IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: 47954/2010
72184/2010
77881/2009

In the matter between:

GOVERNMENT OF THE REPUBLIC OF ZIMBABWE	Applicant
and	
LOUIS KAREL FICK	First Respondent
RICHARD THOMAS ETHEREDGE	Second Respondent
WILLIAM MICHAEL CAMPBELL	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

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JUDGMENT
Delivered on _____

R D CLAASSEN J

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED.
6/6/11
DATE SIGNATURE

By order of this Court three cases involving the same parties, and emanating from the same issues between them, were consolidated and are now being heard together.

2.

BACKGROUND:

In 2007 seventy odd white commercial farmers in the Republic of Zimbabwe, including the present Respondents, approached the South African Development Community ("*SADC*") Tribunal ("Tribunal") for a ruling that the dispossession of their farms by the Applicant, without compensation, is unlawful, and asking the Tribunal to order the Applicant to protect their rights. The order was granted. The Applicant refused to adhere to the orders and the Respondents brought two applications to the Tribunal asking it to find the Applicant in contempt of Court. Again these applications succeeded. The Tribunal thereafter made a ruling that the taxed costs of the two contempt applications were reasonable and made an order in favour of the Respondents against the Applicant for those costs (R112 780.13 and USD5,816.47, respectively). (The Third Respondent died a day or two before the hearing as a result of the assaults sustained during his eviction from his farm. No substitution of an executor was sought because the other Respondents still had *locus standi* to continue with the hearing and the Applicant did not object thereto).

3.

Respondents then wanted to make those costs orders enforceable as against the Applicant here in the RSA. It was obvious that Applicant was not going to pay because it denied the Tribunal's jurisdiction over it, in any way or form. The Respondents then first applied for an order of edictal citation allowing them to serve the notice of motion for the registration of the orders in South Africa, via their attorney, on the Applicant in Harare, at:

3.1 The offices of the Attorney General in Harare Zimbabwe;

3.2 The administrative head office of the Applicant's Minister of Justice in Harare.

After full argument *inter alia* on the question of jurisdiction of this Court in the matter, Tuchten AJ (as he then was) gave the order. It was subsequently so served on Applicant, and the matter was set down for hearing on the 25th February 2010, before Rabie J.

4.

Applicant, subsequent to the service of the edictal citation order, entered an appearance to defend, but withdrew it afterwards. Again, the issue of jurisdiction was fully canvassed in the argument before Court (heads of argument were filed by Mr Gauntlett SC, who also now appears for the Respondents together with a junior, Mr Pelser.) It must be noted that when the notice of intention to defend was withdrawn, no reasons were given.

Rabie J then granted the application on the 25th February 2010 on an unopposed basis. The Applicant has now applied in the three applications before Court for the following relief:

4.1 Case Number 77881/09:

Suspending a writ, pursuant to Rabie J's judgment) issued against the properties of the Applicants on the 26th March 2010, (by the Registrar). It does so on two grounds:

4.1.1 That the writ was not actually served on applicant;

4.1.2 The applicant's property is subject to international immunity.

4.1.3 Alternatively it prays that the writ be suspended pending the finalisation of the SADC process on whether the Protocol on the Tribunal is in force and binding on the Applicant. It is common cause that the writ issued by the present Respondents has not yet been served on the Applicant but has been executed, to the extent that the Sheriff of Wynberg (Western Cape) has attached the properties in terms of the writ. The Applicant further applies that the properties listed in the writ be declared to be protected in terms of Applicant's immunity in terms of the Foreign States Immunity Act 87/81 ("*The FSIA*") (as amended) and that the

writ only extends to properties not protected under the *"International Doctrine of State Immunity and which are executable"*. In this regard it is to be noted that the South Gauteng High Court (per Lamont J) has already found that at least one property is not immune in that it is used as a commercial property (being rented out) and therefore not protected by the FSIA (Section 14(3)).

4.2 Case Number 47945/10:

This is an application to rescind Rabie J's order of registering the costs orders of the Tribunal in South Africa, in terms of which the writ was issued.

4.3 Case Number 72184/10:

This is an application to rescind the order of Tuchten AJ for edictal citation.

5.

For ease of reference I shall deal with the cases in chronological sequence.

6.

CASE NO 72184/10: EDICTAL CITATION: (Tuchten AJ's Judgment)

In the founding papers of this application the Applicant states that:

6.1 It was not legally competent for this Court to grant substituted service by way of edictal citation to have the Tribunal's orders registered here;

6.2 At the time of hearing the application for edictal citation the Court was not apprised of the provisions of the FSIA where procedures are laid down for service of process on foreign states (i.e. via their respective Ministries of Justice), and giving a two-month period to file an intention to defend. The FSIA also provides that the Court must *mero moto* take cognisance of a foreign state's immunity, even without it appearing at the hearing.

7.

In argument before Court reference was also made to Section 27 of the Supreme Court Act 59/69, which prescribes a 21-day period to file an intention to defend where service is affected outside the jurisdiction of the Court.

8.

In essence applicant contends that :

8.1 The court has no jurisdiction over it;

8.2 Respondents used the wrong procedure;

8.3 The order could not be given legal effect to.

9.

It is so that Respondents did not follow the procedure prescribed in the FSIA, nor did it give the Applicant at least a 21 days or the 2 months period to file an intention to defend. Edictal citation is however an interlocutory order. No substantive rights follow from it for any party. It is true that a court in an *ex parte* application must be fully appraised of all the facts and law. It is not disputed that Tuchten AJ did hear full argument on the question of jurisdiction. The order however does not *per se* grant the court hearing the matter any more jurisdiction or any other power that it did not have in any event. In other words the applicant retained all its rights. The merits thus have to be addressed at the final hearing.

10.

10.1 A further point to be considered is sec 13(7) of the FSIA. It provides that the provisions, relating to a manner of service, prescribed in the other subsections of Section 13 "*shall not be construed as affecting any rules whereby leave is required for service of process outside the jurisdiction of the Court.*" From this it is obvious that edictal citation is the proper way of serving a process. Applicant's argument that the High Court Rules relating to edictal citation, only relates to natural persons in corporate entities, and not to foreign states, is simply not correct;

10.2 The only point that may have been relevant is the applicant was not granted the 2 month period granted by the FSIA, nor the 21 days granted by the Supreme Court Act, to file an intention to defend. The fact is that applicant did file such a notice within a few days. The fact that it withdrew it subsequently is of no import on this issue.

10.3 There is thus no merit in the application, and even if there was, it would have had no effect on the matter whatsoever.

11.

In view of the abovementioned findings, the application is to be dismissed with costs, including costs of two counsel.

12

CASE NUMBER 47954/10: JUDGMENT OF RABIE J.:

The Applicant's main contention in this case, which also affects the other two cases, is that the Protocol was not ratified in Zimbabwe. The Treaty itself, and Zimbabwe's own constitution, requires foreign treaties to be registered by its own Parliament. This, it says, was not done. Therefore it is argued that the Tribunal had no jurisdiction over it and consequently those orders cannot be registered in South Africa.

13

The second point is that the whole Treaty and Protocol, has been referred to the Summit Meeting of SADC to review aspects of the Protocol relating to the

The second point is that the whole Treaty and Protocol, have been referred to the Summit Meeting of SADC to review aspects of the Protocol relating to the enforcement and binding effect thereof in various countries. This happened as a result of the Applicant denying that the rulings and judgments of the Tribunal are binding on it, and the Court was not apprised of this review process.

14

The argument on the ratification of the Protocol in Zimbabwe is based on Article 35 of the Protocol which simply states that: "*the Protocol shall be ratified by signatory states in accordance with their constitutional procedures.*" In terms of the Zimbabwean constitution treaties with foreign states must be ratified by its Parliament. It is common cause that this has not happened. This issue has however received a few judicial expressions. **Firstly** the Tribunal itself, in the so-called "*Campbell case*", case number SADC (T) 2/2007, decided that the Tribunal's decisions are binding on the Applicant. In that case Applicant not only took part in the proceedings, but its representative, the Acting Attorney General, admitted to the Court that the Applicant is bound by the Tribunal's decisions (see page 820 of the record). The Applicant even went further and nominated its own Judge to that forum, but later recalled him. In argument before this Court it was submitted that the Applicant is not bound by that admission, however no basis could be laid for that submission and it is rejected.

15.

The **second decision** is one from Applicant's own High Court in **Gramara (Pvt) Ltd and Another v The Government of the Republic of Zimbabwe and Two Others, Case Number HC5483/09**. In that case Patel J found that although the Applicant is bound by the decisions of the Tribunal, it refused an application to register the Tribunal's decision in Zimbabwe. The two Applicants in that case were part of the 79 Applicants in the Campbell case referred to above. The basis of the refusal of the Court was that it would be contrary to Applicant's public policy relating to expropriation without compensation of the land of white agricultural farmers (see pages 1074 and 1079 of the record).

16.

The decision of the Tribunal (on costs), must be seen against the background of the facts that: (1) The Treaty itself has been ratified by Applicant; (2) In terms of Article 16(2) of the Treaty, "*the composition powers functions procedures and other related matters governing the Tribunal, shall be prescribed in a Protocol which shall 'notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit*" (my underlining). Article 22 deals with Protocols in respect of different areas of co-operation, and their coming into force and effect. Clearly the Protocol on the Tribunal is taken out of the ambit of Article 22 and is as effective and binding as the Treaty itself. This obviously also overrides Article 35 of the Protocol (on the Tribunal) which requires the Protocol to be "*ratified by signatory states in accordance with their constitutional procedures.*"

17.

Of further importance are the following articles:

17.1 Article 4 of the Treaty:

SADC and its members shall act in accordance with the following principles:

a. sovereign equalityof all Member States,

b. solidarity, peace ands security;

c. human rights, democracy and the rule of law;

d. peaceful settlement of disputes.

17.2 Article 32 of the Treaty

Any dispute arising from the interpretation or application of this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.

17.3 Article 14 of the Protocol:

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relates to:

(a) The interpretation and application of the Treaty;

(b) The interpretation, application or validity of Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community.

17.4 Article 21 (of the Protocol):

"*The Tribunal shall:*

(a) Apply the Treaty, this Protocol ....

(b) Develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the Law of States.

17.5 Article 24(3) (of the Protocol):

"Decisions and rulings of the Tribunal shall be final and binding."

18.

A further related matter to this issue is an amendment to the Protocol by:

18.1 Repealing Article 35 thereof dealing with ratification.

18.2 Providing that the agreement (to amend): "*Shall enter into force on the date of its adoption by ¾ of all member states*"

19.

This amendment was adopted by all the members' Heads of State at Blantyre on 14th August 2001. It came into operation on the 29th November 2002. The executive secretary of SADC informed all members of SADC that the amendment had officially come into operation (see page 143).

20.

There was some argument that the amendment had not come into operation, but on Applicant's own papers it clearly did. In any event it was never raised in the papers nor mentioned in the opening argument, where all the

Applicant's points for argument were set out in brief, and an applicant must make out its case in the founding papers.

21.

A further argument was that since it was an *ex parte* application, the Applicants in that case (presently the Respondents) had to put the Court fully into the picture with all relevant facts. In particular they failed to advise that Court of the requirements of Section 27 of the Supreme Court Act, 59 of 1959, and Section 13 of the FSIA. Furthermore, at least Section 27 has been found to be imperative. It is of course also true that the Court cannot override provisions of a law, as it can its own rules.

22.

Reference was also made to the case of **Bay Loan Investment (Pty) Ltd v Bay View (Pty) Ltd 1971 (4) SA 538 (C)** where the Court held that entering a notice of defence does not necessarily mean taking a further step and a Court will not likely assume a waiver. A party relying on waiver must prove it. If reliance is placed on conduct, such conduct must be inconsistent with the intention to maintain a right. It was submitted that a waiver could only be inferred after an affidavit (or pleading) on the merits was filed, and no issue was taken with short service. It was also submitted that it could be raised *in limine* in Court. Of course Applicant was not present in Court to raise these issues and did not do it at any other time. The only inference then to be drawn

is that a defendant/respondent does not wish to oppose the application. The argument on that score must then fail.

23.

On this issue mention must be made of an e-mail letter recently sent to me from the applicant's attorney's offices. In the letter it is stated that reference was made, during the hearing, of a letter sent to the Registrar of this court, setting out its reasons for withdrawing its intention to defend, (i.e. after having received legal advice), and setting out its defences, i.a. relating to its immunities. This letter was now received after the judgment had been almost completed. There was no affidavit attached to it. It does not seem to have been sent to the other parties. In court there was only scant reference to the possibility of such a letter having been sent to the Registrar. It was not finalised. There is no evidence that the letter reached the Registrar. It was definitely not on the file at any stage while in my possession. If any reliance is to be put on it, it should have been raised in the founding papers, which it was not. Under those circumstances no adherence will be given to it.

24.

The last issue on this case is the issue of the Applicant's immunity as claimed by him in terms of Section 2(1) of the FSIA. Although this is a pre-Constitution act, it must still be interpreted in the light of our Constitution in the sense that the Court must "*promote the spirit*" purport an objects of the Bill of Rights (Section 39(2)). Section 39(1)(b) of the Constitution further requires the Court to "*consider international law*".

25.

Even before the advent of our Constitution, our Courts held that there is good reason to believe that the rule of sovereign immunity has undergone an important change, and that the old doctrine of absolute immunity has yielded to a restrictive doctrine. This was clearly spelt out by Margo J in the case of **Inter-Science Research and Development Services (Pty) Ltd v Repubica Popular De Mocambique 1980 (2) TPD 120 C – 122 H.** This change has, in fact been entrenched in Section 4 of the FSIA. However, by the same reasoning as set out in the abovementioned case and the cases referred to therein, it is submitted by the Respondents that foreign immunity has also undergone a change in further fields. It would seem to me that in the present case this extension should also be applied in relation to human rights affairs. I say this with specific reference to the SADC Treaty and its implications. In terms of the Treaty itself, the Protocol on the Tribunal is part of the Treaty and as such becomes part of national law. Furthermore, a treaty, like any other agreement, remains an "*agreement*". Section 3(2) of FSIA specifically provides for a waiver of immunity "*by prior written agreement*". Since the Applicant has subscribed to the Treaty, and therefore also the Protocol, then at least on a restricted interpretation of international immunity, it would mean that this Court has jurisdiction over the Applicant. This approach is further strengthened by the provisions of Article 6 of the Treaty which reads as follows:

"1. *Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty.*

2. *SADC and member states shall not discriminate against any person on grounds of gender, religion .....*

3. *SADC shall not discriminate against any member state.*

4. *Member states shall take all steps necessary to ensure the uniform application of this Treaty.*

5. *Member states shall take all necessary steps to accord this Treaty the force of national law.*

6. *Member states shall co-operate with and assist institutions of SADC in the performance of their duties."*

(My emphasis.)

Having signed the Treaty and adopted it, and in view of the reasoning already referred to earlier, it is not for the Applicant to now renege on its obligation to

fully import the obligations of the Treaty and the Protocol. Under those circumstances to it seems to me that the Applicant has clearly waived its right to immunity in terms of the Treaty, and/or the FSIA.

26.

On the facts and reasoning set out above, it is clear to me that

26.1 The writs issued by this Court cannot be attacked on any grounds;

26.2 The Court granting the registration order, had the necessary jurisdiction and power to do so;

26.3 The writ issued in respect of at least one of the properties of the Applicant, was properly obtained, in the sense that the one property is not subject to immunity. However, until the writ and the order are served on the Applicant, which has not yet happened, that writ cannot be executed. That at least is common cause. Furthermore, since the judgment of Lamont J is not under attack in this court, I must accept it as being correct. At least that property then makes the order of Rabie J enforceable.

In the light of all that has gone before it is clear that all the applications by the Applicant are to be dismissed with costs including the costs of two counsel.

R D CLAASSEN
Judge of the High Court