THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 283/10

In the matter between:

The Government of the Republic of South Africa	**First Appellant**
The President of the Republic of South Africa	**Second Appellant**
The Minister of Foreign Affairs	**Third Appellant**
The Minister of Trade and Industry	**Fourth Appellant**
The Minister of Justice and Constitutional Development	**Fifth Appellant**

and

Crawford Lindsay von Abo	**Respondent**

Neutral citation: *The Government of the Republic of South Africa v Von Abo* (283/10) [2011] ZASCA 65 (4 April 2011)

Coram: MPATI P, CLOETE, SNYDERS AND THERON JJA AND PLASKET AJA

Heard: **28 February 2011**

Delivered: **4 April 2011**

Summary: Peremption of appeal – appealability – court obliged not to enforce order contrary to law - Diplomatic protection – nature of – appropriate order when violated.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Prinsloo J sitting as court of first instance):

1 The appeal is upheld.

2 The order of the court a quo made on 29 July 2008 is set aside, except for the declaration in para 1 and the costs order in para 7 thereof, and replaced with the following:

'Save for prayers 1 and 7 which are granted, the application is dismissed.'

3 The order of the court a quo made on 5 February 2010 is set aside.

JUDGMENT

SNYDERS JA (Mpati P, Cloete, Theron JJA and Plasket AJA concurring)

[1] The respondent is a South African citizen and a farmer from the Free State. More than fifty years ago he started acquiring farming land in the then Southern Rhodesia, today the Republic of Zimbabwe. By 1995 the respondent owned a vast and successful farming empire in Zimbabwe.[1] After 1997 the Zimbabwean Government commenced with a program of land reform which entailed dispossessing white farmers in Zimbabwe of the ownership of their land without any compensation. This policy was applied to the respondent

[1] All of the respondent's farming interests in Zimbabwe were acquired and developed in various companies and a trust that were registered legal entities in Zimbabwe. The respondent controlled these legal entities. As the farms in Zimbabwe were not held by the respondent in private ownership, it was an issue between the parties in the court below whether the respondent had any standing to approach the South African Government for diplomatic protection. That issue was not pursued by the appellants in this court and is consequently not addressed in this judgment. For purposes of this judgment it is accepted that the respondent had a direct interest in the relevant farming land in Zimbabwe.

with the result that he lost all his farming interests and suffered a comprehensive and massive financial loss. It is common cause that this loss was suffered as a result of a gross violation of international minimum standards. The respondent exhausted all possible remedies available to him in Zimbabwe against the Zimbabwean Government, but to no avail. Hence he turned to the appellants. At first he requested diplomatic protection by way of correspondence, and thereafter he sought to compel the provision of diplomatic protection by way of an application to the North Gauteng High Court.

[2] The appellants collectively represent all possible official interests in the dispute with the respondent. The first appellant is the South African Government. The second appellant is the head of the national executive and exercises the executive authority of the Republic of South Africa together with the Cabinet.[2] The third and fourth appellants, the Minister of Foreign Affairs and the Minister of Trade and Industry, were cited when the respondent issued the application. The fifth appellant, the Minister of Justice and Constitutional Development, was subsequently joined because of an interest in relief that was initially sought in relation to the ratification of an international convention. For reasons of convenience I will refer to the appellants collectively unless expressly distinguished.

[3] The respondent was successful in the court below. On 29 July 2008 an order (the first order) was issued declaring the rights and obligations of the parties and compelling the appellants to take steps within a prescribed period of time to give effect to that declaration of rights.[3] On 5 February 2010, after receiving an affidavit on the steps taken in compliance with the first order, the court below issued an order (the second order) that the first and third appellants are 'liable to pay to the [respondent] such damages as he may prove that he has suffered as a result of the violation of his rights by the

[2] Sections 83, 84, 85 and 92 of the Constitution.
[3] The judgment has been reported as *Von Abo v Government of the Republic of South Africa & others* 2009 (2) SA 526 (T).

Government of Zimbabwe'.[4] The court below (Prinsloo J on both occasions) granted all the appellants leave to appeal to this court against the first order and the first and third appellants leave to appeal against the second order.

[4] On 24 March 2002 the respondent addressed his first written request for assistance to the South African authorities. It was addressed to the second appellant. After that date and until January 2007, when he issued the application that commenced this matter, he wrote more than 50 letters to the appellants. He also addressed requests for assistance to South African diplomatic officials. In addition to the requests by him personally, various attorneys that acted on his behalf tried to secure the intervention of the appellants. Members of Parliament, the South African Human Rights Commission and Grain South Africa also took up the respondent's cause with the appellants. The issue of land reform in Zimbabwe has, for at least the past decade, been prominent in the public domain, the media and in parliament where it has caused lively and, at times, emotional debate.

[5] All of the requests by and on behalf of the respondent were aimed at securing the appellants' intervention in the form of diplomatic protection and assistance in order to achieve the restoration of his rights, a fair and just settlement or full compensation for his loss. As part of his numerous requests, the respondent also urged the first appellant to accede to the International Convention on the Settlement of Investment Disputes (ICSID) of which Zimbabwe is a member and which aims to provide member states and nationals of member states with conciliation and arbitration facilities for the settlement of disputes in order to promote private international investment.[5]

[6] Although responses to the respondent's letters were generally not prompt, they were ultimately forthcoming and sometimes, on the face of it, even encouraging. A letter dated 22 October 2002 from the office of the third appellant concludes with the following:

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[4] The judgment has been reported as *Von Abo v Government of the Republic of South Africa & others* 2010 (3) SA 269 (GNP).

[5] ICSID is an international convention entered into force on 14 October 1966 and which Zimbabwe ratified on 20 May 1994. South Africa has not ratified the ICSID.

'Please be assured that your request to the President has been noted and that [the] South African Government through the High Commission in Harare has been and will continue to interact with the Zimbabwean Government on the protection of the interests of South African citizens in Zimbabwe.'

[7] The most encouraging reaction came as responses to questions in the National Assembly. On 27 March 2002 the third appellant responded as follows to question 103:

'The South African Government would continue to ensure the safety and security of all its citizens, their property as well as South African owned companies in foreign countries.'

The response to question 127 contained the assurance that there was constant engagement between the government of South Africa and that of Zimbabwe about the issue. The response also disclosed that a Bilateral Investment Promotion and Protection Agreement (BIPPA), aimed at protecting the properties of South African nationals in Zimbabwe, had been concluded by the two countries and awaited signature.

[8] The promises of protection and avowed constant engagement with the Zimbabwean Government came to nothing. South Africa did not ratify the ICSID, BIPPA was never signed, and the respondent's substantial investment in Zimbabwe remained lost to him.[6] The respondent was driven to allege in his founding affidavit that:

'The string of correspondence directed at the [appellants] and other Government officials by me and my attorneys and the obtuse, dilatory and evasive response to that correspondence makes plain that the [appellants] have failed to act consistently with their own stated policy to "ensure the safety and security of all its citizens, their property as well as South African owned companies operating in foreign countries".'

[9] The respondent, after an amendment to his notice of motion, sought the following relief from the court below:[7]

'1 Declaring that the failure of the [appellants] to rationally, appropriately and in good faith consider and decide the [respondent's] application for diplomatic protection in respect of

[6] BIPPA was seemingly not signed due to a substantial change in attitude by the Zimbabwean officials that negotiated the agreement.

[7] The amendment effected involved the deletion of a prayer for a mandatory interdict to force the appellants to take steps to ratify the ICSID and to report to the court within thirty days of such order on the steps taken in compliance thereof.

the violation of his rights by the Government of Zimbabwe is inconsistent with the Constitution 1996 and invalid;

2 Declaring that the [respondent] has the right to diplomatic protection from the [appellants] in respect of the violation of his rights by the Government of Zimbabwe;

3 Declaring that the [appellants] have a Constitutional obligation to provide diplomatic protection to the [respondent] in respect of the violation of his rights by the Government of Zimbabwe;

4 Ordering the [appellants] to forthwith, and in any event within 30 (thirty) days of date of this Order, take all necessary steps to have the [respondent's] violation of his rights by the Government of Zimbabwe remedied;

5 Directing the [appellants] to report by way of affidavit to this Honourable Court within 30 (thirty) days of this Order, what steps they have taken in respect of prayer 4 above and providing a copy of such report to the [respondent];

6 That, in the event of the [appellants] failing to comply effectively with either the Order in terms of prayer 4 or in terms of prayer 5, ordering the [appellants] jointly and severally, (the one paying and the other to be absolved) to pay to the [respondent] such damages as he may prove that he has suffered as a result of the violation of his rights by the Government of Zimbabwe;

7 Directing that [appellants], jointly and severally (the one paying the other to be absolved) pay the [respondent's] costs of this application.'

[10] On 29 July 2008 the first order was granted. It differs from the one sought in only three respects. First, the period within which steps had to be taken in terms of paras 4 and 5 was increased to 60 days. Second, the prayer for damages in para 6 was, 'subject to effective compliance with paragraphs 4 and 5', postponed sine die. Third, the costs granted in terms of para 7 were to include the costs of two counsel.

[11] Steps were taken by the appellants in purported compliance with the first order. On 19 October 2008 an affidavit, setting out the steps taken, was filed by the appellants.[8] The respondent's attorney pursued the taxation of the costs ordered in para 7 of the first order and the appellants paid those costs. The respondent, in the meantime and incorrectly, approached the Constitutional Court for confirmation of para 1 of the first order in terms of s

[8] The fact that the affidavit was not filed within sixty days of the date of the first order was never regarded as significant.

172(2) of the Constitution.[9] The application was, for obvious reasons, only opposed by the second appellant. It was heard on 26 February 2008 and judgment was delivered on 5 June 2009.[10] The Constitutional Court concluded that the application was misconceived as para 1 of the first order did not affect 'conduct' of the President as meant in s 172(2)(a). At no stage during this time did the appellants seek to obtain leave to appeal the first order. During the hearing in the Constitutional Court, counsel for the second appellant 'assured [the Constitutional Court] that neither the Government nor any of the other [appellants] is minded to do anything other than comply with the order of the High Court'.[11]

[12] After the judgment by the Constitutional Court the parties agreed that the matter be set down for hearing on 12 and 13 October 2009 in the high court. The purpose of another hearing was to consider the postponed claim for damages which was inter-twined with the appellants' compliance with paras 4 and 5 of the first order. The court below did not accept that the affidavit filed or the steps taken by the appellants pursuant to the first order constituted compliance with that order. On 5 February 2010 it issued the following order (the second order):[12]

'1 It is declared that the first and third [appellants], jointly and severally, the one paying the other to be absolved, are liable to pay to the [respondent] such damages as he may prove that he has suffered as a result of the violation of his rights by the Government of Zimbabwe.

2 The question of the quantum of the damages is referred to oral evidence.

3 The usual rules will apply with regard to discovery, expert evidence and the holding of a pre-trial conference.

4 The [appellants], jointly and severally, are ordered to pay the [respondent's] costs arising from this follow-up hearing, including the costs of two counsel.'

[13] On 26 February 2010 the appellants applied to the court below for leave to appeal against the first order, for condonation for the late filing of that

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[9] Section 172(2)(a): 'The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.'

[10] The judgment is reported as *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC).

[11] *Ibid* para 13.

[12] The date of the order as reported is incorrect.

application and for leave to appeal against the second order. The appellants were granted the relief they sought, except in relation to the costs ordered in para 7 of the first order.

[14] In this court the respondent contended that the appeal against the first order had been perempted. He relied on the objective facts that the appellants did not timeously seek leave to appeal the first order, took steps and filed an affidavit in purported compliance with the first order, declared to the Constitutional Court that they intended to comply with the first order and paid the costs that were ordered and taxed.

[15] If the respondent is able to show that the appellants' unequivocal conduct after the first order is inconsistent with an intention to appeal, the appeal has been perempted.[13] The answer to this question is, however, tied up with the question whether the first order was appealable. If it be accepted that the first order was appealable, the appellants' actions following upon the first order clearly illustrate an intention by them not to proceed with an appeal. The appealability of the first order was peripherally mentioned during the confirmation proceedings before the Constitutional Court. The context in which it came to be raised appears from para 13 of the judgment:

'Neither the government nor any of the other [appellants] has assailed the correctness of the judgment or the validity of the order of the High Court by way of an appeal. The order was made nearly ten months ago and the time within which the [appellants] in that court may have sought leave to appeal has long elapsed. A party to confirmation proceedings in this court has an automatic right of appeal against the order sought to be confirmed. None of the government [appellants] has availed itself of this right of appeal. If anything, during the hearing in this court, counsel for the [President] sought to tender new evidence to show that the government [appellants] were taking active steps to comply with the order of the High Court. From the bar counsel for the [President] assured this court that neither the government nor any of the other [appellants] is minded to do anything other than comply with the order of the High Court.'

[13] *Standard Bank v Estate van Rhyn* 1925 AD 266 at 268; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600A-D; *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 443F.

[16] From this excerpt it appears that the appealability of the first order seems to have been impliedly conceded by the second appellant's counsel and accepted by that court, although it was not argued or decided. It only became necessary to decide whether that concession was correctly made and accepted when the appellants applied for leave to appeal against the first order. The court below inclined towards the view that the first order was not appealable, without expressly stating so. It granted leave and said in the judgment that 'it is not unreasonable to argue that the [appellants] did not act, or were not out of order, by attempting to comply with orders 4 and 5, that is the supervisory *mandamus*, before noting an appeal against the main judgment, because had their efforts, in that regard, been successful, and had they persuaded me in the follow-up judgment that they had complied with the supervisory *mandamus*, it would have been the end of the matter, and it would also have redounded to the benefit of the . . . [respondent] in the main proceedings'.

[17] At the start of the second judgment the court below had the following to say:

'Where this judgment is a sequel to the main judgment, it must inevitably be read in conjunction with that judgment.

. . .

When the Constitutional Court judgment, dated 5 June 2009, was handed down, and in view of the outcome thereof, the parties made arrangements for this further hearing, which inevitably had to flow from the provisions of paras 4 and 5 of my order in the main judgment, to take place.'[14]

That leave was granted is not decisive of the issue. The complications surrounding appealability in any given instance were recently summarised by Lewis JA in *Health Professions Council of South Africa v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) paras 14-19. It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is

[14] Paras 3 and 7.

considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.[15] The appealability of the order was not argued in this court, hence I am reluctant to decide the peremption point on that basis alone.

[18] However, it matters not whether the first order was appealable or whether the appeal had been perempted. As a matter of logic the second order arose from the first order and has no independent existence separate from the first order. As the second order was given in consequence of the first order, and would not nor could have been given if it was not for the first order, it follows that if the first order is wrong in law, the second order is legally untenable. Whether the appellants were ill-advised not to appeal against the first order, but rather to try and comply with it, should not have the unacceptable result that this court is held to a mistake of law by one of the parties. I can put it no better than Jansen JA in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23F:

'[I]t would create an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part. . . . '[16]

[19] In *Paddock* the principle of the court not being bound by what is legally untenable was applied in the narrower context of a legally wrong concession by one of the parties during proceedings, but the principle is equally valid in the present context. It would be similarly intolerable if, in the current situation, this court would be precluded from investigating the legal soundness of the first order, as a result of the incorrect advice followed by the appellants or an incorrect concession made by them.

[20] I turn to the merits of the first order. The legal principles applicable in matters of this nature have been authoritatively pronounced upon by the

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[15] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533A; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F-11C; *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656 (SCA) paras 46 and 50-51.

[16] See also at 19B and *Van Rensburg v Van Rensburg & andere* 1963 (1) SA 505 (A) at 510A.

Constitutional Court in *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC) and by this court in *Van Zyl & others v Government of the Republic of South Africa & others* 2008 (3) SA 294 (SCA). It is apparent from both these decisions that it is important to distinguish between international law, which deals with the relationship between state and state, and municipal law, which deals with the relationship between citizen and state.[17] A national in the position of the respondent has to rely on municipal law for diplomatic protection as international law does not recognise a right of a national to diplomatic protection. When a state affords its national diplomatic protection in terms of municipal law, it then proceeds to rely on international law in its dealings with the other state. The focus that has been placed on diplomatic protection from an international perspective was summarised in *Kaunda* from which it is useful to quote:[18]

'The nature and scope of diplomatic protection has been the subject of investigations by the International Law Commission. It was requested in 1996 by the General Assembly of the United Nations to undertake this task. Special Rapporteurs and working groups were involved in the investigations the outcome of which is referred to in reports of the International Law Commission. The report dealing with issues relevant to the present matter is the report published in 2000 (the ILC report). This report contains summaries by the Special Rapporteur, Professor Dugard, of the relevant debates.

The term diplomatic protection is not a precise term of art. It is defined in the Special Rapporteur's report as "action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State".

. . .

According to the Special Rapporteur's report, diplomatic protection includes, in a broad sense, "consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, [and] economic pressures".'[19]

[21] When a state decides to afford its national diplomatic protection it engages the other state by means of existing diplomatic channels. Its successes and failures in this process are largely dependant on the nature of the relationship between the states and the inclination of the other state to

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[17] *Van Zyl* para 60.
[18] Paras 25-27.
[19] *Kaunda* makes reference to the *Report of the International Law Commission on the work of its 52nd session,* 1 May to 9 June and 10 July to 18 August (2000) A/55/10 (ICL report).

engage, grant and implement requests or succumb to pressure. This superficial description of the structure of the subject under discussion suffices to illustrate that diplomatic protection is not merely for the asking, but is a complex issue the success of which is dependant on a multitude of variables.

[22] The question whether a national has a right to diplomatic protection was asked and answered in *Kaunda.* Chaskalson CJ stated the legal position to be as follows:

'If, as I have held, citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution.'[20]

It was expressly held that s 7(2) of the Constitution should not be construed as granting citizens a positive right to demand, or imposing on government a positive obligation to ensure, 'that laws and conduct of a foreign State and its officials meet not only the requirements of the foreign State's own laws, but also the rights that our nationals have under our Constitution'.[21] The remarks made by Harms DP in *Van Zyl* are apposite in the present instance:[22]

'The [respondent's] request was premised on a "right" to diplomatic protection and not on a right to have a request considered. It was further based on the duty of government to provide a particular type of diplomatic protection. These demands were, in the light of the Constitutional Court's judgment, ill-founded.'

[23] The relief sought by the respondent in the court below and granted was an express declaration of rights and duties contrary to the law. The judgment by the court below contains extensive references to the judgment in *Kaunda.* Despite those references an incorrect conclusion was reached. One can only assume that the broader and, with respect, less precise views expressed in the concurring minority judgment by Ngcobo J, extensively quoted by the court below without distinguishing it from what the majority held the law to be, resulted in the incorrect approach. The judgment in the court below contains no reference to *Van Zyl* in which the applicable legal principles were clearly re-stated and helpfully explained.

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[20] *Kaunda* para 67.
[21] *Kaunda* para 44.
[22] *Van Zyl* para 52.

[24] Paragraphs 2 and 3 of the first order are therefore contrary to the law. The misconception evident in these paragraphs, together with the conclusions reached by the court below that the appellants' responses to the respondent's numerous demands were not appropriate, informed the order in paras 4 and 5. If paras 2 and 3 are to be struck out, paras 4 and 5 cannot stand, but I will continue to consider the legitimacy of paras 4 and 5 of the first order independently of their relationship with paras 2 and 3.

[25] I will not, at this stage, consider the appropriateness of the appellants' responses, but assume, for present purposes, that the court below was correct in the following conclusion:

'In my view, and for all the reasons mentioned, the government, in the present instance, failed to respond appropriately and dealt with the matter in bad faith and irrationally. For six years or more, and in the face of a stream of urgent requests from many sources, they did absolutely nothing to bring about relief for the applicant and hundreds of other white commercial farmers in the same position. Their "assistance", such as it is, was limited to empty promises. They exhibited neither the will nor the ability to do anything constructive to bring their northern neighbour to book. They paid no regard, of any consequence, to the plight of valuable citizens such as the fifth generation applicant with a 50 year track record in Zimbabwe, and other hardworking white commercial farmers making a substantial contribution to the GDP in Zimbabwe and providing thousands of people with work in that country.'[23]

[26] Para 4 of the first order is extraordinary. It orders the appellants to remedy the violation of the respondent's rights perpetrated by the Zimbabwean Government. The ordinary grammatical meaning of this order is that the appellants were expected to restore, within 60 days of the order, all the respondent's losses in Zimbabwe. The order ignores several vital considerations. First, that on a practical level it is unrealistic to expect any government, the wheels of which sometimes turn even more slowly than the wheels of justice, to act so expeditiously. Second, it ignores the fact that the nature and essence of diplomatic protection is a process the result of which is necessarily dependant on the responses of another state, which is not bound by the order. Third, it ignores the factual situation in Zimbabwe, widely

[23] Para 143.

published in the international media during the past decade and included in the respondent's papers, that the action taken in Zimbabwe accorded fully with Zimbabwean governmental policy and extensive international pressure hardly brought any change.

[27] Compliance with the order was impossible. Assuming that it was a legitimate order, it set an impossible task for the appellants, and dare I say it, for any government in the world. The appellants' efforts were doomed to failure. They were to report, in compliance with para 5 of the order, on the steps taken 'in respect of paragraph 4'. That meant a report on the steps taken to achieve the restoration of the respondent's property to him. Such an outcome could not realistically have been expected.

[28] I return to the question whether the orders contained in paras 4 and 5 of the first order are legally tenable. Again, no new legal ground needs to be canvassed. In paras 77 to 81 of *Kaunda* Chaskalson CJ said:

'A decision as to whether protection should be given, and if so, what, is an aspect of foreign policy which is essentially the function of the Executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than Judges, and which could be harmed by court proceedings and the attendant publicity.

This 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. Thus even decisions by the President to grant a pardon or to appoint a commission of inquiry are justiciable. This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection.

For instance, if the decision were to be irrational, a court could intervene. This does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection.

> "Rationality . . . is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate for the opinions of those in

> whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."

If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list.

What needs to be stressed, however, in the light of some of the submissions made to us in this case, is that government has a broad discretion in such matters which must be respected by our courts.'[24]

[29] In paras 4 and 5 of the first order the court below prescribed to the appellants, as representing the Executive, the result their diplomatic protection should achieve for the respondent, the time frame within which to do so and appointed itself the overseer of the Executive. The order violates the legal principles laid down in *Kaunda* and the form of the order illustrates some pitfalls that were illustrated in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA), namely:[25]

'As mentioned, the Court below granted, in terms of s 38 and s 172(1), a declaratory order and a *mandamus* in the form of a "structural interdict" (ie an order where the court exercises some form of supervisory jurisdiction over the relevant organ of state). . . Structural interdicts . . . have a tendency to blur the distinction between the Executive and the Judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights.'

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[24] See also *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC) paras 37-38; *Glenister v President of the Republic of South Africa & others* 2009 (1) SA 287 (CC) paras 33 -35.

[25] Para 39.

This is not to conclude that a structural interdict is never appropriate where the exercise of executive functions is concerned, but in this case it served to encroach on the functions of the Executive.[26]

[30] Paras 4 and 5 of the first order are legally untenable in and of themselves. As the court below was not entitled to make the order contained in paras 4 and 5 of the first order, the appellants' subsequent actions cannot be measured by the standard set in those orders and the second order could and should not have resulted. The inter-connectedness of the orders is also evident from the following paragraph in the second judgment by the court below:

'It was held in the main judgment (more particularly at 560C-566I) that the [appellants] had acted unconstitutionally and, in the process, had violated the [respondent's] right to diplomatic protection as entrenched in the Constitution.'[27]

[31] The second order is without legal foundation, not only because of its inter-connectedness to the first order, but also because of its substance. In terms of the second order the appellants are ordered to pay damages for a breach or violation of rights committed by the Zimbabwean Government, akin to the field of vicarious liability and not for their own breach or violation of the respondent's rights.[28] The factual situation does not give rise to vicarious liability and such liability does not arise in a constitutional law context. It is therefore a completely foreign concept that one state would attract liability in terms of its municipal law (because that is the only law that the respondent could enforce against the appellants) viz-a-viz its own national for the wrongs of another state, committed by that state in another country viz-a-viz the same individual. The only breach that could legally have occurred in the present case is that the appellants failed to comply with their duty viz-a-viz the respondent to act appropriately to his request for diplomatic protection.

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[26] *Sibiya & others v Director of Public Prosecutions, Johannesburg, & others* 2005 (5) SA 315 (CC) is an example where a supervisory interdict was used.
[27] Para 60.
[28] Liability that one person attracts for the delict committed by another by reason of the relationship between them, for example employer and employee. See *Minister of Safety and Security v F* (592/09) [2011] ZASCA 3 (22 February 2011) for a discussion on the nature, history and application of vicarious liability.

[32] It is apparent from the judgment that the second order was the consequence of an investigation into what an appropriate remedy would be in the circumstances of the breach. Section 38 of the Constitution empowers a court to grant appropriate relief when it concludes that a breach of rights under the Bill of Rights has been established.[29] In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC),[30] and several other decisions that followed,[31] the principles and requirements for an appropriate remedy to be effective have been explored. It states that a monetary award of damages for a constitutional breach could in appropriate circumstances be made.

[33] The constitutional breach in this case, if there was one, could only have been a failure to have responded appropriately to the respondent's request for diplomatic protection. Theoretically, an appropriate response in certain circumstances could be to do nothing. In order to decide on an appropriate remedy, the nature of the breach must also be considered. This brings the issue of causation into focus. The result of the breach of the constitutional duty properly to consider a request for diplomatic protection and respond to it appropriately is not the factual cause of the loss suffered. This is particularly true on the facts of this case. From annexures to the founding affidavit and the affidavits filed by the appellants pursuant to the first order the facts speak clearly of a firm attitude by the Zimbabwean Government in defiance of all pressure that the land reform policy implemented in Zimbabwe is ongoing and irreversible.[32]

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[29] The relevant part of s 38 of the Constitution reads: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill or Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

[30] Para 60.

[31] *Minister of Health & others v Treatment Action Campaign & others (No 1)* 2002 (5) SA 703 (CC); *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre Amici Curiae), President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA); *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA).

[32] An attitude expressed by Zimbabwean Ambassador Moyo and Mr Chifamba, Zimbabwean Divisional Head for Africa: Economics, at different meetings with South African delegations. The annexures to the founding affidavit were: Human Rights Watch *Fast Track Land Reform in Zimbabwe* March 2002, Vol 14, No 1(A), New York; Human Rights Watch *Under a Shadow: Civil and Political Rights in Zimbabwe,* June 6, 2003; Amnesty International Report 2002; US

[34] I turn to the finding of the court below in relation to the affidavits filed pursuant to para 5 of the second order. The court below perceived the purpose of what it called the 'follow-up' hearing to be as follows:

'The essence of the enquiry which came before me in the follow-up hearing was to establish whether or not the [appellants] had effectively complied with para 4 of my order in the main judgment – at 567A.

A positive finding, from the point of view of the [appellants], would signal the end of the matter. A negative finding would result in declaratory relief to the effect that the [appellants] were liable to compensate the [respondent] for his damages.'[33]

[35] I have already dealt with the illogical conclusion contained in the last sentence of the extract. The court below held that the affidavits filed on behalf of the appellants, regardless of their content, did not constitute compliance with the second order as they were not deposed to by any of the appellants personally. It further held that paras 4 and 5 of the first order were directed at the appellants personally.

[36] The conclusion by the court below that the appellants had to have personally taken steps and deposed to affidavits, unrealistically and naïvely ignores that diplomatic actions involve complex and sensitive relationships conducted through an extensive hierarchy according to a particular protocol which, if breached, could result in failure even before the substance is considered. It was also unrealistic to have expected the appellants to comply personally with the second order within the short time frame of 60 days without taking account of relevant facts like other pressing matters of state, that may have made it impossible for them to comply personally with the order. This does not mean that ministers of government departments can never be ordered to personally see to compliance with court orders by their departments. It only means that it was not appropriate in this matter, as appropriate and relevant facts and considerations were not explored.

Department of State *Country Reports on Human Rights Practices* 2002, 2003, 2004 and 2005.

[33] Para 9.

[37] In the judgment on the misconceived confirmation proceedings before the Constitutional Court para 50 the following appears:

'The Constitution carefully apportions powers, duties and obligations to organs of State and its functionaries. It imposes a duty on all who exercise public power to be responsive and accountable and to act in accordance with the law. This implies that a claimant, who seeks to vindicate a constitutional right by impugning the conduct of a State functionary, must identify the functionary and its impugned conduct with reasonable precision. Courts too, in making orders, have to formulate orders with appropriate precision.'

I find it appropriate to apply the essence of what is stated in that paragraph in the current context. The appellants exercise executive powers as the respective heads of their departments by means of a multitude of functionaries. It would have been necessary for the court to state with 'reasonable precision' if it required the ministers to comply with its order personally. The order that was issued by the court below is indiscriminate. It is addressed to all the appellants in their official capacities without any indication that it was expected of one or all of them to respond personally. The inappropriateness of the expectation is further illustrated when its logical conclusion is tested by posing the rhetorical question whether all the appellants, the President and all three ministers, were each supposed to approach the Zimbabwean Government in person and make affidavits.

[38] This requirement of the first order as interpreted by the court below is another violation of the separation of powers discussed in paras 28 and 29 above, as it prescribes to the Executive which functionary is required to act.

[39] In view of the conclusions reached, it is only necessary to express a view on the nature of the appellants' response to the respondent's request for diplomatic protection and their answering affidavit delivered in this application, insofar as it is relevant to the costs order made against the appellants in para 7 of the first order. In the time leading up to the application the appellants seem to have promised the respondent diplomatic protection. The answering affidavit painted with a broad brush. Irrespective of the source of the evidence it consists of general allegations and conclusions of fact. The court was not entrusted with the content of the government's policy or specific steps taken by particular officials in terms of recognised procedures and protocols. In

short, the court was not put in a position to assess the reasonableness or appropriateness of what was done or not done by the appellants. The frustration that the court and certainly the respondent was left with, was that he was given glowing promises, but received nothing, not even a response that engaged the issues. The respondent and the court were entitled to an honest and open disclosure on policy, approach and action. The manner in which the opposition to the confirmation matter was conducted in the Constitutional Court was criticised by that court. That criticism was applicable to the appellants' conduct throughout the proceedings. This case is an example of how a government, founded on a constitutional dispensation and a culture of human rights, is not supposed to treat its citizens and its courts. The government's conduct in *Van Zyl* is in stark contrast to the current matter.

[40] The appellants' response to the respondent was inappropriate. For that reason they were rightly ordered to pay the respondent's costs and leave to appeal that costs order was rightly refused. Still, it was for the court to find an appropriate way to ensure compliance with the constitutional duty to consider the request for diplomatic protection appropriately, whilst respecting the separation of powers and recognised legal principles.

[41] In view of the appellants' success in this court it is not appropriate to order them to pay the costs on appeal. It is, however, appropriate to adopt the usual approach in matters involving the enforcement of constitutional rights and not order the respondent to pay the appellants' costs. The appellants, in my view rightly, did not insist on costs.

[42] I need to make some final remarks on para 1 of the first order. In view of the conclusion that I have arrived at that the appellants' response does not conform to what is demanded of them in terms of the Constitution, that part of the first order should stand, albeit that it is of theoretical value only.

[43] I make the following order:

1 The appeal is upheld.

2 The order of the court a quo made on 29 July 2008 is set aside, except for the declaration in para 1 and the costs order in para 7 thereof, and replaced with the following:

‘Save for prayers 1 and 7 which are granted, the application is dismissed.’

3 The order of the court a quo made on 5 February 2010 is set aside.

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S SNYDERS

Judge of Appeal

APPEARANCES:

For appellant:	PJJ de Jager SC (with him M Mphaga & M Sello) Instructed by The State Attorney, Pretoria, The State Attorney, Bloemfontein.
For respondent:	P Hodes SC (with him A Katz SC & M du Plessis) Instructed by Ernst J V Penzhorn Attorneys, Pretoria, Hill, McHardy & Herbst Inc., Bloemfontein.