THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Luke M Tembani and Others v President of the Republic of South Africa and Another (167/2021) [2022] ZASCA 70 (20 May 2022)

Today the Supreme Court of Appeal (SCA) handed down a judgment in which it upheld an appeal and struck a cross-appeal from the roll, in each instance with costs, against a judgment of the Gauteng Division of the High Court, Pretoria (the high court).

The litigation has its genesis in Zimbabwe's ambitious land and agrarian reform programme. Some farmers, including South African citizens, who had lost their land due to the implementation of the programme, turned to the Southern African Development Community (SADC) Tribunal (the Tribunal), which concluded that Zimbabwe breached certain obligations under the SADC Treaty (the Treaty) and ordered it to pay fair compensation. Zimbabwe, however, failed to comply with the order of the Tribunal.

When Zimbabwe's failure to comply, was raised before a meeting of the Summit (being the supreme executive body constituted by the Treaty and comprising the Heads of State of the member states of SADC) it came ultimately to be decided, in effect, to suspend the operations of the Tribunal by neither re-appointing Members of the Tribunal whose term of office had expired in 2010 nor replacing those whose term would expire in 2011. As a result, the Tribunal was effectively disabled and unable to function.

On 18 August 2014, the Summit adopted a new Protocol (the 2014 Protocol) which abolished access by all private individuals to the Tribunal. Thus, instead of facilitating enforcement of the Tribunal's decisions, the Summit chose to disregard the binding Treaty obligations of member states. It treated the relevant Treaty provisions and the Tribunal decisions as non-existent and also violated the undertaking to support and promote the Tribunal, whose decisions are supposed to bind member states and, by extension, the Summit.

The appellants are all private individuals, who had claims arising, in each instance, from the dispossession by the Government of Zimbabwe (contrary to the Treaty and International Law) of farms owned, registered or worked by each of them. Those claims would have been justiciable before the Tribunal prior to the 2014 Protocol abolishing its jurisdiction.

The then South African President's negotiation and signing of the 2014 Protocol was subsequently challenged in litigation by the Law Society of South Africa. So too, his decision to make common cause with his peers to not appoint or re-appoint Members or Judges to the Tribunal, thereby suspending its operations. Some of the current appellants applied for leave to intervene in those proceedings. On 1 March 2018, a Full Court of the Gauteng Division declared that the President's participation in suspending the operations of the SADC Tribunal and his subsequent signing of the 2014 Protocol was unlawful, irrational and thus, unconstitutional. On 11 December 2018, the Constitutional Court confirmed the full court's declaration of unconstitutionality.

Following the Constitutional Court's judgment, the attorney for the appellants served a notice in terms of s 3(1)*(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) on the State Attorney, pursuant to which ten of the appellants gave notice of their intention to institute claims for damages against the President and the Government of the Republic of South Africa, the respondents in this matter. On 15 January 2019, the appellants' attorney served a 'supplementary notice in terms of section 3(1)*(a)*' to 'clarify, and in certain respects, correct our letter of 14 December 2018'. The supplementary notice made reference to all 25 of the appellants as well as the various amounts claimed by each. The State Attorney responded that the appellants' claims were not admitted and that the notice and supplementary notice had not been sent within the period prescribed in the Act.

On 9 April 2019, the appellants served a conditional condonation application, summons and particulars of claim. The respondents chose to meet the particulars of claim by raising multiple exceptions. Although the particulars of claim were subsequently amended, the respondents filed a further notice of exception. Before the high court, the respondents pressed each of their exceptions and also opposed the appellants' conditional condonation application on the basis that the claims had prescribed. The high court took the view that no order was required to be made in respect of the condonation application. It upheld only one of the exceptions raised by the respondents, namely what was described as the causation exception. The high court thereafter granted leave to the (1) appellant's to appeal against the upholding of the 'causation exception'; and (2) the respondents to cross appeal against - (2.1) the dismissal of what was described as the 'legal duty exception' and (2.2) 'the order to the extent that the Court did not grant an order dismissing the plaintiffs' condonation application'.

The SCA held that, whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it was nonetheless necessary that they be dealt with sensibly. It is where pleadings were so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception was competent. Thus, the burden rests on an excipient, who must establish that on every interpretation that could reasonably be attached to it, the particulars of claim are excipiable. The test was whether, on all possible readings of the facts, no cause of action might be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contended cannot be supported on every interpretation that could be put upon the facts.

In addition, the SCA held that a court must be satisfied that a novel claim was necessarily inconceivable under our law as potentially developed under s 39(2) of the Constitution before it could uphold an exception premised on the alleged non-disclosure of a cause of action. Moreover, the SCA found that, this case indeed involves, as was expressly conceded on behalf of the respondents, 'an unprecedented and novel delictual claim'. According to the SCA, the high court appeared to have construed a *single* exception explicitly premised on an alleged failure to plead that the defendants are the 'cause' of the plaintiff's losses, as forming *two* separate exceptions (factual causation and legal causation).

Furthermore, the SCA held that the high court did not properly analyse any of the seven multitier issues raised in the exception. It referred only to three, but without conducting a thorough analysis of any or even considering whether the criticisms satisfied the applicable legal test for exceptions. According to the SCA, the high court appeared to have misconceived the test. The SCA accordingly upheld the appeal and substituted the order of the high court with one dismissing the causation exception.

In dealing with the respondents' cross-appeal: The SCA held that the dismissal by the high court of the legal duty exception was not appealable. Insofar as the conditional condonation application was concerned, the SCA held that the high court's order on that score was likewise not appealable. As a result, the cross-appeal fell to be struck from the roll.

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