that a 'foreign state shall be immune from the jurisdiction of courts of the Republic except as provided in this Act or in any proclamation issued thereunder'.³⁴ According to the FSIA, the term 'foreign states' includes the head of state in his or her capacity as such.³⁵ Vally J observed that the FSIA 'was clearly intended to expound, with as much precision as possible at the time of its enactment, the parameters of immunity from the jurisdiction of our courts that foreign states enjoy'.³⁶ The judge accentuated that there is an exception to this provision in terms of section 6(a), which states that 'a foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to the death or injury of any person'.³⁷ Consequently, Vally J held that Grace Mugabe was not entitled to derivative immunities in terms of the FSIA as former President Mugabe would not have enjoyed personal immunities himself under these circumstances.³⁸ This meant that Grace Mugabe should have been arrested and charged with assault with intent to do grievous bodily harm.

30 As above.

31 Para 34.

32 As above.

33 Para 35.

34 Sec 2(1).

35 Sec 1(2)(a).

36 Para 38.

37 Para 39.

38 Para 40.

3 The South African law position on foreign incumbent heads of state personal immunities for criminal proceedings before the national courts: Which statute applies?

Before exploring the South African law position on foreign incumbent heads of state personal immunities, it is important first to ascertain the status of personal immunities for incumbent heads of state under customary international law in general. The Constitution of the Republic of South Africa, 1996 recognises customary international law as part of the South African law if it does not conflict with the provisions of the Constitution or an Act of Parliament.³⁹ In this regard, the Constitution endorses the common law position which supported the monist approach in relation to customary international law before the Constitution entered into force.⁴⁰ Customary international law recognises personal immunity or immunity *ratione personae* for a foreign head of state before national courts.⁴¹ Personal immunity is described as 'a rule of international law that facilitates the performance of public functions by the state and its representatives by preventing them from being sued or prosecuted in foreign courts'.⁴² The rule forms part of state immunity in order to protect foreign states from a violation of their sovereignty or an interference with the official functions of their agents under the pretext of dealing with an exclusively private act.⁴³ Professor Zappala explains this protection of foreign heads of states from a possible interference with their official functions as follows:⁴⁴

Protection is generally afforded when a Head of State is abroad both for official missions and for private visits (or even incognito). In the former case immunity for private actions guarantees the scope of the mission and the fulfilment of the particular tasks involved, While in the latter, immunity is afforded in order to protect the general interest of the state to be represented (on the basis of a principle comparable

39 Sec 232 of the Constitution of the Republic of South Africa, 1996.

40 See also A Coutsooudis & J Dugard 'The place of international law in South African municipal law' in J Dugard et al *Dugard's international law: A South African perspective* (2019) 57, 62, 67.

41 This article focuses only on personal immunities, which bar courts from exercising jurisdiction over incumbent foreign heads of state while they are still in office. The article deliberately ignores immunity *ratione materiae* which bars courts from exercising jurisdiction over foreign heads of state for official acts attributed to the state. See J Crawford *Brownlie's principles of public international law* (2012) 489.

42 Crawford (n 41) 487.

43 A Cassese 'Where may senior state officials be tried for international crimes?' (2002) 13 *European Journal of International Law* 853, 862.

44 S Zappala 'Do heads of state enjoy immunity from jurisdiction for international crimes? The *Ghaddafi* case before the French *Cour de Cassation*' (2001) 12 *European Journal of International Law* 595, 599.

to *ne impediatur legatio*). There are two main reasons that justify this approach: The first is reciprocal respect and courtesy (international comity); the second is linked to the particular position of the Head of State, and consequently, without territorial limitations. These two aspects of personal immunity ensure that the Head of State is fully shielded from interventions in his or her personal sphere.

The International Court of Justice (ICJ) in the *Arrest Warrant* case⁴⁵ and several decisions of the International Criminal Court (ICC)⁴⁶ have confirmed the existence of personal immunities for incumbent foreign heads of state in customary international law. The *Arrest Warrant* case, the principle authority on this subject, established that 'certain holders of high-ranking office in a State, such as the Heads of State, Heads of Government and Ministers for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal'.⁴⁷ In explaining the nature of the customary international law on immunities of a foreign incumbent Minister for Foreign Affairs, the ICJ pronounced that 'the immunities accorded to Minister for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States'.⁴⁸

The *Arrest Warrant* case was recently endorsed in the ICC Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa Separate Opinion of the Appeals Referral Judgment,⁴⁹ stating that 'the operation of the idea of immunity *ratione personae* in [the *Arrest Warrant* case] must be confined to the exercise of criminal jurisdiction by national courts without more'.⁵⁰ South African courts have endorsed the *Arrest Warrant* case in their judgments in cases such as *Minister of Justice and Constitutional Development v Southern African Litigation Centre*,⁵¹ and even in the *Mugabe* decision.⁵² It must be emphasised that personal immunities are temporary in nature and lapse once the person to which the immunity was attached

45 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment (2002) (14 February 2002) ICJ Reports 3 (*Arrest Warrant* case).

46 See, eg, *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* ICC-02/05-01/09 (9 April 2014) para 25; *Decision under article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir*, ICC-02/05-01/09-302 (6 July 2017) para 68; *Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139-Corr (15 December 2011) para 34.

47 *Arrest Warrant* case (n 45) para 51.

48 Para 53.

49 ICC-02/05-01/09-397-Anx1-Corr 17-05-2019 1/190 NM PT OA2 (6 May 2019).

50 Para 185.

51 *Minister of Justice v Southern African Litigation Centre* (n 3) para 85.

52 Para 18.

ceases to hold office.⁵³ Further, personal immunities are invoked only in order to bar national courts from exercising jurisdiction over a foreign head of state without dealing with the merits of the case,⁵⁴ for that reason a head of state is not required to be present when such a determination is made.⁵⁵

The above discussion demonstrates that customary international law recognises absolute personal immunity for a foreign incumbent head of state before national courts. The application of this rule depends also on the domestic law of the state in question;⁵⁶ and the discussion now turns to South African law on personal immunities for foreign incumbent heads of states.

South Africa has three pieces of legislation that deal with the issue of customary international law immunity for incumbent foreign heads of state: the ICC Act, the DIPA and the FSIA. In this part I analyse these three pieces of legislation and demonstrate that each deals with personal immunity for incumbent foreign heads of state differently. It is important to make this distinction and to know what kind of facts trigger application of which statute. Later in this article I argue that Vally J did not make that distinction.

3.1 Personal immunity and the ICC Act

The ICC Act domesticates the Rome Statute to which South Africa is party.⁵⁷ The ICC Act is not applicable in this scenario as it does not recognise any type of immunity irrespective of anyone's status. In this regard, the ICC Act, in its long title, confirms that it was enacted, among others,

[t]o provide for a framework to ensure the effective implementation of the Rome Statute of the [ICC] in South Africa [and] to provide for the prosecution in South Africa and beyond the borders of South Africa ... of persons accused of having committed [international] crimes and their surrender to the [ICC] in certain circumstances.

53 *Minister of Justice v Southern African Litigation Centre* (n 3) para 66.

54 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* Judgment (2012) (3 February 2012) ICJ Reports 99 para 93, confirming that '[t]he rules of state immunity are procedural in character and are confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another state'.

55 Eg, sec 2(2) of the FSIA, which states that '[a] court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question'.

56 Crawford (n 41) 488.

57 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Another* 2015 (1) SA 315 (CC) para 33.

Further, section 4(2) of the ICC Act does not recognise invoking head of state immunities as a defence or to reduce the sentence of the person convicted of international crimes. In interpreting this provision, the Supreme Court of Appeal (SCA) in *Minister of Justice and Constitutional Development v Southern African Litigation Centre* held that this provision reflects section 27(1) of the Rome Statute titled 'Irrelevance of official capacity', which recognises neither the immunities or the status of anyone brought before the ICC.⁵⁸

The ICC Act is 'a specific Act dealing with South Africa's implementation of the Rome Statute' and it enjoys priority in relation to criminal proceedings pertaining to international crimes.⁵⁹ The question that remains to be explored further is which of the remaining statutes applied, in order to establish if FSIA is the correct piece of legislation as relied upon by Vally J. It is to this discussion that I now turn.

3.2 Personal immunity and the FSIA

The FSIA is the oldest of these three statutes as it was enacted in 1981. The purpose of the FSIA is 'to 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'.⁶⁰ It defines the term 'foreign state' to include a foreign head of state 'in his capacity as such Head of State'.⁶¹ There are three interesting provisions of the FSIA that are of value to this discussion in relation to immunity of incumbent foreign heads of state. The first provision is section 2(1), which provides that '[a] foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder'. The second provision is section 2(3), which provides that '[t]he provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic'. The third provision is section 6(a), which states that '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'.

58 Para 93. For a different view on the interpretation of this provision, see D Tladi 'The duty of South Africa to arrest and surrender Al Bashir under South African and international law: A perspective from international law' (2015) 13 *Journal of International Criminal Justice* 1027, 1038.

59 *Minister of Justice v Southern African Litigation Centre* (n 3) para 102.

60 Preamble.

61 Sec 1(2)(a).

These three provisions seem to be contradictory and to resolve the matter it is crucial to consider the background to the FSIA, and to establish if the drafters intended for this Act to apply to criminal proceedings involving an incumbent foreign head of state. I argue that the drafters of the FSIA did not so intend and show that the FSIA adopts the doctrine of absolute immunity when it comes to incumbent foreign heads of state in relation to criminal proceedings before the South African courts.

The genealogy of the FSIA may be traced to the United Kingdom (UK) law on state immunity. It must be clarified that state immunity is distinct from head of state immunity in that state immunity is broader and also covers heads of state immunity;⁶² it 'protects a state and its property from the jurisdiction of the courts of another state. It covers administrative, civil, and criminal proceedings (jurisdictional immunity), as well as enforcement measures (enforcement immunity)'.⁶³ It reflects the equality of states as entrenched in article 2(1) of the United Nations (UN) Charter⁶⁴ and confirms 'the principle of the sovereign equality of all [the UN] members'.

Many Western states have adopted the doctrine of restrictive immunity because state enterprises otherwise are favoured when concluding commercial agreements with non-state enterprises.⁶⁵ The doctrine of restrictive immunity means that immunity is available in relation to governmental activity (*jure imperii*) and not when the state participates in commercial activity (*jure gestiones*).⁶⁶ For a period the courts in the UK 'followed the traditional doctrine of absolute immunity in terms of which a foreign state [was] immune from the jurisdiction of the municipal courts of the country irrespective of the nature of the transaction in which it engages'.⁶⁷ Absolute state immunity included the commercial activities of a foreign state.⁶⁸ Because of respect for the doctrine of judicial precedent,⁶⁹ the UK

62 P Stoll 'State immunity' (2011) *Max Planck Encyclopedia of Public International Law* para 21.

63 Stoll (n 62) para 1; see also *Ex Parte Pinochet (No 3)* [2000] 1 AC 147, 201; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588.

64 UN Charter 1945.

65 Eg, Austria, Belgium, Italy and the United States. See also MN Shaw *International law* (2017) 529.

66 Shaw (n 65) 526-527.

67 N Botha 'Some comments on the Foreign States Immunities Act 87 of 1981' (1982) 15 *Comparative and International Law Journal of Southern Africa* 334; Shaw (n 65) 526; J Dugard 'Immunity from jurisdiction' in Dugard et al (n 40) 350.

68 Shaw (n 65) 526.

69 *The Parlement Belge* (1880) 5 PD 197, holding that '[t]he principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its

was one of the last states to change to the doctrine of restrictive immunity.⁷⁰ From *Thai-Europe Tapioca Service Ltd v Government of Pakistan*, *The Harmattan*⁷¹ the rationale for this change is because

a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises, which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities ... it thereby enters into the market places of the world; and international comity requires that it should abide by the rules of the market.⁷²

The UK enacted the States Immunity Act of 1978, which gives effect to restrictive foreign state immunity⁷³ and to 'bring [the UK's] law on the immunity of foreign states more into line with current international practice'.⁷⁴

South Africa adopted the restrictive approach in enacting the FSIA, which is modelled on the UK's States Immunity Act.⁷⁵ *The Akademik Fyodorov: Government of the Russian Federation & Another v Marine Expeditions Inc* confirms that

[t]he law relating to such immunity has been codified in the [FSIA]. The Act adopts what has been referred to as a doctrine of relative foreign State immunity, as opposed to absolute immunity, in that, generally speaking, it grants immunity to foreign states from the adjudicative jurisdiction of the courts and from the processes for enforcement of the orders of the courts in relation to acts performed in the exercise of sovereign authority of a foreign state, but not for acts relating to commercial transactions undertaken by a state. This was the trend adopted by our courts shortly before the Act came into effect.⁷⁶

territorial jurisdiction over the person of any sovereign or ambassador of any other state'; see also R Higgins 'Recent developments in the law of sovereign immunity in the United Kingdom' (1977) 71 *American Journal of International Law* 423.

70 *Trendtex Trading Corporation v The Central Bank of Nigeria* [1977] QB 529, 554-G-H, famously known for holding that 'international law knows no rule of *stare decisis*'; and subsequent cases such as *I Congresso del Partido* [1983] 1 AC 244.

71 [1975] 1 WLR 1485.

72 1491. See also *Trendtex Trading Corporation* (n 70) 588, holding that '[i]f a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.'

73 Botha (n 67).

74 Hansard, House of Lords, vol 388, c59, 17 January 1978 (Second Reading) as quoted in Crawford (n 41) 491.

75 See Botha (n 67) 335 fn 7 comparing the FSIA provisions to those of the States Immunity Act.

76 1996 (4) SA 422 (C) 441 D-F.

The FSIA and the UK's States Immunity Act extend general immunity to foreign heads of state in their provisions.⁷⁷ Accordingly, heads of state enjoy personal immunities from the jurisdiction of the national courts.⁷⁸ Further, both make it clear that courts are barred from exercising criminal proceedings over incumbent foreign heads of state. Section 2(3) of the FSIA and section 16(4) of the UK's States Immunity Act expressly state that '[t]he provisions of [these two Acts] shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts'. Dugard confirms that 'section 2(3) [of the FSIA] makes it clear that the Act is not to be construed as subjecting a foreign state to the criminal jurisdiction of South African courts'.⁷⁹ It is apparent that although both statutes adopt the doctrine of restrictive approach when it comes to commercial activities into which a state enters with corporations, there is absolute immunity from criminal jurisdiction of national courts over incumbent foreign heads of states.

To illustrate this point further, the ICJ in the *Jurisdictional Immunities of the State* judgment, which deals with civil proceedings in relation to foreign state immunity in jus cogens situations, made reference to section 6(a) of the FSIA and its counterpart in the UK's States Immunity Act, among others, in order to determine state practice.⁸⁰ The ICJ observed that these states 'have adopted provisions to the effect that a state is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum state'.⁸¹ It is clear from this that section 6(a) of the FSIA applies to civil claims to the exclusion of criminal proceedings and in relation to the state's commercial activities. Equally, the United Nations Convention on Jurisdictional Immunities of States and their Property⁸² which, although not yet in force,

77 Sec 1(2)(a) of the FSIA and sec 14(1) of the States Immunity Act, which states that 'references to a state include references to (a) the sovereign or other head of that state in his public capacity'.

78 See sec 2(1) of the FSIA and sec 1(1) of the States Immunity Act.

79 See Dugard (n 67) 350 fn 27. Cf 355, where Dugard seems to endorse the *Mugabe* decision on its interpretation of sec 6(a), where he observes that '[a]s Robert Mugabe himself would not have been able to succeed in a claim for immunity on account of section 6 [(a) of the FSIA], it follows that his wife – if she was entitled to immunity as his spouse – would not have been able to claim immunity either'. See also Botha (n 67) 336 confirming that sec 2(3) 'expressly provides that criminal jurisdiction is not affected by the [FSIA]; and Crawford (n 41) 499 confirming that the States Immunity Act excludes criminal proceedings from its scope.

80 *Jurisdictional Immunities of the State* case (n 54) para 70. For further discussion on this case, see A Orakhelashvili 'Jurisdictional Immunities of the State (*Germany v Italy; Greece Intervening*)' (2012) 106 *American Journal of International Law* 609.

81 Para 70 (my emphasis).

82 GA Res 59/38, 2 December 2004.

codifies customary international law in jurisdictional immunities,⁸³ also recognises the doctrine of absolute immunity in relation to incumbent heads of state (although it adopts the doctrine of restrictive immunity in relation to commercial activities of states).⁸⁴

In addition, it is important to revisit the current work of the ILC on personal immunity for foreign heads of state from foreign criminal jurisdiction, which confirms absolute personal immunity.⁸⁵ The ILC provisionally adopted Draft Article 4, which determines the scope of personal immunities for incumbent foreign heads of state as follows:

Scope of immunity *ratione personae*

- (1) Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
- (2) Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
- (3) The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

The Draft Article 4 reflects the *Arrest Warrant* case principle as discussed earlier.

From the above discussion, I submit that section 6(a) of the FSIA did not apply to the *Mugabe* decision. It makes sense to conclude that section 6(a), read together with section 2(3) of the FSIA, confirms that the FSIA was enacted in order to deal with commercial activities involving a foreign state before South African courts as opposed to criminal litigation.⁸⁶ I submit that Vally J did not make this important

83 See, eg, the Preamble to the Convention on Jurisdictional Immunities of States and their Property confirming that '[c]onsidering that the jurisdictional immunities of states and their property are generally accepted as a principle of customary international law'. See also *Jurisdictional Immunities of the State* case (n 54) para 55.

84 Art 3(2) of the United Nations Convention on Jurisdictional Immunities of States and their Property (n 82), which stipulates that '[t]he present Convention is without prejudice to privileges and immunities accorded under international law to heads of state *ratione personae*'.

85 General Assembly, International Law Commission, *Seventh report on immunity of state officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, *Special Rapporteur*, 71st session, Geneva, 29 April to 7 June 2019 and 8 July to 9 August 2019 69, draft art 3; see also UN General Assembly, International Law Commission, *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction* by Concepcion Escobar Hernandez, *Special Rapporteur*, 68th session (Geneva, 2 May-10 June and 4 July-12 August 2016), Supplement 10 (A/71/10) para 196, endorsing this view that there is no evidence from state practice that shows exception to personal immunities at horizontal level.

86 Botha (n 67) 334.

distinction and, as a result, misapplied the FSIA. It is not clear why he did not mention section 2(3) of the FSIA in his judgment, even though the parties did not bring that provision to light, Vally J could have decided on that provision *mero motu*, especially since he referenced section 2(1) – a provision that shares the same section as section 2(3). To do so would not have been unusual as courts have always exercised this power, the Constitutional Court in *CUSA v Tao Ying Metal Industries & Others* held:⁸⁷

Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.

I have argued that there has been a misinterpretation of the law and the remark by Vally J in the case affects personal immunities of incumbent foreign heads of state and requires the need to explore the meaning of section 2(3) of the FSIA.⁸⁸

I now turn to the DIPA to ascertain whether it provides for personal immunity to incumbent foreign heads of state.

3.3 Personal immunity and DIPA

The DIPA was enacted specifically to confer ‘immunities and privileges [to] heads of state, special envoys and certain representatives’ from both criminal and civil jurisdiction of the South African courts.⁸⁹ Unlike the FSIA, section 4(1) of the DIPA explicitly states that ‘[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as (a) heads of state enjoy in accordance with the rules of customary international law’.⁹⁰ This type of immunity is conferred by the Minister of International Relations if it is in the national interest to do so, and the conferral of personal immunity has to be published in the Government Gazette.⁹¹

87 (2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC) para 68.

88 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development & Others* (2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) para 39, holding that ‘[a] court is not always confined to issues of law explicitly raised by the parties. If a litigant overlooks a question of law which arises on the facts, a court is not bound to ignore the question of law overlooked.’

89 Long title.

90 My emphasis.

91 Sec 7 (my emphasis).

The DIPA has been a source of controversy in the recent past as reflected in *Minister of Justice and Constitutional Development v Southern African Litigation Centre*.⁹² In that case the question was whether the former President of Sudan, Al Bashir, as the then incumbent foreign head of state was entitled to customary personal immunity barring South African courts from exercising jurisdiction. The ICC had issued two warrants of arrest against him and further requested state parties to the Rome Statute to arrest and surrender him to the Court. I do not intend to reopen that debate.⁹³ However, for the purposes of this article the SCA made a clear distinction between the application of immunities to persons wanted for international crimes (whether before the national courts or the ICC per the ICC Act) and the application of immunities to persons wanted for other crimes (before our courts per the DIPA). The SCA explained the relationship between DIPA and the ICC Act as follows:⁹⁴

It is rather more an example of the application of the related principle in the converse situation embodied in the *maxim generalia specialibus non derogant* (general words and rules do not derogate from special ones). Where there is legislation dealing generally with a topic and, either before or after the enactment of that legislation, the legislature enacts other legislation dealing with a specific area otherwise covered by the general legislation, the two statutes co-exist alongside one another, each dealing with its own subject matter and without conflict. In both instances the general statute's reach is limited by the existence of the specific legislation. So DIPA continues to govern the question of head of state immunity, but the Implementation Act excludes such immunity in relation to international crimes and the obligations of South Africa to the ICC.

From the above quotation legislation applicable in the *Mugabe* decision clearly is the DIPA as determined by its specificity to the issue at hand. If one compares the DIPA to the FSIA, the DIPA specifically deals with customary international law heads of state immunity whereas the FSIA deals with state immunity in relation to commercial activities. Hence, the application of the FSIA is erroneous.

92 *Minister of Justice v Southern African Litigation Centre* (n 3).

93 See, eg, N Dyani-Mhango 'The ICC Pre-Trial Chamber's decision on South Africa's failure to arrest and surrender President Al Bashir: South Africa escapes "sanctions"!' (2017) *African Yearbook of International Humanitarian Law* 37; N Dyani-Mhango 'South Africa's dilemma: Immunity laws, international obligations and the visit by Sudan's President Omar Al Bashir' (2017) 26 *Washington International Law Journal* 535; Tladi (n 58) 1027.

94 *Minister of Justice v Southern African Litigation Centre* (n 3) para 102.

4 Did Vally J go too far?

Vally's remark did not bear directly on the case and have far-reaching consequences for South Africa's foreign relations. I argue that the courts should exercise restraint and deal only with the question on the facts before them. In *Albutt v Centre for the Study of Violence and Reconciliation & Others* Ngcobo CJ cautioned the judiciary against going beyond questions brought before them as follows:⁹⁵

Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting ... to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted.

I submit that on the facts in this case it was not necessary for Vally J to extend his reasoning to include foreign heads of state.

I submit that it is possible to argue that in his remark Vally J breached the separation of powers and he encroached upon the domain of foreign relations attached to the executive branch of government.⁹⁶ The doctrine of separation of powers 'recognises the functional independence of branches of government'.⁹⁷ According to O'Regan J, '[t]he courts must remain sensible to the legitimate constitutional interests of the other arms of government and seek to ensure that the manner of their intrusion, while protecting fundamental rights, intrudes as little as possible in the terrain of the executive and legislature'.⁹⁸

I argue that in this case it was unnecessary for the Court to deal with an issue that should be left to the executive.⁹⁹ Recently, the executive has grappled with the issue of immunities as demonstrated

95 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) para 82.

96 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) para 104.

97 *In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 para 109.

98 K O'Regan 'Checks and balances: Reflections on the development of the doctrine of separation under the South African Constitution' (2005) 8 *Potchefstroom Electronic Law Journal* 120, 146.

99 See, eg, O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC) para 48 who remarked as follows: 'A court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.'

in the Al Bashir and the Rome Statute withdrawal cases¹⁰⁰ and via its representatives at the ICC Assembly of States Parties has been at pains to explain its difficulty participating in peace-making missions in the African region when the issue arises of the personal immunity of foreign heads of state exercised in relation to the prosecution of international crimes.¹⁰¹ The Deputy Minister of Justice and Constitutional Development reminded the Assembly:¹⁰²

At the Fifteenth Session of the Assembly South Africa announced its intention to withdraw from the Rome Statute as it was argued that South Africa's continued membership to the Rome Statute carries with it the potential risk of undermining its ability to carry out its peace-making mission efforts in Africa, and elsewhere.

The executive introduced the International Crimes Bill, 2017 in Parliament in terms of the Constitution¹⁰³ in order to legislate its withdrawing from the Rome Statute and retain heads of state personal immunities even when they are accused of international crimes.¹⁰⁴ These examples support the doctrine of the separation of powers indicating the branch of government that deals with certain issues. The issue of personal immunity is controversial, but it is submitted that it is the responsibility of the executive branch. It is only when there is a breach of the Constitution or a rule of law that the judiciary becomes involved.

Additionally, I submit that by his remark Vally J encroaches upon the power of the legislature to enact law in regulation of foreign relations. I submit that these remarks by Vally J have the effect of nullifying the DIPA's provision to grant personal immunities to foreign incumbent of states, at least the provision that recognises absolute personal immunity of foreign heads of state in order to bar criminal

100 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1; *Minister of Justice v Southern African Litigation Centre* (n 3); *Democratic Alliance v Minister of International Relations and Cooperation* (n 3).

101 ICC, statement by Mr John Jeffrey MP, Deputy Minister of Justice and Constitutional Development, Republic of South Africa, General Debate: 18th session of the Assembly of States Parties of the International Criminal Court, The Hague, 2-7 December 2019.

102 ICC (n 101) 3.

103 See sec 85(2)(d) of the Constitution, which stipulates that the executive branch of government 'exercises the executive authority ... by preparing and initiating legislation', read with sec 73(2) which states that a member of the cabinet or a deputy minister 'may introduce a Bill in [Parliament]'.¹⁰⁴

104 Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill [Bill 23–2016] published on 3 November 2016. For a discussion of this Bill, see N Dyani-Mhango 'Reflecting on South Africa's attempt to withdraw from the Rome Statute in favour of immunities for sitting heads of state: An analysis of the International Crimes Bill 2017' (2020) 28 *African Journal of International and Comparative Law* 319.

jurisdiction of the national courts in contradiction of the intent of the legislature.¹⁰⁵ *Doctors for Life international* makes it clear that

[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.¹⁰⁶

I do not maintain that the courts are barred from exercising jurisdiction when it comes to foreign relations.¹⁰⁷ Ngcobo CJ explains that courts must wait for the right occasion to deal with such matters and an issue of this kind cannot be dealt with as an ancillary matter.¹⁰⁸ Foreign relations notoriously are complex and deal with sensitive issues that I consider should be dealt with by the other branches of government.¹⁰⁹ Once the law is enacted¹¹⁰ a court intervention may be required in response to an issue affecting the personal immunities of foreign heads of state.

5 Conclusion

This article examined the remark attached to the *Mugabe* decision by Vally J and focused on the following issues: First, it explored the status of heads of state personal immunities in general; second, it explored the status of foreign heads of state personal immunities for criminal jurisdiction in South Africa by looking at the three pieces of legislation; and, lastly, it raised the question that Vally J exceeded his competencies. It was argued that the piece of legislation applicable in the *Mugabe* decision is the DIPA as the FSIA deals with civil proceedings and the ICC Act is specific to international crimes. The article further argued that Vally J misconstrued the application in FSIA

105 See, eg, *Director of Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 39, per Ngcobo CJ, stating that '[c]ourts should observe the limits of their powers. They should not constitute themselves as the overseers of laws made by the legislature.'

106 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 37.

107 Eg, *Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) para 78, per Chaskalson CJ, remarking that '[t]his does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection. The exercise of all public power is subject to constitutional control.'

108 *Albutt* (n 95) para 82. See also *Director of Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 39.

109 See Woolaver (n 8) 453.

110 However, see *Doctors for Life International* (n 106) para 67, where Ngcobo J observes that '[t]here is no express constitutional provision that precludes the Constitutional Court from doing so'. See also *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC) para 47, explaining that such cases that may require intervention 'will be extremely rare'.

and by his remark breached the doctrine of separation of powers. I submit that South African courts are barred from exercising criminal jurisdiction (other than in terms of the ICC) over incumbent foreign heads of state. Vally J's judgment has not been appealed as the facts of the case did not deal with personal immunities of incumbent heads of state and I determine it remains bad law. Vally J's approach in the remark attached to the *Mugabe* decision is contrary to the recommendation by Mogoeng CJ in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*:¹¹¹

I hasten to state that there is merit in the approach that recognises that prolixity must be avoided where that can be achieved without watering down the quality of reasoning or the soundness of a judgment. Where one or more key constitutional rights or principles could help to properly dispose of an issue, very little purpose is hardly ever served by the long-windedness that takes the form of trolling down all the rights, principles or issues implicated or raised in order to arrive at the same conclusion.

111 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & Others* 2020 (1) SA 1 (CC), para 30.