CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 101/12
[2013] ZACC 22

In the matter between:

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

Heard on : 28 February 2013

Decided on : 27 June 2013

JUDGMENT

MOGOENG CJ (Moseneke DCJ, Froneman J, Khampepe J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and (Zondo J except [44] to [46]) concurring):

Introduction

[1] For the right or wrong reasons, or a combination of both, Africa has come to be known particularly by the western world as the dark continent, a continent which has little regard for human rights, the rule of law and good governance. Apparently driven by a strong desire to contribute positively to the renaissance of Africa, shed its southern region of this development-inhibiting negative image, coordinate and give impetus to regional development, Southern African States established the Southern African Development Community (SADC) with special emphasis on, among other things, the need to respect, protect and promote human rights, democracy and the rule of law.[1]

[2] To ensure that no SADC Member State is able to undermine the regional development agenda by betraying these noble objectives with impunity, a regional Tribunal (Tribunal) was created to entertain, among other issues, human rights related complaints particularly by citizens against their States.[2] It is to this Tribunal that the respondent farmers (farmers) brought their land dispossession dispute with the applicant, the Government of the Republic of Zimbabwe (Zimbabwe), for determination. They did so because their farms were expropriated by Zimbabwe in terms of its Constitution, which denied them compensation for their land and access to court.

[1] Treaty of the Southern African Development Community (1993) 32 *ILM* 116, Preamble and article 4.

[2] Id article 9(1)(f) and article 18 of the Protocol on Tribunal in the Southern African Development Community (Tribunal Protocol) adopted on 14 August 2001, http://www.sadc.int/documents-publications/show/814, accessed on 26 March 2013. In August 2012, the Summit (the highest policy making body of SADC) resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to disputes between Member States.

[3] The Tribunal decided in favour of the farmers.[3] When Zimbabwe refused to comply with the decision, the aggrieved farmers again approached the Tribunal for further relief. The Tribunal referred the matter to the Summit[4] for appropriate action to be taken and granted a costs order against Zimbabwe (costs order). Dissatisfied with a disregard for even this order, the farmers applied successfully to the North Gauteng High Court, Pretoria (High Court) for the registration and enforcement of the costs order, to facilitate execution against Zimbabwe's property in South Africa.

[4] Registration of the costs order led to an unsuccessful appeal to the Supreme Court of Appeal by Zimbabwe. Aggrieved by the dismissal of the appeal, Zimbabwe approached this Court with an application for leave to appeal. We are now required to determine whether the High Court had the jurisdiction to enforce the costs order made by the Tribunal.

SADC and its legal instruments

[5] SADC was established in terms of the Treaty of the Southern African Development Community[5] (Treaty) that was signed on 17 August 1992 in Windhoek, Namibia, by the Heads of State or Government of ten Southern African States.[6]

[3] *Mike Campbell (Pvt) Ltd. and Others v The Republic of Zimbabwe* [2008] SADCT 2 (28 November 2008) (Tribunal ruling).

[4] This was done pursuant to article 32(4) and (5) of the Tribunal Protocol.

[5] See above n 1.

[6] Chapter 17 of the Treaty deals with, inter alia, signature, ratification and the entry into force of the Treaty. Article 39 provides that the Treaty shall be signed by the "High Contracting Parties" which are the States represented in concluding the Treaty for the purpose of establishing SADC.

Zimbabwe ratified the Treaty on 17 November 1992,[7] as confirmed by its Attorney-General.[8] And the Treaty came into force on 30 September 1993.[9] South Africa joined SADC by acceding to the Treaty on 29 August 1994. Our Senate[10] and National Assembly approved the Treaty on 13 and 14 September 1995 respectively.

[6] The purpose for the establishment of SADC was to achieve certain regional developmental goals. Some of the key objectives are set out in the Preamble to the Treaty as: a collective realisation of the progress and well-being of the peoples of Southern Africa; promotion of the integration of the national economies of Member States; the need to mobilise international resources and secure international understanding, support and cooperation; and, more importantly, "the need to involve the peoples of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law". Member States bound themselves in terms of article 4(c) of the Treaty to act in accordance with the human rights, democratic and rule of law principles.

[7] SADC Tribunal, *Status List of SADC Legal Instruments* (2010), http://sadc-tribunal.org/pages/status_list.htm, accessed 26 March 2013.

[8] In an affidavit filed by Zimbabwe's Attorney-General, Mr Johannes Tomana, in proceedings in the High Court of Zimbabwe he stated:

> "It is correct that Zimbabwe is a member of SADC, and assumed the obligations referred to in the Treaty establishing SADC when His Excellency, the President, signed that Treaty at Windhoek, Namibia, on 17th August, 1992. Zimbabwe's legislature ratified the Treaty on 17th November, 1992."

[9] See above n 7.

[10] The Senate was later replaced by the National Council of Provinces (NCOP). See article 3(1)(b) of Schedule 6 to the Constitution.

[7] They undertook to adopt measures to promote the achievement of the objectives of SADC and to "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 this Treaty."[11] Added to this was the responsibility to take all the necessary steps to accord the Treaty the force of national law[12] and a commitment to "cooperate with and assist institutions of SADC in the performance of their duties."[13] One of those institutions to be cooperated with and assisted was the Tribunal.[14]

[8] The Tribunal was established to ensure adherence to and the proper interpretation of the Treaty as well as the adjudication of such disputes as may be referred to it.[15] The composition, powers, functions, procedures and other related matters were subsequently provided for in a Protocol pertaining to the Tribunal[16] (Tribunal Protocol).

[9] The coming into effect of the Tribunal Protocol depended on its ratification by two-thirds of the Member States.[17] It appears that the requisite number of ratifications was not obtained. As a result, the Tribunal Protocol did not come into operation. This hurdle was overcome through the amendment of the Treaty by the SADC supreme

[11] Article 6(1) of the Treaty.

[12] Id article 6(5).

[13] Id article 6(6).

[14] Id article 9(1)(f).

[15] Id article 16(1).

[16] Protocol on Tribunal in the Southern African Development Community (Tribunal Protocol) adopted on 14 August 2001, http://www.sadc.int/documents-publications/show/814, accessed on 26 March 2013.

[17] Article 38 of the Tribunal Protocol provides that it shall come into force after ratification by two-thirds of the Member States.

policy-making body known as the Summit, which comprises the Heads of State or Government of SADC Member States. It has the power to amend the Treaty. And such amendment becomes operative only after adoption by the prescribed three-quarters of all Members of the Summit.[18]

[10] The amendment alluded to above was effected by the Summit in terms of the Agreement Amending the Treaty of the Southern African Development Community[19] (Amending Agreement). Article 16(2) of the Treaty was amended to provide for the Tribunal Protocol to be an integral part of the Treaty, obviously subject to the adoption of the Amending Agreement. This was notwithstanding the provisions of article 38 of the Tribunal Protocol which required ratification of the Tribunal Protocol by two-thirds majority before it could come into operation.[20] This amendment, therefore, removed the ratification requirement.

[11] Consequently, the Amending Agreement came into force on the date of its adoption by three-quarters of all Members of the Summit.[21] That happened on 14 August 2001 in Blantyre, Malawi, where it was signed by 14 Heads of State or Government including Zimbabwe and South Africa. Both South Africa and Zimbabwe are thus bound by the amended version of the Treaty which incorporated the Tribunal Protocol (Amended Treaty).

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[18] Article 36(1) of the Treaty (included in Chapter 14 of the Treaty which is titled "Amendment of the Treaty").

[19] Adopted on 14 August 2001, http://www.sadc.int/documents-publications/show/1181, accessed on 18 June 2013.

[20] See above n 17. Article 38 of the Tribunal Protocol was subsequently repealed by the Agreement Amending the Protocol on Tribunal which entered into force on 3 October 2002.

[21] Article 32 of the Amending Agreement.

Litigation background

[12] It was about a decade after SADC had set the above objectives and established institutions that could enhance human rights and the rule of law that Zimbabwe amended its Constitution to facilitate agrarian reform.[22] The amendment caters for the compulsory State acquisition of all agricultural land identified by the State's acquiring authority.[23] Compensation is not payable for the agricultural land acquired in this manner but only for the improvements effected on the land. In addition, a person who has a right or interest in the expropriated land is barred from approaching any domestic court of Zimbabwe to challenge the acquisition.

[13] Numerous farmers were dispossessed of their agricultural land in terms of this agrarian reform policy. And they were aggrieved.

(a) In the Tribunal

[14] In 2007 the farmers, together with 76 others who were also affected by Zimbabwe's agrarian reform policy, turned to the Tribunal to challenge the policy's implementation. The Tribunal decided in their favour and ordered Zimbabwe to protect the ownership, occupation and possession of those of their farms that had been compulsorily acquired but from which farmers had not yet been evicted and pay

[22] Section 16B of the Constitution of the Republic of Zimbabwe.

[23] In terms of section 16B of the Constitution of the Republic of Zimbabwe, an "acquiring authority" is defined as, "the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority" for the purposes of acquiring land for "resettlement and other purposes".

compensation for the expropriated farms, from which farmers had already been evicted.

[15] Zimbabwe refused to comply with the Tribunal's decision. The farmers referred that non-compliance to the Tribunal for relief. It found Zimbabwe to have failed to comply with the judgment, referred the matter to the Summit for appropriate action[24] and granted the costs order against Zimbabwe. When the costs order was also not complied with, the farmers then approached the High Court to have it enforced in South Africa.

(b) In the High Court

[16] Two related orders were granted by the High Court. The first order was leave to commence proceedings by edictal citation granted by Tuchten AJ in an unopposed application (service order).[25] It was on its strength that the application to enforce the costs order was served on the offices of the Zimbabwean Attorney-General and the administrative head office of the Zimbabwean Ministry of Justice in Harare. In response, Zimbabwe filed a notice of intention to oppose which it subsequently withdrew on the basis that it was a sovereign State immune from the jurisdiction of South African courts. In the second order, Rabie J ordered the registration of the costs

[24] A referral to the Summit is provided for in article 32(5) of the Tribunal Protocol which provides that "[i]f the Tribunal establishes the existence of [any failure by a State to comply with a decision of the Tribunal], it shall report its finding to the Summit for the latter to take appropriate action."

[25] *Fick and Others v Government of the Republic of Zimbabwe*, Case No 77880/2009, North Gauteng High Court, Pretoria, 13 January 2010, unreported.

order, thus facilitating its enforcement in South Africa (registration order).[26] Consequently, a writ of execution was issued authorising the attachment and sale in execution of certain properties owned by Zimbabwe in Cape Town, South Africa, to satisfy the costs order.

[17] Zimbabwe then applied for the suspension of the farmers' writ of execution and the rescission of the service and registration orders. The three applications were consolidated and were all dismissed by Claassen J.[27] This was followed by an appeal to the Supreme Court of Appeal.

(c) In the Supreme Court of Appeal

[18] Zimbabwe's challenge to the service order was premised on its sovereign immunity against suits in South African courts in terms of the Foreign States Immunities Act[28] (Immunities Act). The grant of the registration order was assailed on two grounds. First, that the Tribunal did not have jurisdiction to entertain the farmers' challenge to Zimbabwe's land reform policy.[29] Second, that the High Court lacked jurisdiction because the Treaty and the Tribunal Protocol were not approved by the South African Parliament[30] and could not therefore enforce the costs order.

[26] *Fick and Others v Government of the Republic of Zimbabwe*, Case No 77881/2009, North Gauteng High Court, Pretoria, 25 February 2010, unreported.

[27] *Government of the Republic of Zimbabwe v Fick and Others* [2011] ZAGPPHC 76.

[28] 87 of 1981.

[29] *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122 (Supreme Court of Appeal judgment) at para 29.

[30] Id at para 45.

[19] The Supreme Court of Appeal, per Nugent JA, held that Zimbabwe had waived its immunity by "expressly submitting itself to the SADC Treaty and the [Tribunal] Protocol."[31] It held further that the Amending Agreement was adopted by the prescribed majority, including Zimbabwe.[32] It added that the Treaty, together with the Tribunal Protocol which became part of the Treaty as a result of the amendment, came into effect in 2001.[33] For these reasons, the Supreme Court of Appeal concluded that the Tribunal Protocol did not need to be ratified by Member States to be binding. It dismissed the argument that the Tribunal lacked jurisdiction on the additional basis that Zimbabwe's submission to the Tribunal's jurisdiction was sufficient for the purpose of the enforcement of the costs order in South Africa.

[20] The Court concluded that Zimbabwe failed to show that it had a bona fide defence and reasonable prospects of success against either the service or registration order, which is a requirement for the rescission of a judgment. It thus held that the Amended Treaty, which incorporated the Tribunal Protocol, was binding on Zimbabwe and conferred jurisdiction on the Tribunal over the farmers' claim. It added that our common law on the enforcement of foreign judgments applied to international tribunals and that the costs order was enforceable in South Africa. The appeal was dismissed. Aggrieved by this outcome, Zimbabwe approached this Court for leave to appeal.

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[31] Id at para 20.

[32] Id at para 40.

[33] Article 16(2) of the Treaty, as amended by the insertion of the underlined section, provides:

> "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."

Leave to appeal

[21] This application concerns the enforcement of the costs order granted by the Tribunal against Zimbabwe. The origin of that costs order is a dispute that implicates human rights and the rule of law, which are central to the Treaty and our Constitution. A constitutional matter does, therefore, arise here in relation to access to courts[34] which is an element of the rule of law.[35]

[22] Zimbabwe argues that the Tribunal did not have the jurisdiction to entertain the dispute that led to the costs order. It also contends that the High Court lacked the jurisdiction to order the registration of the costs order made by the Tribunal. The objection, as indicated earlier, is grounded on Zimbabwe's immunity from the jurisdiction of our courts as a foreign State and South Africa's alleged non-compliance with our constitutional requirements in relation to giving a binding effect to international agreements. This is an important matter of public interest on which this Court should pronounce. Moreover, the contentions advanced by Zimbabwe are eminently arguable. It is thus in the interests of justice to hear the dispute. Leave to appeal should be granted.

[34] Section 34 of the Constitution.

[35] Id section 1(c). See *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others*, Amici Curiae*)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (*Modderklip*) at para 39.

Issues

[23] The main issue is whether South African courts have the jurisdiction to register and thus facilitate the enforcement of the costs order made by the Tribunal against Zimbabwe. The following subsidiary issues are relevant to the determination of the main issue:

(a) Rescission;

(b) The binding effect, on South Africa, of the Amended Treaty, which incorporates the Tribunal Protocol;

(c) The immunity of foreign States from civil litigation in South Africa;

(d) The application of the Enforcement of Foreign Civil Judgments Act[36] (Enforcement Act); and

(e) The enforcement of foreign judgments in terms of the common law.

Rescission

[24] Unlike in the Supreme Court of Appeal, Zimbabwe does not raise the service order as an issue in its application in this Court and it is not dealt with except in passing in its heads of argument. It is therefore not necessary to deal with this issue, suffice it to say that it was correctly dismissed by the Supreme Court of Appeal.[37] What remains to be addressed is the rescission of the registration order.

[25] Scant reference is made to rescission of the registration order in Zimbabwe's papers. Based on *Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz and*

[36] 32 of 1988.

[37] Supreme Court of Appeal judgment above n 29 at paras 18-25.

Others,[38] Zimbabwe contends that it does not have to show good cause, which entails a reasonable explanation for its default and that it has a bona fide defence to the orders granted in its absence, to be entitled to the rescission of the High Court orders. And the third rescission requirement to be met is of course that Zimbabwe must show reasonable prospects of success. Zimbabwe contends that it need not show good cause because, (i) there was an irregularity in the proceedings; (ii) the High Court lacked competence to make the order; and (iii) the High Court was unaware of facts which, if known, would have precluded the granting of the order.

[26] As the Supreme Court of Appeal correctly held, the first two requirements for rescission need not be dealt with because no explanation was proffered to meet them.[39] Only prospects of success require this Court's attention. And the fate of this requirement, which is an integral part of the application for rescission, depends on the outcome of the challenge to the jurisdictional capacity of both the Tribunal and the High Court. A dismissal of the jurisdictional challenge would inevitably lead to the collapse of the very superstructure that sustains Zimbabwe's rescission application. I will return to this matter towards the end of the judgment.

Was the Treaty put into operation in terms of the Constitution?

[27] Our Constitution creates a mechanism in terms of which international agreements can be ratified or acceded to and domesticated. Section 231 of the Constitution provides:

[38] 1996 (4) SA 411 (C).

[39] Supreme Court of Appeal judgment above n 29 at para 17.

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[28] The implications of compliance with this section were articulated by Moseneke DCJ and Cameron J in *Glenister v President of the Republic of South Africa and Others*[40] as follows:

"Now plainly there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This court will not be prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the State, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable.

And it is here where the courts' obligation to consider international law when interpreting the Bill of Rights is of pivotal importance. Section 39(1)(b) states that when interpreting the Bill of Rights a court 'must consider international law'. The

[40] [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

> impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the State to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law. And international law, through the inter-locking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence.
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> That is a duty this country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them, more especially the UN Convention."[41] (Footnote omitted.)

[29] Zimbabwe argues that our Parliament did not approve the Treaty in terms of section 231 of the Constitution and that that non-compliance is a bar to the enforcement of the costs order in South Africa. For these reasons, Zimbabwe concludes that orders of the Tribunal cannot be registered and enforced by South African courts.

[30] This argument lacks merit. Our Parliament approved the Treaty in 1995.[42] The Treaty and the Amended Treaty are thus binding on South Africa, at least on the international plane.

[31] Article 32(2) of the Tribunal Protocol imposes a legal obligation on South Africa to take all legal steps necessary to facilitate the execution of the decisions of the Tribunal[43] created in terms of the Treaty that our Parliament has approved.

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[41] Id at paras 191-3.

[42] South Africa acceded to the Treaty on 29 August 1994 in Gaborone, Botswana. This accession was approved by the Senate and National Assembly on 13 and 14 September 1995 respectively.

Immunity

[32] Zimbabwe ordinarily enjoys immunity against civil suits in South Africa in terms of section 2 of the Immunities Act. Section 2(1) 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." Section 3(1) of the Immunities Act, however, provides that immunity shall be forfeited in proceedings in respect of which the State expressly waived its immunity.

[33] Zimbabwe contends that none of the exceptions to sovereign immunity applies to it in this matter. This cannot be correct. Article 32 of the Tribunal Protocol imposes an obligation on Member States to take all steps necessary to facilitate the enforcement of judgments and orders of the Tribunal. It also makes these decisions binding and enforceable "within the territories of the States concerned." This is provided for in these terms:

> "ARTICLE 32
> ENFORCEMENT AND EXECUTION
> 1. The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement.
> 2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
> 3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of the particular case and enforceable within the territories of the States concerned.

[43] Article 32 is reproduced in full in [33] below.

4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.
5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action."

[34] Subject to compliance with the law on the enforcement of foreign judgments in force in South Africa, Zimbabwe is duty-bound to act in accordance with the provisions of article 32. That obligation stems from its ratification[44] of the Treaty and the adoption of the Amending Agreement. For the sake of completeness, the Tribunal Protocol is, in terms of the Amending Agreement, to be treated as part of the original Treaty.

[35] In sum, Zimbabwe's agreement to be bound by the Tribunal Protocol, including article 32, constitutes an express waiver in terms of section 3(1) of the Immunities Act. It is a waiver by Zimbabwe of its right to rely on its sovereign immunity from the jurisdiction of South African courts to register and enforce decisions of the Tribunal made against it.

Application of the Enforcement Act

[36] Foreign civil orders may be enforced in this country in terms of the Enforcement Act. It is however not possible to do so in this matter owing to non-compliance with section 2(1) of the Enforcement Act which provides:

[44] According to article 2 of the Vienna Convention on the Law of Treaties, 1969 (1969) 8 *ILM* 679, "ratification" and "accession" are defined as international acts whereby a State establishes, on the international plane, its consent to be bound by a treaty.

> "This Act shall apply in respect of judgments given in any country outside the Republic which the Minister has for the purposes of this Act designated by notice in the *Gazette*."

[37] The Minister has not made any designation contemplated by this section to qualify the order made by the Tribunal for registration in terms of the Enforcement Act. Besides, the requirement of "judgments given in any country" arguably places the costs order outside the ambit of this section because it did not make its order as a component of the domestic court system of "any country". More importantly, the Enforcement Act applies only to Magistrates' Courts.[45] It follows that the Enforcement Act does not apply to this matter.

The common law on enforcement

(a) Principles

[38] What remains to be explored is whether the High Court had the jurisdiction under the current common law to enforce the costs order against Zimbabwe. The

[45] The long title of the Enforcement Act states that it was passed to provide for the enforcement, in Magistrates' Courts in the Republic, of civil judgments given in designated countries. The Act defines "court", in relevant part, as:

> "[I]n relation to a court in the Republic . . . the magistrate's court of the district where—
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> (a) the person against whom a judgment in question was given—
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> (i) resides, carries on business or is employed; or
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> (ii) owns any movable or immovable property;
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> (b) any juristic person against which the judgment was given has its registered office, or its principal place of business;
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> (c) any partnership against which the judgment was given has its business premises or any member thereof resides".

jurisdictional requirements for the enforcement of foreign orders were reiterated in *Purser v Sales*.[46] Mpati AJA said, in relevant part:

> "[T]he present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence'); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Business Act 99 of 1978, as amended.
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> . . .
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> The principles recognised by our law with reference to the jurisdiction of foreign courts for the enforcement of judgments sounding in money are:
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> 1. at the time of the commencement of the proceedings the defendant . . . must have been domiciled or resident within the State in which the foreign court exercised jurisdiction; or
> 2. the defendant must have submitted to the jurisdiction of the foreign court."

[39] It is not in dispute that the costs order is final and that it was not obtained fraudulently, it does not involve the enforcement of the revenue law of Zimbabwe and its enforcement is not precluded by the Protection of Businesses Act.[47] The enforcement of the costs order is also not against public policy, of which our

[46] *Purser v Sales; Purser and Another v Sales and Another* [2000] ZASCA 46; 2001 (3) SA 445 (SCA) (*Purser v Sales*) at paras 11-2. See also *Jones v Krok* 1995 (1) SA 677 (A) at 685A-E.

[47] 99 of 1978.

Constitution is an embodiment.[48] For our Constitution promotes democracy, human rights and the rule of law.[49] The questions that remain are whether: (a) the Tribunal had jurisdiction; (b) the costs order constitutes a "foreign judgment" that can be enforced in terms of our common law; and if not, (c) the common law needs to be developed.

(b) The jurisdiction of the Tribunal

[40] One of the common law requirements for the enforcement of a judgment of a foreign court is that that foreign court must have had jurisdiction. And this is an additional basis on which Zimbabwe attacks the decision of the Supreme Court of Appeal. It contends that the Tribunal itself did not have jurisdiction over Zimbabwe, to decide on the validity of non-compensable expropriation and the subsequent costs order sought to be enforced in South Africa. The objection is grounded on the alleged failure by two-thirds of the SADC Member States to ratify the Tribunal Protocol and three-quarters to adopt the Amending Agreement. Zimbabwe relies also on the alleged non-compliance with section 231 of the Constitution to facilitate the application of the Treaty and the Tribunal Protocol in South Africa, which was dismissed as being without merit above. The last objection is that these international agreements do not bind Zimbabwe because it did not ratify them as required by section 111B of its Constitution.[50]

[48] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at paras 28-9.

[49] Section 1 of the Constitution.

[50] Section 111B of the Constitution of the Republic of Zimbabwe provides:

> "(1) Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by

[41] These objections to the Tribunal's jurisdiction are different from those raised by Zimbabwe in the Tribunal.[51] The Tribunal had to, and did, confine itself to addressing only the jurisdictional challenges raised by Zimbabwe. They were essentially that the Tribunal lacked the jurisdiction to rule on the validity of the alleged human rights violations or agrarian reforms in Zimbabwe, having regard to the provisions of the

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> or under the authority of the President with one or more foreign states or governments or international organisations—
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> (a) shall be subject to approval by Parliament; and
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> (b) shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament.
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> (2) Except as otherwise provided by or under an Act of Parliament, any agreement—
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> (a) which has been concluded or executed by or under the authority of the President with one or more foreign organisations, corporations or entities, other than a foreign State or government or an international organisation; and
>
> (b) which imposes fiscal obligations upon Zimbabwe;
>
> shall be subject to approval by Parliament.
>
> (3) Except as otherwise provided by this Constitution or by or under an Act of Parliament, the provisions of subsection (1)(a) shall not apply to—
>
> (a) any convention, treaty or agreement, or any class thereof, which Parliament has by resolution declared shall not require approval in terms of subsection (1)(a); or
>
> (b) any convention, treaty or agreement the subject-matter of which falls within the scope of the prerogative powers of the President referred to in section 31H(3) in the sphere of international relations;
>
> unless the application or operation of the convention, treaty or agreement requires—
>
> (i) the withdrawal or appropriation of moneys from the Consolidated Revenue Fund; or
>
> (ii) any modification of the law of Zimbabwe."

[51] See the Tribunal ruling above n 3 at 23-4 where the Tribunal summarised Zimbabwe's submissions as follows:

> "[Zimbabwe] . . . submitted that the Treaty only sets out the principles and objectives of SADC. It does not set out the standards against which actions of Member States can be assessed. . . . [T]he Tribunal cannot borrow these standards from other Treaties as this would amount to legislating on behalf of SADC Member States. . . . [T]here are numerous Protocols under the Treaty but none of them is on human rights or agrarian reform, pointing out that there should first be a Protocol on human rights and agrarian reform in order to give effect to the principles set out in the Treaty. . . . [T]he Tribunal is required to interpret what has already been set out by the Member States and that, therefore, in the absence of such standards, against which actions of Member States can be measured, in the words of its learned Agent, '*the Tribunal appears to have no jurisdiction to rule on the validity or otherwise of the land reform programme carried out in Zimbabwe'.*" (Emphasis in original.)

Treaty and its protocols. The reason advanced in support of this objection was that SADC did not have its own protocols or standards on human rights or agrarian reform against which Zimbabwe's actions could be measured and that it was impermissible for the Tribunal to impose provisions or norms and standards of other international treaties on SADC.

[42] Zimbabwe did not then object to the Tribunal's jurisdictional capacity as such. It objected merely to the Tribunal's power to rule on the validity of a specific dispute, the land reform programme carried out by Zimbabwe, in the absence of SADC protocols or standards on which to ground its decision. By implication, Zimbabwe asserted that although the Tribunal generally had the jurisdictional capacity to entertain disputes brought by citizens or residents against Zimbabwe, it would not have jurisdiction if the dispute involved an issue for which no provision was made in any of the SADC legal instruments. It was jurisdiction over an issue, not the very authority of the Tribunal to entertain disputes within the region, that was objected to. Zimbabwe's objection was not that the precondition for the Tribunal's jurisdictional competence, like ratification, adoption or domestication of the Treaty or the Tribunal Protocol, had not yet been met.

[43] This would explain why, in addressing the objection to jurisdiction, the Tribunal did not consider ratification of or accession to the Treaty and Tribunal Protocol and the adoption of the Amending Agreement or their domestication by Member States or

Zimbabwe in particular. It focused on article 4(c) of the Treaty[52] which obliges SADC Member States to act in accordance with the human rights, democratic and rule of law principles. The objections raised by Zimbabwe lack merit and Zimbabwe had in any event submitted to the jurisdiction of the Tribunal by reason of its participation in the proceedings before the Tribunal.

[44] The basis for objecting to the jurisdiction of a foreign court or tribunal whose order is sought to be enforced in a South African court must, in my view, be materially similar to the objections previously raised before the foreign court or tribunal that made the order to be enforced. Otherwise the objection should be dismissed. This insistence on consistency is logical, and informed by the same principle that enjoins a party to take on appeal the same case that the trial court heard. This is designed to afford an institution like the Tribunal the opportunity to consider and address the same deliberate choice of jurisdictional challenges, relied on in all other courts subsequently called upon to consider the same matter. This approach ensures an orderly and just way of dealing with perceived jurisdictional hurdles.

[45] Barring exceptional circumstances, such as where the new basis for objection was not yet available to the objecting party to raise in a foreign court, grounds on which jurisdiction is objected to in a domestic court, must have been raised in a foreign or regional court. Otherwise, it should not be open to a party, which chose to

[52] Article 4 provides in relevant part:

> "SADC and its Member States shall act in accordance with the following principles:
>
> c) human rights, democracy and the rule of law".

confine itself to specific objections, to later shift to altogether new ones before another court whenever those previously raised have proved to be without merit.

[46] A jurisdictional challenge based only on certain specific grounds amounts to a submission to jurisdiction, subject to the dismissal of those specific concerns raised. In other words, absent those objections, it is to be accepted that there was a submission to that court's jurisdiction. And that submission to jurisdiction must always stand. Once a litigant has submitted to the jurisdiction of a court, ordinarily, it may not in later or appellate proceedings, dispute that jurisdiction. By parity of reasoning, once a litigant has chosen specific grounds for impugning the jurisdiction of a court, it may not in later proceedings attack the jurisdiction of the first court on new or fresh grounds.

[47] No ratification was required for the Amended Treaty, and by extension the Tribunal Protocol, to bind Member States. Since the Treaty had already been ratified by the prescribed majority, including Zimbabwe, acceded to by South Africa and duly approved by our Parliament, the Tribunal Protocol that was subsumed under it, became immediately operational upon adoption by the requisite majority. The Tribunal therefore had jurisdictional competence over Zimbabwe at all times material hereto. When the matter that gave rise to the costs order was filed by the farmers in 2007 and the costs order was later made, the Tribunal Protocol had already been operational for about six years.

[48] The Tribunal had jurisdiction over all disputes relating to the interpretation and application of the Treaty[53] and over disputes between Member States and natural or legal persons.[54] This was subject to prior exhaustion of all available remedies unless otherwise domestically unavailable.[55] Member States are required to take all measures necessary to ensure execution of the decisions of the Tribunal.[56] Provision is also made for the enforcement of the decisions of the Tribunal, the role of Member States in that regard and the binding effect of those decisions.[57] What all of these provisions boil down to, is that both Zimbabwe and South Africa effectively agreed that domestic courts in the SADC countries would have the jurisdiction to enforce orders of the Tribunal made against them.

[49] In terms of our common law on jurisdiction, a foreign court or tribunal which would otherwise not have had jurisdiction over a party, would be clothed with jurisdiction if that party submits to the jurisdiction of that forum.[58] In this case, having otherwise recognised and accepted the Tribunal's jurisdiction but for the alleged absence of standards on human rights or agrarian reform, Zimbabwe did, according to our law, submit to the Tribunal's jurisdiction. Broadly speaking, this meets the first common law jurisdictional requirement.[59]

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[53] Article 14(a) of the Tribunal Protocol.

[54] Id article 15(1).

[55] Id article 15(2).

[56] Id article 32(2).

[57] Id article 32.

[58] *Purser v Sales* above n 46 at paras 11-2.

[59] I say "broadly", because we must still address the question whether a "foreign court" also means an international court or tribunal or whether the common law must first be developed in order to extend the meaning of this concept to include the Tribunal.

[50] Additionally, the Amended Treaty incorporating the Tribunal Protocol binds Zimbabwe and South Africa in the international sphere. The signing of the Treaty by the Heads of State and its approval by our Parliament and that of Zimbabwe, the adoption of the Amending Agreement by more than three-quarters of Members of the Summit, thus rendering the Tribunal Protocol an integral part of the Treaty, bears out this conclusion. I am satisfied that the Tribunal had jurisdiction at the time when the Tribunal ruling and the costs order were made. But this does not address the jurisdictional competence of South African courts to enforce an order of a regional or international tribunal in terms of the common law.

The need to develop the common law

[51] That a foreign court had jurisdiction in terms of the laws of its country does not, without more, clothe our courts with the jurisdiction to enforce a judgment of that foreign court.[60] And of the common law jurisdictional requirements to be met in this case to enable our courts to entertain applications for the recognition and enforcement of foreign orders, the most relevant are: (i) a party who applies for the enforcement of a judgment sounding in money "must have been domiciled or resident within the State in which the foreign court exercised jurisdiction" or (ii) the one against whom the order is sought to be enforced must have submitted to the jurisdiction of the foreign court.[61]

[60] *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (T) at 1037A-C.

[61] See *Purser v Sales* above n 46 at para 12.

[52] Arguably, the enforcement provided for in our common law relates only to judgments or orders made by a domestic court of a particular foreign country. If international courts like the Tribunal were within the contemplation of our courts when they developed the common law and laid down these foreign judgment-enforcement requirements, the condition that the defendant "must have been domiciled or resident within the State in which the foreign court exercised jurisdiction" would have been differently or more appropriately and inclusively crafted. This would have been done to provide for or accommodate regional or international tribunals which are obviously not to be treated as if they were institutions created by a particular State. The Tribunal, like all international tribunals, does not belong to any State, not even the State in which it has its permanent seat.[62]

[53] It follows from the requirements listed in *Purser v Sales*[63] that the South African common law on the enforcement of foreign civil judgments was, thus far, developed to provide only for the execution of judgments made by domestic courts of a foreign State. It does not apply to the enforcement of judgments of the Tribunal and there is no other legal provision for the enforcement of such decisions in our country. This then gives rise to the need to develop the common law of South Africa in order to pave the way for the enforcement of judgments or orders made by the Tribunal. This development of the common law extends to the enforcement of judgments and orders

[62] Such as the European Court of Human Rights in Strasbourg, France.

[63] Quoted in [38] above.

of international courts or tribunals, based on international agreements that are binding on South Africa.

Development of the common law

[54] The development of the common law revolves around the resolution of the question whether the concept of "foreign judgment or order" ought also to apply to a judgment of the Tribunal. What would help us to solve this issue is the answer to the question, "what was the mischief sought to be addressed by developing the common law to empower our domestic courts to enforce or facilitate the execution of orders made outside the borders of our country?" It appears to me that that development was driven by the need to ensure that lawful judgments are not to be evaded with impunity by any State or person in the global village.

[55] This finds support from the two reasons advanced in *Richman v Ben-Tovim*[64] for the existence of the law on the enforcement of judgments of foreign courts. First, enforcement is what is required by the "exigencies of international trade and commerce" and second, because "not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions."[65]

[56] Other reasons are: (i) the principle of comity, which requires that a State should generally defer to the interests of foreign States, with due regard to the interests of its

[64] [2006] ZASCA 121; 2007 (2) SA 283 (SCA).

[65] Id at para 9.

own citizens and the interests of foreigners under its jurisdiction, in order to foster international cooperation and (ii) the principle of reciprocity, the import of which is that courts of a particular country should enforce judgments of foreign courts in the expectation that foreign courts would reciprocate.[66]

[57] Another important factor is that certain provisions of the Constitution facilitate the alignment of our law with foreign and international law.[67] This promotes comity, reciprocity and the orderly conduct of international trade, which is central to the enforcement of decisions of foreign courts.

[58] Article 32 of the Tribunal Protocol is an offshoot of the Amended Treaty that binds South Africa. It is foundational to the development of the common law on enforcement in this matter and provides that States "shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal."[68] It also provides that the "law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement" of the Tribunal's decisions.[69] Since the Enforcement Act does not apply to this matter, the only other applicable foreign judgment enforcement mechanism is the common law. We must, therefore, turn to the South African common law. Based on article 32(1), the common law must be developed in a way

[66] See, in a different context, *Geuking v President of the Republic of South Africa and Others* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) at para 2.

[67] Sections 39 and 233 of the Constitution.

[68] Article 32(2) of the Tribunal Protocol.

[69] Id article 32(1).

that would empower South Africa's domestic courts to register and facilitate the enforcement of the Tribunal's decisions.

[59] Article 32 imposes a duty upon Member States, including South Africa, to take all execution-facilitating measures, such as the development of the common law principles on the enforcement of foreign judgments, to "ensure execution of decisions of the Tribunal."[70] It also gives binding force to the decisions of the Tribunal on the parties including the affected Member States, paves the way and provides for the enforceability of the Tribunal's decisions within the territories of Member States.[71] South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as the obligations under the Amended Treaty. Added to this, are our own constitutional obligations to honour our international agreements and give practical expression to them,[72] particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated. We are also enjoined by our Constitution to develop the common law in line with the spirit, purport and objects of the Bill of Rights.

[70] Id article 32(2).

[71] Id article 32(3).

[72] See section 231 of the Constitution, quoted in [27] above, and *Glenister* above n 40 at paras 191-3, quoted in [28] above.

[60] The rule of law is a foundational value of our Constitution[73] and an integral part of the Amended Treaty.[74] And it is settled law that the rule of law embraces the fundamental right of access to courts[75] in section 34 of the Constitution which provides:

> "Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[61] The right to an effective remedy or execution of a court order is recognised as a crucial component of the right of access to courts.[76] This position was eloquently articulated by Jafta J in *Mjeni v Minister of Health and Welfare, Eastern Cape*[77] in these terms:

> "The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order."[78]

[62] An observance of the right of access to courts would therefore be hollow if the costs order were not to be enforced. To give practical expression to the enjoyment of

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[73] Section 1(c) of the Constitution. See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 17.

[74] Article 4(c) of the Amended Treaty.

[75] *Modderklip* above n 35 at para 39.

[76] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at paras 11 and 13.

[77] 2000 (4) SA 446 (Tk).

[78] Id at 453B-C.

this right, even in relation to judgments or orders of the Tribunal, articles 32(1) and (2) of the Tribunal Protocol and section 34 of the Constitution must be interpreted generously to grant successful litigants access to our courts for the enforcement of orders, particularly those stemming from human rights or rule of law violations provided for in treaties that bind South Africa. In this matter, this would be achieved by construing the words "foreign courts" to include the Tribunal.

[63] Section 8(1) of the Constitution provides that the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state." As was correctly observed by this Court, when the Judiciary exercises its constitutional powers to develop the common law, it must thereby seek to give expression to the right of access to courts.[79]

[64] No law gives effect to the farmers' right of access to courts for the purpose of enforcing their costs order against Zimbabwe in this country. This Court is thus enjoined, not only by article 32 of the Tribunal Protocol but also by section 8(3) of the Constitution,[80] to either apply or develop the common law in order to give effect to the farmers' right to have the costs order enforced. And since the common law as it stands

[79] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 28. See also *Glenister* above n 40 at para 190.

[80] Section 8(3) provides as follows:

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right".

does not provide for the enforcement of the Tribunal's decision, the only option available is development.

[65] Another instrument of cardinal importance for the development of the common law is section 39 of the Constitution, which provides:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
>
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[66] When courts are required to develop the common law or promote access to courts, they must remember that their "obligation to consider international law when interpreting the Bill of Rights is of pivotal importance."[81] This is an obligation imposed on them by section 39(1)(b) of the Constitution.[82] Measures to be taken by this Court in fulfilling its obligations in terms of sections 34, 8(3) and 39 of the Constitution, in relation to this matter, are to be informed by international law, as set

[81] *Glenister* above n 40 at para 192

[82] Id.

out in the Amended Treaty, which obliges South Africa to facilitate the enforcement of decisions of the Tribunal.

[67] Analogous to the reasoning in *Glenister*, based on partial reliance on the SADC Protocol on Corruption which flows from the Treaty,[83] South Africa's obligation to develop the common law as a measure necessary to execute the Tribunal's decision—

> "is a duty this country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them".[84]

[68] Not only must the relevant provisions of the Treaty be taken into account as we develop the common law, but so must the spirit, purport and objects of the Bill of Rights be promoted. A construction of the Amended Treaty as well as the right of access to courts, with due regard to the constitutional values of the rule of law, human rights, accountability, responsiveness and openness,[85] enjoins our courts to be inclined to recognise the right of access to our courts to register and enforce the Tribunal's decision. This will, as indicated above, be achieved by extending the meaning of "foreign court" to the Tribunal. The need to do so is even more pronounced since Zimbabwe, against which an order sanctioned by the Treaty was made by the Tribunal,

[83] Id at para 185.

[84] Id at para 193.

[85] Section 1 of the Constitution.

does, in terms of its Constitution, deny the aggrieved farmers access to domestic courts and compensation for expropriated land. Of importance also is the fact that a further resort to the Tribunal was necessitated by Zimbabwe's refusal to comply with the decision of the Tribunal.

[69] In addition, section 233 of the Constitution enjoins a court to prefer any reasonable interpretation of legislation that is consistent with international law to one that is not. This resonates with our purpose for developing the common law, comity and the principle of reciprocity, which are central to the enforcement of foreign judgments. The Amended Treaty, incorporating the Tribunal Protocol, places an international law obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced.[86] Section 34 of the Constitution must therefore be interpreted, and the common law developed, so as to grant the right of access to our courts to facilitate the enforcement of the decisions of the Tribunal in this country. This, as said, will be achieved by regarding the Tribunal as a foreign court, in terms of our common law. It bears emphasis that South Africa has an obligation to facilitate the enforcement of human rights related orders made against a State, including those stemming from the Amended Treaty, in accordance with international instruments which bind South Africa in terms of section 231 of the Constitution. The Tribunal Protocol itself imposes a duty on Member States to take all measures

[86] Articles 15(1) and 32(2) of the Tribunal Protocol read with article 6 of the Amended Treaty.

necessary to ensure the execution of the decisions of the Tribunal.[87] The development of the common law thus amounts to compliance with that injunction.

[70] We thus conclude, without straining the language of article 4(c) of the Amended Treaty, article 32 of the Tribunal Protocol, and sections 34, 8(3) and 39 of the Constitution which create a platform for the development of the common law, that the right of access to South African courts is applicable to the farmers as well. To this end, the concept of a "foreign court" will henceforth include the Tribunal.

Conclusion

[71] When the farmers' rights to property, their human rights in general and the right of access to courts in particular were violated, Zimbabwe was, in terms of article 6(6) of the Amended Treaty, obliged to cooperate with the Tribunal in the adjudication of the dispute. After the Tribunal had delivered its judgment, Zimbabwe was duty-bound to assist in the execution of that judgment and so is South Africa.

[72] Now that the common law has been developed to extend the concept of a "foreign court" to the Tribunal, all common law requirements for the enforcement of foreign judgments have been met. Our domestic courts have jurisdiction and were, subject to the development of the common law, entitled to register the costs order of

[87] Article 32 of the Tribunal Protocol, quoted in full in [33] above.

the Tribunal as the High Court did. This development applies only to this and future matters.[88]

[73] Zimbabwe has failed to show that the High Court lacked the jurisdiction to register the costs order. Its application for rescission must fail and the appeal also falls to be dismissed with costs.

Order

[74] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel where applicable.

ZONDO J:

[75] I have had the opportunity of reading both judgments prepared by the Chief Justice and Jafta J in this matter. Although I find some of the points raised by Jafta J in support of the conclusion that leave to appeal should be refused attractive, on balance I am in agreement with the Chief Justice's conclusion that leave should be granted. I agree with the Chief Justice's reasons for dismissing the appeal except paragraphs 44, 45 and 46. I think paragraph 47 is a sufficient answer to Zimbabwe's

[88] See *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at paras 45 and 50.

contention on ratification. It seems to me that the proposition dealt with in paragraphs 44 to 46 is too widely stated.

JAFTA J:

[76] I have read the judgment prepared by the Chief Justice (main judgment). I agree that the matter raises constitutional issues but disagree that it is in the interests of justice to grant leave. In my respectful view the application must be dismissed on the basis that it is not in the interests of justice to grant leave in the present circumstances.

[77] It is by now axiomatic that in order to succeed, an applicant for leave must meet two requirements. First, it must show that the case raises a constitutional issue or an issue connected therewith. Second, the applicant must show that the interests of justice favour the granting of leave. To establish that the matter involves constitutional issues, as the applicant has done in this case, is not by itself sufficient. If the applicant fails, as demonstrated below, to prove that it is in the interests of justice to grant leave, the application must be dismissed.

[78] In an affidavit filed in support of the application for leave to appeal to this Court, Zimbabwe does not refer at all to the interests of justice. The deponent to this affidavit is Zimbabwe's Attorney-General. In my view this is a serious shortcoming.

[79] The question is whether there is anything in the record showing that it is in the interests of justice for leave to be granted. As appears below I think there is nothing.

In my view Zimbabwe has not shown prospects of success against the order granted by the Supreme Court of Appeal. As stated below, this is an important factor, more so if the appeal is against a judgment of the Supreme Court of Appeal. In its written submissions, Zimbabwe does not canvass the question of the interests of justice at all.

Zimbabwe's case

[80] For a better understanding of the matter it is necessary to recount briefly what this case is about. The first to third respondents (the respondents) are farmers whose farms were expropriated in Zimbabwe without compensation. This happened in circumstances where disputes in relation to expropriation of land in that country were placed beyond the reach of its Judiciary. Aggrieved parties literally had no forum to take their cases to in Zimbabwe.

[81] As a result the respondents took their case to the Tribunal for adjudication. Having participated in the proceedings before the Tribunal, Zimbabwe later refused to carry out its order. Belatedly, and as illustrated by the judgment of the Supreme Court of Appeal, Zimbabwe wrongly questioned the Tribunal's jurisdiction only when it had rendered judgment against it. Thus the respondents were left with no option but to go back to the Tribunal for further relief. The matter was referred to the Summit and the Tribunal imposed costs orders against Zimbabwe. These costs orders too were not paid.

[82] Next the respondents approached the courts in this country in an attempt to have the costs orders debt paid. They approached the High Court for recognition and registration of the Tribunal's order as a prelude to execution of those orders in this country. The application papers were served on Zimbabwe which filed a notice of intention to oppose. But later the notice was deliberately withdrawn and the matter proceeded unopposed.

[83] Following the registration of the Tribunal's orders, writs of execution were issued by relevant authorities in respect of Zimbabwe's immovable property in this country. This occurred after the sheriff had found no movable property to satisfy the judgment debt. It was the execution of these writs which interrupted Zimbabwe's deliberate inaction and prompted an urgent application in the High Court for a stay of execution and rescission of the order granting registration of the Tribunal's costs orders.

[84] In essence, therefore, this matter is about rescission of the orders granted by the High Court with Zimbabwe's deliberate indifference. The question that arose in the High Court was whether Zimbabwe had made out a case for rescission. The High Court held that it had not and dismissed the application. Zimbabwe's appeal suffered the same fate in the Supreme Court of Appeal. That Court considered the requirements for rescission under the common law and held that Zimbabwe had failed to satisfy them.

Rescission

[85] At common law the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success.[89] Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.

[86] In *Chetty* Miller JA formulated the test in these terms:

> "It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule *nisi* issued on 22 April 1980."[90]

[87] Applying the test to the present facts reveals that Zimbabwe has no prospects of success on appeal. First, it has given an unsatisfactory explanation for its default which was deliberate. In the affidavit filed in support of the claim for rescission in this

[89] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A); *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A); and *Harris v ABSA Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T).

[90] *Chetty* above n 89 at 765D-F.

Court, Zimbabwe says that it withdrew its opposition because as a sovereign State it did not want to subject itself to courts of another State. But surprisingly when the writs were executed Zimbabwe was swift and willing to subject itself to those very courts for protection. The lack of respect displayed by Zimbabwe to the High Court before the impugned order was granted is unfortunate and it is a weighty factor against the granting of leave.

[88] The other ground advanced by Zimbabwe for rescission was that at the time the respondents sought registration, the matter was pending before the Summit. Zimbabwe contended that this fact was not disclosed by the respondents to the High Court and that if the High Court was aware of the fact it would not have granted registration. There is no merit in this contention. Referral of Zimbabwe's failure to carry out the Tribunal's main order relating to compensation to the Summit did not preclude registration of the costs orders in the High Court. If the High Court were to refuse registration on that basis it would not have exercised its power correctly. The costs orders were not subject to reconsideration by the Summit.

[89] In an appropriate case an unsatisfactory explanation furnished by an applicant for rescission may be compensated for by good prospects of success on the merits.[91] As I have just illustrated, this is not such a case. Here the unsatisfactory explanation was accompanied by a disclosure of defences which prima facie had no prospects of success. Accordingly the High Court dismissed the application for rescission.

[91] *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] ZASCA 36; 2003 (6) SA 1 (SCA) at para 12.

[90] In the Supreme Court of Appeal, a new defence which was not pleaded in the High Court was raised. It was contended that it was not competent for the High Court to recognise the Tribunal's orders because that orders were not enforceable in this country.[92] It is apparent from the judgment of the Supreme Court of Appeal that Zimbabwe did not specify why it was not competent to recognise and enforce the Tribunal's orders. Although this was raised for the first time on appeal, the Supreme Court of Appeal considered the argument and rejected it. The Court held that our common law, subject to certain conditions, permitted enforcement of foreign judgments.

[91] Although this rule applied to domestic foreign judgments, the Supreme Court of Appeal extended its application to orders of international tribunals. On this aspect the Court said:

> "While the authorities referred to in that passage from the judgment are directed at the enforcement of a judgment of the domestic courts of a foreign country I see no reason to disagree with Patel J that they are applicable as well to an order of an international tribunal whose legitimacy has been accepted. There is also no question that the order now sought to be enforced satisfies all the requirements of paras (ii)-(vi) tabulated in the extract from the judgment in *Jones v Krok* [1995 (1) SA 677 (A)] that is cited in the passage above. What remains is only whether the Tribunal had jurisdiction to entertain the case, which was hotly contested by Zimbabwe, as foreshadowed by the letter written by its Minister of Justice that I referred to earlier."[93] (Footnotes omitted.)

[92] Supreme Court of Appeal judgment above n 29 at paras 26 and 28.

[93] Id at para 29.

[92] As is apparent from the statement quoted above, the Supreme Court of Appeal found that, barring one requirement, the Tribunal's costs orders met requirements for enforcement of foreign judgments at common law. The Court held further that the only requirement that needed to be considered was whether the Tribunal had jurisdiction to entertain the case. Following an examination of various contentions, including the fact that Zimbabwe had submitted to and participated in the Tribunal's proceedings, the Supreme Court of Appeal held that the Tribunal had jurisdiction to adjudicate the case. This meant that all requirements for the enforcement of a foreign judgment under the common law were satisfied. Consequently the appeal was dismissed.

[93] There can be little doubt that by extending the application of the common-law rule at issue here to orders of international tribunals, the Supreme Court of Appeal was developing the common law. Indeed in *Carmichele*,[94] this Court observed:

> "There are notionally different ways to develop the common law under section 39(2) of the Constitution, all of which might be consistent with its provisions."[95]

[94] This statement is in line with what actually happened previously when the Appellate Division (now the Supreme Court of Appeal) developed the common law. For example, in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd*,[96] that Court developed the common law to recognise delictual liability for pure economic loss

[94] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

[95] Id at para 56.

[96] 1992 (1) SA 783 (A).

caused negligently by a collecting banker to the true owner of a cheque. Before then the common-law rule was that a collecting banker was not liable. In developing the common law, Vivier JA simply stated:

> "[*Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 223] can, in my view, no longer be regarded as authority for the proposition that no delictual action lies against a collecting banker who has negligently caused loss to the true owner of a cheque. There can now be no reason in principle why a collecting banker should not be held liable under the extended *lex Aquilia* for negligence to the true owner of a cheque, provided all the elements or requirements of Aquilian liability have been met."[97]

[95] Having stated the new common law rule in the terms outlined above, the Appellate Division proceeded to apply it and examined whether the requirements for Aquilian liability had been met and concluded that only the element of wrongfulness was at issue. Similarly in this case the Supreme Court of Appeal held that no reasons existed for not extending the relevant rule to orders of international tribunals whose legitimacy has been accepted. In addition, the Court found that, of the requirements for enforcing foreign judgments, only jurisdiction was in dispute and proceeded to consider if that requirement had been established.

Zimbabwe's contentions on rescission

[96] In argument before us – both written and oral – Zimbabwe failed to address the question whether the requirements for rescission were met. In written argument, Zimbabwe submitted that the impugned orders were erroneously granted by the High

[97] Id at 796I-797B. See also *Gouda Boerdery Bk v Transnet* 2005 (5) SA 490 (SCA) at para 12.

Court. For this contention reliance was placed on *The* Akademik Fyodorov*: Government of the Russian Federation and Another v Marine Expeditions Inc.*[98] But that case dealt with the immunity enjoyed by a foreign State under the Foreign States Immunities Act[99] (Immunities Act). Zimbabwe argued that this Act immunised it from jurisdiction of courts in this country and as a result it was not competent for the High Court to register an order against it. Since the order was erroneously granted against Zimbabwe, continued the argument, it was not necessary for Zimbabwe to establish sufficient cause. In this regard reference was made to *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others.*[100]

[97] It is true that where rescission of a judgment is sought on the basis that it was erroneously granted the applicant need not show sufficient cause.[101] All that is required for an applicant to succeed under this ground is for it to establish the error which vitiated the impugned order or the proceedings in which the order was granted.

[98] On this aspect, the case pleaded by Zimbabwe was the following. Section 13(1) of the Immunities Act prescribes that process on a foreign State should be served through the Department of Foreign Affairs which must deliver the process to the Ministry of Foreign Affairs of the foreign State. It is common cause that this was not followed in this case. But section 13(3) of the Immunities Act provides that a foreign

[98] 1996 (4) SA 422 (CPD).

[99] 87 of 1981.

[100] 1996 (4) SA 411 (CPD).

[101] *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at para 56 and *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (Tk).

State that appears in the proceedings cannot later object that it was not served in compliance with section 13(1). As stated earlier, Zimbabwe filed a notice to oppose which was later withdrawn. By so doing Zimbabwe waived its entitlement to insist on service in terms of section 13(1). Therefore the issue of service did not constitute the error which vitiated the order granted.

[99] Zimbabwe also contended, in its affidavit filed in support of rescission, that in breach of section 13(5) of the Immunities Act, the order in terms of which the Tribunal's ruling was registered was not served on it through the Department of Foreign Affairs. In the context of rescission, reliance on section 13(5) is misplaced. The section regulates the execution of a judgment obtained by default against a foreign State in circumstances where the foreign State is allowed two months within which to seek rescission. The complaint here is not that Zimbabwe was given insufficient time within which to apply for rescission. Instead, Zimbabwe contended that the failure to serve the order in terms of section 13(5) was fatal to the validity of the order.

[100] Since service of an order is effected after the conclusion of court proceedings, common sense dictates that an irregular service cannot affect the validity of the order served. Therefore Zimbabwe has failed to establish an irregularity which invalidated the registration of the impugned order.

[101] In a nutshell Zimbabwe has not established that if leave to appeal is granted there are prospects of success on the merits of the appeal. Although the lack of

prospects is not a decisive factor, it is certainly a weighty factor in determining whether the granting of leave will be in the interests of justice. In *S v Boesak*[102] this Court said:

> "A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal. The decision to grant or refuse leave is a matter for the discretion of the Court, and in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry. An applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the SCA."[103]

[102] In some cases the absence of prospects of success may be decisive. For instance, this will be the position where no pronouncement is to be made by this Court on an important constitutional principle which will guide the litigants and other courts in future cases. But where leave is sought against a fully reasoned judgment of the Supreme Court of Appeal – as is the position here – prospects of success become paramount. In *Bruce and Another v Fleecytex Johannesburg CC and Others*[104] this Court stated:

> "In dealing with applications for leave to appeal against a decision of the Supreme Court of Appeal this Court has held that the prospects of success are of fundamental importance."[105] (Footnote omitted.)

[102] [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[103] Id at para 12.

[104] [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC).

[105] Id at para 6.

[103] As mentioned earlier, here the Supreme Court of Appeal has already developed the common law by extending the application of the rule under which foreign judgements are enforced to orders of international tribunals. The Supreme Court of Appeal went further to apply that rule. In this regard that Court examined whether the Tribunal's orders satisfied the requirements for enforcing foreign judgments. Having considered this it held, correctly in my view, that all requirements were met. In these circumstances no pronouncement on a constitutional principle is required from this Court. This coupled with the fact that there are no prospects of success places an insurmountable obstacle against the granting of leave. Therefore, no purpose will be served by granting Zimbabwe leave to appeal.

[104] Moreover, the jurisprudence of this Court illustrates that the Supreme Court of Appeal has the expertise and that it and the High Courts are best placed when it come to the development of the common law.[106] This is demonstrated by the following principles. First, the development of the common law must be pleaded or requested at the earliest possible stage.[107] Ordinarily where the development has not occurred in the Supreme Court of Appeal and the High Court, this Court remits the case to those courts.[108] Except in special circumstances, this Court refuses to develop the common law as a court of first and last instance.[109] The views of the other courts on the

[106] *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33.

[107] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 52.

[108] *Amod* above n 106 and *Carmichele* above n 94.

[109] *Lane and Fey NNO v Dabelstein and Others* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC).

development of the common law are highly valued by this Court.[110] This Court defers to the Supreme Court of Appeal and the High Court to determine whether the common law needs to be developed to meet the objects of section 39(2) of the Constitution and if so, the form that development should take.[111]

[105] Consistent with these principles the Supreme Court of Appeal decided that the common-law rule in terms of which foreign judgments were enforced required development to include enforcement of orders issued by international tribunals. Furthermore, that Court has determined the manner in which that development was to be undertaken. The process cannot, in my view, be faulted and the main judgment does not assail it. Consequently it is not in the interests of justice for this Court to grant leave merely to endorse what the Supreme Court of Appeal has done.

[106] For these reasons I would dismiss the application for leave with costs.

[110] Id at para 5 and *Amod* above n 106 at para 33. See also *Fourie and Another v Minister of Home Affairs and Another* [2003] ZACC 11; 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC) at para 12.

[111] *Carmichele* above n 94 at para 55.

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