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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 29/07/2008
CASE NO: 3106/2007

REPORTABLE

In the matter between:

CRAWFORD LINDSAY VON ABO	APPLICANT
And	
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1ST RESPONDENT
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2ND RESPONDENT
THE MINISTER OF FOREIGN AFFAIRS	3RD RESPONDENT
THE MINISTER OF TRADE AND INDUSTRY	4TH RESPONDENT
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	5TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This matter came before me as a special opposed application. Mr Hodes SC, assisted by Mr Katz and Mr Du Plessis, appeared for the applicant. Mr Mtshaulana SC, at times assisted by Mr Sello, appeared for the respondents.

Brief Synopsis

[2] The applicant is a 75 year old South Africa citizen. He hails from Bothaville in the Freestate, where he was born on 6 April 1933. He still lives in Bothaville.

[3] More than fifty years ago, in 1954 or 1955, the applicant began to obtain farming interests, including farming landed property, in the Republic of Zimbabwe (then Southern Rhodesia, later Rhodesia and now Zimbabwe, as it will be referred to throughout for the sake of convenience).

For reasons of commercial expediency, the applicant, from time to time, floated private companies and procured the registration of the farming properties into the name of these private companies, for his ultimate benefit. In 1985 he also arranged for the registration of a trust (known as the Von Abo Trust – "the Trust"), which he also employed in the same manner as the private companies aforesaid. At present the applicant is the sole beneficiary of this Trust with the right to appoint, in his sole discretion, further or other beneficiaries out of the group consisting of direct descendents born in legal wedlock of, or legally adopted by, the applicant.

[4] The final control of all decisions of and actions by the relevant private

companies and the Trust at all times vested in the applicant by virtue of the fact that he is, and always has been, the managing director of the companies and the trustee of the Trust.

[5] Over the years, the applicant increased his financial and farming interests in Zimbabwe, accordingly also his involvement in the farming activities of the different companies and the Trust.

[6] The applicant initially found it necessary to finance the activities in Zimbabwe by applying his own South African resources. Within a relatively short period he was, however, able to continue with the farming activities in Zimbabwe by using financial support available in Zimbabwe. He consistently over the past fifty years re-invested all profits and capital gains from the Zimbabwean activities, in Zimbabwe. This enabled him to reach the point, as referred to in greater detail below, of being the beneficial owner of a considerable farming empire in Zimbabwe.

[7] The development of the applicant's Zimbabwean involvement obviously required not only financial ability, but also substantial personal sacrifices, business acumen, the ability to persist in correct decision taking, and unmitigated hard work.

[8] Beginning in 1997, (but, as history shows, in more accelerated fashion since 2000) the government of Zimbabwe violated the applicant's rights by destroying his property interests in a number of farms in Zimbabwe, or contributing to their destruction. This destruction of property rights was achieved as part of an overall scheme and/or policy of the Zimbabwean government to expropriate land owned by white farmers. The scheme and/or policy continues to this day in Zimbabwe, notwithstanding international condemnation and the fact that the expropriation of property rights in the manner perpetrated by the Zimbabwean government is a clear violation of international law, and, for that matter, South African Law.

[9] No compensation of any sort was paid. This action by the government of Zimbabwe constituted expropriation without the payment of compensation, which action did not comply with the international minimum standard, which standard is to be afforded to all persons, citizens and aliens (foreign nationals) alike.

[10] It is common cause that the applicant has attempted, without success, to protect his rights in Zimbabwe and the rights of the entities under his control, or at least to ameliorate the violation of such rights.

[11] Those attempts failed and there was (and is) no effective recourse

available to the applicant and countless others in Zimbabwe. This is not disputed. The applicant has exhausted all remedies available in Zimbabwe. This is also not disputed.

[12] As a national and citizen of the Republic of South Africa, the applicant directed correspondence to the first respondent as represented by the second respondent (the president) and a number of different ministers and officials, which correspondence brought to the first respondent's attention the applicant's plight and that of other South Africans similarly situated in Zimbabwe. The cumbersome and futile journey travelled by the applicant in this process, is detailed in the correspondence forming part of the papers.

[13] It appears that the applicant embarked on these written appeals to government when it was plain that his efforts to persuade the Zimbabwean authorities to leave his property alone were unsuccessful. He describes in graphic detail how he attempted, through litigation, to protect his interests with the assistance of the Zimbabwean courts. These efforts failed dismally, there were broken promises, court orders were ignored and eviction notices came flooding in, thick and fast.

[14] Already in March 2002, the applicant wrote to the second respondent in his capacity as Head of State, requesting diplomatic protection

concerning the violation of his rights in Zimbabwe.

[15] The protection envisaged consisted of diplomatic assistance in the furtherance of the protection of the applicant's rights *vis-á-vis* the State of Zimbabwe.

[16] Early on in the correspondence, the applicant also requested the second respondent or the fourth respondent to become a party to the International Convention on the Settlement of Investment Disputes (ICSID), in order that the applicant might pursue a compensation claim against the government of Zimbabwe pursuant to the ICSID complaint mechanisms, and requested a meeting with the second respondent in order to convince the latter of ICSID's importance from both a practical and legal perspective.

I pause to point out that part of the relief initially sought before me by the applicant, was a *mandamus* directing the respondents to take up membership of ICSID. Apart from the fact whether it was open to me to grant mandatory relief of this nature, Mr Mtshaulana strongly argued, by referring to the rules of ICSID, that such an order, if granted, may turn out to be a *brutum fulmen*, because Zimbabwe would have to consent to take part in such dispute resolution proceedings. It was argued that there was no guarantee that such a

consent would be forthcoming. This state of affairs, or perhaps other practical considerations, prompted the applicant, towards the end of the proceedings before me, to abandoned the prayer for this special mandatory relief and only to pursue prayers for more general declaratory, mandatory and supervisory relief.

An initial prayer for the reviewing and setting aside of the failure of the respondents to consider and decide the applicant's application for diplomatic protection was also abandoned.

[17] The cumbersome correspondence journey, *supra*, came to Nought. Eventually, the applicant placed the respondents on terms. They did not respond. This prompted the applicant to launch this application.

The Relief Sought

[18] The prayers contained in the original notice of motion were the following:

> "1. Reviewing and setting aside the failure of the Respondents to consider and decide the Applicant's application for diplomatic protection in respect of the violation of his rights by the Government of Zimbabwe;

2. Declaring that the failure of the Respondents to consider and decide the Applicant's application for diplomatic protection in respect of the violation of his rights by the Government of Zimbabwe is inconsistent with the Constitution, 1996 and invalid;

3. Declaring that the Applicant has the right to diplomatic protection from the Respondents in respect of the violation of his rights by the Government of Zimbabwe;

4. Declaring that the Respondents have a Constitutional obligation to provide diplomatic protection to the Applicant in respect of the violation of his rights by the Government of Zimbabwe;

5. Ordering the Respondents to forthwith, and in any event within 30 (thirty) days of date of this Order, take all necessary steps to have the Applicant's violation of his rights by the Government of Zimbabwe remedied, including, but not limited to, becoming a party to ICSID or consenting ad hoc to the Applicant's dispute with the Government of Zimbabwe (in respect of his claim that such Government has violated his rights), being

submitted to the International Centre for Settlement of Investment Disputes (ICSID) established under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States;

6. Directing the Respondents 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 5 above and providing a copy of such report to the applicant;

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

8. Directing that the Respondents, jointly and severally (the one paying the other to be absolved) pay the Applicant's costs of this Application."

[19] After the relief sought was scaled down, as I have explained, the prayers now before me are the following:

> "1. Declaring that the failure of the Respondents to rationally, appropriately and in good faith consider and decide the Applicant's application for diplomatic protection in respect of the violation of his rights by the Government of Zimbabwe is inconsistent with the Constitution, 1996 and invalid;
>
> 2. Declaring that the Applicant has the right to diplomatic protection from the Respondents in respect of the violation of his rights by the Government of Zimbabwe;
>
> 3. Declaring that the Respondents have a Constitutional obligation to provide diplomatic protection to the Applicant in respect of the violation of his rights by the Government of Zimbabwe;
>
> 4. Ordering the Respondents to forthwith, and in any event within 30 (thirty) days of date of this Order, take all necessary steps to have the Applicant's violation of his rights by the Government of Zimbabwe remedied;

5. Directing the Respondents 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 Applicant;

6. That, in the event of the Respondents failing to comply effectively with either the Order in terms of prayer 4 or in terms of prayer 5, ordering the Respondents jointly and severally, (the one paying and the to be absolved) to pay to the Applicant 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 Respondents, jointly and severally (the one paying the other to be absolved) pay the Applicant's costs of this application."

[20] As far as prayer 6 (the damages claim) is concerned, the applicant requested me, in the event of him being successful, to postpone this prayer *sine die* pending compliance by the respondents with prayers 4 and 5, and granting all parties leave to supplement their papers prior to

the hearing of the damages claim.

The Citation of the Respondents

[21] The first respondent is the Government of the Republic of South Africa.

[22] The second respondent is the President of the Republic of South Africa, cited as such in his official capacity. The second respondent is cited inasmuch as he is in terms of section 83(a) of the Constitution both the Head of State and Head of the National Executive. In terms of section 84 of the Constitution, he has been assigned certain powers and functions, and in terms of section 85 he, together with the other members of the Cabinet, exercises the executive authority of the Republic of South Africa.

[23] The third respondent is the Minister of Foreign Affairs of the Republic of South Africa who is cited in her capacity as such.

The third respondent is cited because on 6 April 2006, a letter from the second respondent's office was sent to the applicant's attorneys recording that "it is the practice of the President's office to seek the comments and recommendations of the Ministry of Foreign Affairs as the responsible line functionary dealing with issues affecting Foreign Affairs. As soon as the latter's response is received, the presidency

will take these (*sic*) into consideration and you will be advised of the outcome."

[24] The fourth respondent is the Minister of Trade and Industry who is cited in his official capacity. He was also cited because of advice contained in some of the letters to the effect that he had an interest in the matter.

[25] The fifth respondent is the Minister of Justice and Constitutional Development. She was only joined at a later stage. This came about when, in January 2007, an officer in the Department of Foreign Affairs wrote to the applicant's attorney, telling him that it had been decided that the Department of Justice and Constitutional Development is the Government Department responsible for coordinating matters relating to ICSID.

Of matters ICSID, BIPPA and BIT

[26] I have recorded the applicant's later decision to abandon the prayer for mandatory relief that would force the respondents to join ICSID. I have mentioned the apparent reason for this late abandonment.

[27] Nevertheless, I consider it convenient and appropriate to make a few brief remarks about ICSID as well as the other two structures

mentioned above.

[28] As indicated, ICSID is the International Convention on the Settlement of Investment Disputes.

ICSID is a public international organisation created under a treaty with its head office in Washington DC, in the United States of America. ICSID provides facilities for the conciliation and arbitration of investment disputes between contracting states (Zimbabwe is a contracting state) and nationals of other contracting states. Its objective in making such facilities available is to promote an atmosphere of mutual confidence within states and foreign investors conducive to increasing the flow of private international investment.

[29] South Africa is not a party to ICSID. However, should it join the other 136 states parties to ICSID (including Zimbabwe) by becoming a party to the treaty, it will at no financial or political cost to itself provide to its nationals an avenue to settle investment disputes with other nations (such as those at issue in this matter in respect of Zimbabwe).

[30] Another avenue to assist the applicant would be for South Africa to make an *ad hoc* declaration of consent under the Additional Facility Rules of ICSID which allow for cases involving nationals of states not a

party to ICSID (South Africa) and states parties to ICSID (Zimbabwe) to be arbitrated under ICSID rules.

[31] The above constitute obvious reasons for the applicant to urge the respondents to either join ICSID or make the *ad hoc* declaration in order to open those obvious opportunities to the applicant and other aggrieved citizens in their quest for compensation.

[32] Of course, both sides agreed, on a proper interpretation of the ICSID rules, that Zimbabwe would have to consent to such a process even if the republic were to join ICSID. Hence the abandonment of the prayer for this particular relief.

[33] Nevertheless, no reason was advanced for the refusal on the part of the respondents to join ICSID and, thereafter, bring pressure to bear on Zimbabwe to give the required consent. The paper trail journey to which I have referred reveals a constant failure on the part of the respondents to even debate the possibility of joining ICSID let alone disclosing reasons of the refusal to do so.

[34] I add that the late Chief Justice I Mahomed, when chairperson of the South African Law Commission ("the Commission") in the commission's project report 94 of July 1998, directed to the then

Minister of Justice, made specific recommendations in regard to the ICSID convention, "the Washington Convention of 1965". The commission discussed the purpose of ICSID and its special features and benefits for South Africa and concluded that "the arguments in favour of South Africa ratifying the Convention are strongly persuasive".

Already at that stage, the Washington Convention enjoyed a high degree of international acceptance, particularly among African States. As at 30 June 1995 it had been rectified by 119 states and signed by a further fifteen states. The only states in the region yet to ratify the Convention were (at that stage) South Africa, Namibia and Angola. The Convention has also generally been positively received by developing countries.

[35] I find it convenient to quote a few extracts from the aforesaid report of the Law Commission:

> "92.1.9 Although South Africa is a developing country, its relatively strong infrastructure and position as the major economic power in the region place South Africa in a somewhat unique position as a country which could get a dual benefit from ICSID

membership.

92.1.10 On the other hand, the country is anxious to attract more foreign investment and some of the potential projects could benefit from the availability of arbitration or conciliation under the Washington Convention. Ratification of the Convention would therefore be another positive signal which South Africa could send out to indicate that the new Government is eager to create the necessary legal framework to encourage foreign investment. Bilateral investment treaties between states, particularly between a developed and a developing state, commonly contains a provision for arbitration under ICSID as a means of encouraging private investment in the developing country. As appears from the text below, such clauses are already being included in bilateral investment treaties recently entered into by the South Africa Government with the Governments of certain foreign states.

92.1.11 On the other hand, South African companies are

eagerly looking for investment opportunities in other African countries, virtually all of which are members of ICSID. Ratification of the Convention by South Africa would facilitate such investment and further the economic development of the region.

92.1.12 Failure to ratify the Convention would leave South Africa as one of the very few African countries which have not done so and a continued failure to do so appears difficult to justify. Moreover, the inclusion of ICSID arbitration clauses in bilateral investment treaties recently entered into by the South African Government with the Governments of, for example, Germany, France, Switzerland, Denmark, Korea and Canada have created the expectation among potential investors in those countries that South Africa intends acceding to the Washington Convention.

92.1.13 Secondly, as appears from paragraphs … above, the ICSID mechanism reduces the involvement of foreign state courts to an absolute minimum,

thereby reducing sensitivity concerning national sovereignty.

92.1.14 It is, however, necessary to consider what the possible additional costs of membership of ICSID would be, pursuant to ratification of the Convention.

92.1.15 South Africa would therefore incur no costs in joining ICSID, other than the cost of enacting the legislation to give effect to ratification to the Convention.

92.1.16 For the reasons set out in paragraphs … above, it is submitted that South Africa should follow the example of most other African countries and ratify the Washington Convention. Draft legislation to give effect to this recommendation is contained in chapter 4 of the Draft Bill."

[36] Against this background, counsel for the applicant, in their very comprehensive and well-crafted heads of argument, submitted that it was startling to discover that the advantages of ICSID are not unknown

to the respondents. The first respondent, in concluding various bilateral investment treaties prior to the commission's report of 1998, "created the expectation among potential investors in those countries that South Africa intends acceding to the Washington Convention". This much was stated in a report of the Law Commission, *supra*.

Counsel for the applicant submit that the aforesaid expectation created among potential investors, as alluded to by the Commission, is reflected in the fact that in each of a number of investment treaties concluded by the first respondent with foreign states, an ICSID arbitration is referred to as one of the options by which any investment dispute arising between the parties would be settled. Counsel then list seven such agreements or treaties, referring in each instance to the relevant article in the treaty designed to promote and protect reciprocal investments. For example, there was a bilateral agreement between the republic and Canada in 1995, a treaty with Germany in 1995, an agreement with Denmark, an agreement with France, an agreement with Korea and, lastly, an agreement with the Swiss Federal Council on the promotion and reciprocal protection of investments.

The last mentioned agreement, dated 27 June 1995, was handed up as an exhibit during the course of his diligent address by Mr Mtshaulana on behalf of the respondents. He did so to fortify his

argument, *supra*, that an agreement from both sides was required in order to bring about, for example, an ICSID arbitration and, where the consent of Zimbabwe was by no means guaranteed, the original prayer for this court to order the respondents to take out ICSID membership ought not to be entertained.

[37] The fact that the prayer for this specific relief was abandoned as a result, does not mean, in my view, that the consistent failure on the part of the respondents to join ICSID and make a serious attempt to enter into a Bilateral Investment Treaty ("BIT") with Zimbabwe with the view to protecting its nationals investing in that country should not come under the spotlight when consideration is given to the submissions by the applicant that the failure of the respondent to grant the applicant diplomatic protection is unconstitutional for its irrationality.

Counsel for the applicants, in their heads of argument, put it as follows:

> "94. With respect, the above demonstrates that ICSID is in fact considered by the South African Government to be a plausible means by which South African nationals might settle their investment disputes with foreign states. To withhold such a means of dispute settlement from the applicant and similarly situated individuals in respect of

investment disputes arising, and within Zimbabwe, is discriminatory, irrational and contrary to the foreign policy commitments made by the first respondent to which reference is made earlier.

95. The question remains unanswered by the respondents: if the South African Governments' so-called efforts to assist the applicant (and others) in disputes with Zimbabwe around that Government's expropriation of property of South African nationals has 'not met with great success, if any at all' then on what plausible rational and Constitutionally sufficient basis are the respondents denying the applicant and others similarly situated an opportunity to proceed under ICSID, a vehicle which, as the Dutch example demonstrates, may well meet with success?"

[38] The "foreign policy commitments made" alluded to by counsel is a reference, *inter alia*, to a written statement by the third respondent in answer to a written question by an opposition member of parliament, dated 27 March 2002, where she says, *inter alia*, the following:

"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 operating in foreign countries."

[39] The "Dutch example" referred to by counsel relates to the fact that Zimbabwe, as a party of ICSID, had consented to the jurisdiction of the ICSID tribunal in relation to a compensation claim lodged by Dutch nationals arising out of the expropriation of their property rights by the Government of Zimbabwe. It is the case of *Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe*, Case Number ARB/05/06, vol 5, p 496, CVA 143(i). The matter was registered with ICSID on 15 April 2005 and it concerns the expropriation without compensation of commercial farms in Zimbabwe. Counsel point out that it should be noted that Mr Funnekotter is a citizen or national of a state, which is also a party to ICSID, and accordingly he was entitled to bring a case against the Republic of Zimbabwe under ICSID for that reason. Zimbabwe has consented to the arbitration.

On the subject of "foreign policy commitments made", *supra*, it is convenient, at this stage, to highlight further commitments made by the Foreign Minister (third respondent) in response to opposition questions in parliament. Already in June 2004 she said the following:

"Among the steps taken are the recommendations made to our

> Department of Trade and Industry (DTI) to discuss and conclude with their Zimbabwean counterparts the Bilateral Investment Promotion and Protection Agreement. BIPPA has been concluded and know awaits signature by our Minister of Trade and Industry and his Zimbabwean counterpart." (Emphasis added)

On the same occasion, she also said the following to parliament:

> "The future steps that the Government will take to ensure the protection of the property rights of South African citizens with agricultural interests and those citizens who own property and companies in Zimbabwe is through the signing of the Bilateral Investment Protection of Property Agreement. Our Department of Trade and Industry and their Zimbabwean counterparts have concluded discussions on the agreement. The agreement is awaiting signature by the Ministers of both Governments once the calendars of the Ministers permit." (Emphasis added)

Later in June 2004, the Minister said the following:

> "Furthermore, our DTI has together with the Zimbabwean Government concluded the Bilateral Investment Promotion and

> Protection Agreement (BIPPA) which is aimed at, among other issues, protecting the properties of South African nationals in Zimbabwe."

On the same occasion she also said the following in writing:

> "Substantial progress has been made in concluding a Bilateral Investment Promotion and Protection Agreement (BIPPA). In December 2003, our DTI and the Government of Zimbabwe met in Harare and concluded BIPPA." (Emphasis added)

[40] It was common cause during the proceedings before me, that the much vaunted BIPPA was never signed. No one ever saw the BIPPA. Repeated appeals by the applicant, in the course of his cumbersome correspondence journey ("the journey") which I will deal with later, to have sight of the BIPPA, were turned down flat. The third respondent never bothered to file a supporting or verifying affidavit to explain why the BIPPA, if it ever existed, was never signed. In fact, not one of the respondents took the trouble to sign a verifying or supporting affidavit to the opposing affidavit. Instead, they got Mr Pieter Andreas Stemmet ("Stemmet"), a Senior State Law advisor at the Department of Foreign Affairs, to attest to the opposing affidavit. There were no verifying or explanatory or supporting affidavits by any of the respondents.

A replying affidavit, containing emphatic submissions to the effect that Stemmet's evidence is inadmissible because it amounts to hearsay and does not reflect his personal knowledge, was filed in May 2007. A year later, in May 2008 when the matter came before me, the respondents, without asking for condonation, handed up a feeble, one and a half page affidavit by Aziz Goolam Hoosein Pahad, the Deputy Minister of Foreign Affairs, who is neither a respondent nor a member of the cabinet, if one has regard to sections 91 and 93 of the Constitution. His affidavit does not advance the case of the respondents. On the contrary, it advances the case of the applicant that Stemmet's evidence amounts to hearsay. The affidavit of Pahad, such as it is, is riddled with hearsay evidence.

[41] The unexplained failure on the part of any of the respondents to file personal affidavits to deal with the complaints of the applicant amounts, in my view, to a shocking dereliction of duty. It also flies in the face of the requirements of section 165(4) of the Constitution which provides that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

[42] While on the subject of dereliction of duty, it is convenient to return to

another promise which the third respondent made to parliament in a written reply to an opposition question in June 2004. She said the following:

> "The Zimbabwean Government has also indicated that properties belonging to nationals from SADC-Member States would be de-listed and that a cabinet task team had been established to develop a policy framework within which properties of foreign investors, including South Africans, would be resolved.
>
> Appreciation is been expressed by the Zimbabwean (*sic*) for the critical role South Africa is playing towards the resolution of the political and economic difficulties facing Zimbabwe and that it was important that Zimbabwe reciprocate and assist South African nationals in Zimbabwe." (Emphasis added)

In the proceedings before me, it was common cause that no de-listing, as promised, ever took place. There was no explanation whatsoever from any of the respondents, let alone the third respondent, for their abject failure, over all these years, as members of the Executive of the power house of the region, to bring about the "reciprocity" promised by Zimbabwe and/or to employ a host of diplomatic measures, recognised

worldwide, to protect its citizens.

The admissibility, or lack thereof, of the evidence contained in the respondents' answering affidavit

[43] I have pointed out that the deponent to the respondents' opposing affidavit, Stemmet, had to make do on his own without any supporting affidavits from any of the respondents.

[44] I have also pointed out that the applicant, in emphatic terms, already in his replying affidavit dated June 2007, submitted that, under the circumstances, Stemmet's evidence mainly amounts to hearsay. In the replying affidavit full details are recorded of the evidence considered to be hearsay and which falls to be struck out or ignored. I pointed out that the only reaction from the respondents was to hand up a short affidavit by the Deputy Minister a year later, when the proceedings commenced before me.

[45] Stemmet, the deponent, is a Senior State Law Advisor (International Law) at the Department of Foreign Affairs. His evidence, unless confirmed by others who were privy to the meetings, documents, advice and/or information on which he comments, is limited to his personal and/or professional involvement therein.

[46] The courts have long and consistently held that it is impermissible for a deponent to an affidavit to give evidence on behalf of another where the latter does not file a confirmatory affidavit to confirm the evidence.

In *Gerhardt v State President and Others* 1989 2 SA 499 (T) the following is said at 504F-H:

> "Clearly one person cannot make an affidavit on behalf of another and Mr Hattingh, who appears on behalf of the three respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible."

In the unreported judgment of *Nasko Demirev Amaudova and 4 Others v Minister of Home Affairs and Director-General Home Affairs*, Case 30035/2003, PATEL J said:

> "It is trite law that only the first respondent could have dealt with what was within his knowledge and why he refused the applicant's representations and request for temporary permits, irrespective of any departmental arrangements in respect of any

> delegation of authority. No-one else could depose to that knowledge except the first respondent himself. Surely, one person cannot make an affidavit on behalf of another unless duly authorised to do so and such authority is either supported or confirmed by an affidavit. There is no supporting or confirmatory affidavit from the first respondent. Further, a court can only have regard to those parts of the affidavit in which he or she refers to matters within his or her knowledge, otherwise it is simply hearsay and inadmissible."

The same sentiments were expressed in *Tantoush v Refugee Appeal Board and Others* 2008 1 SA 232 (TPD). In the same judgment, the learned judge makes the following remark at 256J to 257A:

> "Moreover, as I have already intimated, where new material was introduced in reply, the respondents could have relied upon the principle enunciated in *Sigaba v Minister of Defence and Police and Another* 1980 3 SA 535 (TK) to seek leave to file additional affidavits in the sure likelihood that such leave would have been granted."

[47] Counsel for the applicant developed this argument further by submitting that the respondents, not having furnished admissible

evidence in rebuttal, in the process failed to rebut the applicant's allegations of irrational and unconstitutional conduct. In this regard I was referred to *Hurley and Another v Minister of Law and Order and Another* 1985 4 SA 709 (D) 725G-H where the following passage from *R v Jacobson and Levy* 1931 AD 466 at 479 is quoted:

> "If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence 'calls for an answer' then, in such case, he has produced *prima facie* proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the *prima facie* proof, being undestroyed, again amounts to full proof."

[48] In the light of this trite law the effect of this failure by any of the respondents to adduce evidence is that the evidence in Stemmet's affidavit regarding what was in the mind of any of the respondents as justification for their decisions to refuse diplomatic protection is hearsay and inadmissible. The Constitutional Court in *President of the Republic of South Africa v SARFU* 2000 1 SA 1 (CC) para [105] accepted that hearsay evidence falls to be ignored, even in the absence of an objection or an application to strike out.

[49] In his comprehensive replying affidavit, the applicant spells out, chapter and verse, details of all the evidence which falls to be disregarded for the reasons aforesaid. It is not necessary to repeat everything in this judgment.

One of the examples, however, is paragraph 20 of the opposing affidavit which, in my opinion, is the only paragraph in which the respondents attempt to give some information about efforts taken to afford diplomatic protection. It reads as follows:

> "20.2 Regarding the general request for diplomatic protection, the respondents responded in several ways.
>
> 20.2.1 The ambassador to Harare and his staff have consistently engaged the Zimbabwean Government on the question of the status of all South African farmers in Zimbabwe. During the last few years, meetings were held with several cabinet ministers including the Minister of Foreign Affairs, the Minister of Land Affairs, the Minister of Finance, the Minister of Agriculture, the Permanent Secretary of Land Affairs and the

Permanent Secretary of Justice. In these meetings, the plight of South African farmers whose land had either been invaded by war veterans or expropriated by the state was raised.

20.2.2 The ambassador also met with the then Vice President of Zimbabwe, Honourable Vice President Mujuru as well as with Minister of Land Affairs, Mr D Motasa in regard to the issue of expropriation of land belonging to South African farmers.

20.2.3 The embassy has also tried to intervene on behalf of farmers in trouble by engaging with the Zimbabwean foreign ministry requesting intervention on behalf of specific South African investors.

20.3 Regrettably, these efforts have not met with great success, if any at all."

Right at the end of his one and a half page affidavit Deputy Minister Pahad says the following:

> "I further confirm that steps detailed in paragraph 20 of Stemmet's affidavit are known to me from information provided to me." (Emphasis added)

[50] For obvious reasons, Pahad's evidence also amounts to hearsay and does not come to the assistance of the respondents. Moreover, Stemmet's hearsay evidence, as quoted, is so vague that it can have no practical significance: it appears that only the ambassador may have met with some Zimbabwean officials. No details are given about when the meetings were held and what the outcome was. No details are given of what efforts were made to bring pressure to bear, diplomatically speaking, on the perpetrators with the view to protecting the South African citizens.

[51] Paragraph 20.4 of the opposing affidavit (also covered by the umbrella statement, such as it is, by Deputy Minister Pahad) deals with earlier alleged efforts on the part of the South African High Commissioner to speak to some high ranking Zimbabweans about the plight of the South African farmers. The same remarks apply in this instance, and to the rest of the Pahad affidavit, for that matter.

[52] The applicant's request for diplomatic protection by following the ICSID

route is met with the following somewhat cryptic response in the opposing affidavit:

> "Applicant requested diplomatic protection under the auspices of ICSID. This was not acted upon because it was an unlawful request or a request which would have meant that the National Executive performed an unconstitutional act."

It is difficult to understand this approach in the light of the advice by the Law Commission, *supra*.

[53] Most of the allegations in the founding affidavit are, in any event admitted. Some are met with bare denials without controverting evidence being offered.

[54] One "defence" offered is that the applicant's companies are Zimbabwean entities and this court has no jurisdiction to adjudicate on the matter. This issue will be dealt with in the following paragraphs.

<u>Does the duty to afford diplomatic protection fall away because the applicant's companies and the Trust are Zimbabwean entities?</u>

[55] In their opposing affidavit the respondents say the following:

> "The entities on whose behalf the applicant has approached the Court are Zimbabwean entities. Zimbabwe is a sovereign state and how it treats its citizens, companies and trusts is a matter for Zimbabwean Law and this Court has no jurisdiction to adjudicate on this matter."

[56] The applicant has explained that during the fifty year period, *supra*, he began to manage his farming interests through various companies that he formed. In 1985 the applicant also arranged for the registration of a Trust, known as the Von Abo Trust ("the Trust").

[57] The final control of all decisions of and actions by the relevant private companies and the Trust at all times vested in the applicant by virtue of the fact that he is, and always has been, the managing director of the companies and the senior trustee of the Trust. He also holds valid cessions in his favour by all these companies and the Trust as far as this particular application is concerned.

[58] The stance adopted by the respondents, *supra*, appears to fly in the face of their statement that "the respondents responded to the request for diplomatic protection by taking such steps as were appropriate".

[59] Nevertheless, the argument appears to be that nationality, one of the

prerequisites for diplomatic protection by South Africa, is not satisfied in the sense that the companies and the Trust are nationals of Zimbabwe.

[60] In response, counsel for the applicant, in their heads of argument, submit that the South African Government may assert diplomatic protection on the applicant's behalf because of his rights in the companies and Trust that have been injured in Zimbabwe. They argue that it may do so on account of the following International Law Principles: (their submissions are reflected hereunder in abbreviated form):

1. The companies and the Trust have a genuine link with South Africa. The director and sole member of the Zimbabwean companies and sole beneficiary of the Trust is a South African national (the applicant) and the business activities of the Zimbabwean companies and Trust are managed, financed and controlled from South Africa where the seat of management – such as it is – is now forced to be situated.

2. A state under International Law is entitled to take up the protection of its nationals who have direct rights of control and management and/or shareholding in a company incorporated in

a foreign state, which has been the victim of a violation of International Law.

3. Ordinarily the State of Nationality of a corporation must exercise diplomatic protection on behalf of the company. However, there is an important exception to this rule in International Law which allows the State of nationality of the shareholders to intervene where the corporation has the nationality of the state responsible for causing injury to the corporation.

4. A state is entitled to take up the protection of its nationals, shareholders in a company incorporated in a foreign state, which has been the victim of a violation of International Law, so long as there is a genuine link between the state exercising diplomatic protection and the natural person it seeks to protect – Nottebohm case 1955 ICJ reports, 4 at 23.

The companies and the Trust have a genuine link with South Africa.

5. In the present case there is accordingly a “close and permanent connection” between South Africa (through the applicant) and the companies and Trust, such that South Africa is entitled to

exercise diplomatic protection on the applicant's behalf.

"In such cases intervention on behalf of the corporation is not possible under the normal rule of International Law, as claims cannot be brought by foreign states on behalf of a national against its own Government. If the normal rule is applied foreign shareholders are at the mercy of the state in question; they may suffer serious loss, and yet be without redress. This is an extension in the international field of the situation which may arise in Municipal Law when those who should be defending the interest of the corporation fraudulently or wrongfully fail to do so (eg *Foss v Harbottle*)." – See the article by Mervyn Jones "Claims on Behalf of Nationals who are Shareholders in Foreign Companies" (1949) 26 British Yearbook of International Law 225 at 236.

6. The United Kingdom and the United States have asserted the existence of such an exception – notably in the cases concerning the Delagoa Bay Railway Company (1888 to 1889) BFSP 691, Moore International Arbitrations (1898) vol 2 at 1865, cited in Dugard, International Law – A South African Perspective, 3rd Edition, 2005, at 289 and other authorities.

7. In 2003 the International Law Commission gave its approval to the principle expressed in the Delagoa Bay case that the state of nationality of the shareholders in a corporation may exercise diplomatic protection on their behalf where the corporation has the nationality of the state responsible for causing injury to the corporation – Fourth Report on Diplomatic Protection (CA-CN. 4/530, at 27-37).

8. Moreover, Stemmet's legal response is contrary to a recent decision of the International Court of Justice in the Case Concerning Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of Congo*) Preliminary Objections, decided on 27 May 2007. From the passage quoted by counsel, it appears that this court reaffirmed the principle described above namely that the state of nationality of the shareholders in a corporation may exercise diplomatic protection on their behalf as already described.

9. In conclusion, counsel for the applicant argues that Stemmet's argument, advanced in the opposing affidavit, is in any event contrary to the Government's own stated policy. This is a reference to the third respondent's assurance to parliament, quoted above, in her written response to opposition questions,

that “Government is committed to ensure the safety and security of all its citizens, their property as well as South African owned companies operating in foreign countries”. (Emphasis added)

[61] I find myself in respectful agreement with these submissions. Accordingly, I hold that this court does have jurisdiction to entertain the application of the applicant.

Jurisdictional facts to be met for diplomatic protection

[62] It is an elementary principle of International Law that a state is entitled to protect its nationals against the wrongs committed by other states contrary to International Law. The Permanent Court of International Justice described this principle in the *Mavrommatis Palestine Concessions* case (1924) PCIJ reports series A(2) 12 as follows:

> “It is an elementary principle of International Law that a state is entitled to protect its subjects, when injured by acts contrary to International Law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect

for the rules of International Law."

[63] Legal scholars commonly use the term "diplomatic protection" to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, restorsion, severance of diplomatic relations, economic pressure and, in the final resort, the use of force – Dugard First Report on Diplomatic Protection (March 2000) ILCA-CN. 4/506 p 15 para 43.

For reasons already mentioned, and some still to be highlighted, I see very little evidence, if any, of the respondents having adopted any of these courses of action in defence of the applicant.

[64] It is generally accepted that although a state is not obliged to admit foreigners, once it had done so, it was under an obligation towards the foreigners' state of nationality to provide a degree of protection to his or her person or property in accordance with the international minimum standard of treatment for foreigners – Dugard, op cit, p 11, para 33.

[65] A state may normally not intercede on behalf of a national before various jurisdictional facts relating to diplomatic protection are met.

[66] The state may only intercede on behalf of one of its nationals or a

person that has a genuine link with the state.

[67] The victim must have suffered a violation of his rights at the hands of the foreign state which amounts to an infringement of international minimum standard.

[68] The victim must have exhausted all the available remedies against the delinquent state.

[69] The first jurisdictional fact, that of nationality, has already been dealt with, *supra*.

The second jurisdictional fact: violation of the international minimum standard

[70] The applicant, in his founding affidavit, has set out the important acts by the Government of Zimbabwe which led to the destruction or "taking" of his property rights in Zimbabwe. These allegations are undisputed.

[71] These acts are part of a pattern of notorious conduct by the Zimbabwean Government which amounts to large scale expropriation of farmland owned by white farmers. Counsel for the applicant submit that it is beyond dispute, and not seriously open to refutation by the respondents, that the Government of Zimbabwe has sine 1997

egregiously violated International Law and International Human Rights Laws, which has been the sole reason for the damages suffered by the applicant.

[72] The above is common knowledge and has been the subject of intense criticism and scrutiny by the world community. The applicant took the trouble to incorporate, as part of the papers, a series of international reports which highlight all these transgressions and human rights violations. I do not deem it necessary to analyse any of the details contained in those reports. They include:

1. Human Rights Watch Briefing Paper, Under a Shadow: Civil and Political Rights in Zimbabwe, 6 June 2003;

2. Amnesty International's 2002, 2003, 2004 and 2005 Country Report on Zimbabwe; and

3. Zimbabwe, Country Reports on Human Rights Practices – 2002, 2003, 2004 and 2005, released by the Bureau of Democracy, Human Rights, and Labour (US State Department).

[73] In his founding affidavit, the applicant details certain actions which demonstrate the manner in which the Zimbabwean Government has

either itself violated the applicant's property rights or has acquiesced in the violation thereof by individuals who have acted with Government support, whether tacit or express.

[74] The Government of Zimbabwe published a "preliminary notice of compulsory acquisition" in that country's Government Gazette of 28 November 1997 under General Notice 737 of 1997, by virtue of the provisions of the Zimbabwean Land Acquisition Act 3/1992. This publication indicated that the Government of Zimbabwe intended compulsorily acquiring a number of the properties belonging to the applicant's legal personae detailed in his founding affidavit. This came like a bolt out of the blue because up to that stage the political situation in Zimbabwe was peaceful and, certainly from the point of view of a farmer/businessman, stable such as to allow economic activity in the interest of and to the benefit of the country as well as the active and hardworking agricultural farmer.

[75] The applicant opposed the Government of Zimbabwe's intended acquisition of the farming properties in which he has an interest, using whatever legal and proper means available to him and was successful in these matters. All these matters were then satisfactorily disposed of in the course of the period immediately after December 1997, by way of judicial and/or administrative findings handed down by the relevant

authorities. These findings notwithstanding, the Government of Zimbabwe continued its efforts to obtain the farming properties in their country, by publishing further notices and engineering further attachments of properties. In addition, the Government of Zimbabwe encouraged, aided and protected so-called "war veterans" in their action of infiltrating and settling on farms owned by the applicant's entities.

[76] The applicant explained in his founding affidavit what happened to him in regard to his Trusts property, Fauna. As he makes clear, the actions of the Government of Zimbabwe in respect of this property (and movables on this property) and results flowing therefrom, are an example of what took place in Zimbabwe and his experience in respect of all the other relevant properties in similar and all material respects.

[77] And, as the applicant points out, his experience in this regard is similar to the experience of a vast number of other active and fulltime farmers in Zimbabwe at that time.

[78] As the applicant testifies:

> "The situation at present is that I have extremely limited access to Fauna Ranch (and all the other properties) and then only at

the complete discretion of the unlawful squatters and occupants of the property. These squatters have killed off all the game and most of my herd of cattle and have simply confiscated all assets on the property.

The above is a very brief history of my experience in respect of Fauna Ranch. My experience in respect of all the other properties is basically the same with exactly the same result; that my land has been settled by persons who have no lawful right to occupation or possession thereof and who, as a result of their settlement, have destroyed, pilfered and otherwise rendered unusable the land and the assets on the land."

[79] In my view, the applicant demonstrates beyond any serious doubt (and certainly on a balance of probabilities) that his property rights in Zimbabwe have been expropriated unlawfully under International Law. I add that, as will be described later, he was also arrested simply for being on one of his properties and had to appear in court many times before the charges were withdrawn.

[80] Nationalisation or expropriation in International Law may take place by any organ of the state whether by judgment of a court, Legislative Act or Executive Act. The expropriation is characterised by its effect which

may be the taking of property, the destruction of a right or any act which destroys a right even if no physical property has been taken. See *Christie* "What constitutes a taking of property under International Law?" 38 (1962) BYIL 307 at 310.

[81] It is not in issue that the expropriation of the properties in question was effected without compensation, a clear violation of the international minimum standard, which gives rise to state responsibility. See *Dugard*, International Law – A South African Perspective, 3rd ed, 2005, at 299.

The third jurisdictional fact: exhaustion of local remedies

[82] Reference has already been made to the applicant's futile efforts to protect his interest by litigating against the Zimbabwean Government in that country. The applicant's allegations that he had exhausted his local remedies are not disputed on the papers.

[83] The Rule of Public International Law with respect to the exhausting of local remedies finds application in the context of the granting of diplomatic protection. A victim of an unlawful act by a foreign state may only invoke diplomatic protection and his or her state of nationality may only grant it *vis-á-vis* the wrongdoing state, if certain requirements such as the existence of nationality of the victim (*supra*) and

exhaustion of local remedies have been satisfied.

[84] However, a longstanding Rule of Customary International Law is that if remedies are futile they need not be pursued. See *Dugard*, International Law – A South African Perspective, 3rd ed, 2005, at 293-295.

[85] This rule is now been codified in article 10 of the International Law Commission's Rules on Exhaustion of Local Remedies (report of the International Law Commission on the work of its 55th session, chapter V, 2003) and article 44 of the International Law Commission's Articles on State Responsibility, 2001.

[86] No purpose will be served by seeking further remedies in the courts of Zimbabwe. Given the almost absolute disregard that Government shows even for the orders of its own courts, particularly in respect of the expropriation and taking of the farms of white farmers, there are no remedies available to the applicant.

[87] To the extent that it may be suggested that there are any remedies left to exhaust in Zimbabwe, those remedies are not "effective", as that term is understood in International Law.

[88] It appears that on an objective assessment of the facts of the applicant's case, any remedies left to be pursued in Zimbabwe, such as they may be, would be futile.

[89] Upon a realistic assessment of the facts and the history behind this matter, there is no reasonable prospect of the applicant securing damages or vindication of his rights in a Zimbabwean court. The rule about exhaustion of local remedies (which exists in the context of diplomatic protection) finds application in this case and the requirements of this rule have been met by the applicant.

[90] In view of the aforegoing I have concluded that the jurisdictional facts for qualifying for diplomatic protection have been established by the applicant.

By way of example, such diplomatic protection may involve effective diplomatic pressure on the Zimbabwean Government to restore the properties to the applicant and his companies and to pay compensation for losses and damages. Another form of diplomatic protection may be to facilitate the opportunity for the applicant to go the ICSID route and get a proper hearing in front of an international arbitration tribunal. Another possibility might be for the respondents to enter into a BIT or a BIPPA with retrospective effect containing a

clause providing for compensation by the errant state to the aggrieved party.

A good example of such an agreement is the one between the Republic and the Swiss Federal Council which Mr Mtshaulana handed up as an exhibit.

Article 3 of that agreement reads as follows:

> "Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of investments in its territory of investors of the other Contracting Party."

Article 4(1) reads as follows:

> "Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national

> emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter contracting party accords to its own investors or investors of any third state whichever is more favourable to the investor concerned. Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force."

Article 8, under the heading "Pre-agreement Investments", reads as follows:

> "The present agreement shall also apply to investments in the territory of a contracting party made in accordance with its laws and regulations by investors of the other Contracting Party prior to the entry into force of this Agreement."

[91] I have already pointed out that over all these years the respondents have done absolutely nothing to assist the applicant, despite diligent and continued requests for diplomatic protection on the part of the latter.

No explanation whatsoever has been forthcoming for this tardy and lacklustre behaviour. The few vague allegations made in the opposing affidavit, *supra*, referring to "meetings" and "engagements" between the ambassador and other officials are unspecified, contain no information about the details of the meetings and the outcome thereof and, in any event, amount to hearsay.

[92] I have pointed out that the BIPPA, already promised to parliament by the Foreign Minister in 2003, has remained nothing but a phantom on the horizon. The prospective Contracting Parties have been looking at their calendars for a suitable date for more than five years without success. The feeble excuse offered from time to time in the opposing papers that the South Africans are dependent on the whims and time frames of the Zimbabweans is nonsense. This is a powerful and a proud country and there is no reason why it cannot employ any of the effective internationally recognised diplomatic measures, *supra*, to bring about proper protection for its nationals. For this abject failure and dereliction of duty, there is no explanation whatsoever to be found in the papers filed on behalf of the respondents.

[93] Before turning to what the Constitutional Court has had to say on the subject of diplomatic protection, it is necessary to traverse, in abbreviated form, the journey travelled by the applicant in his efforts to

get assistance and help from the respondents. It is a cumbersome exercise, but necessary, albeit in truncated form, because it illustrates the plight of the applicant and the main thrust of his grievance for not managing to elicit any form of protection from his own government.

The journey

[94] The applicant illustrated the details by means of correspondence attached to the founding affidavit and incorporated therein.

[95] Under the heading “efforts to obtain assistance” the applicant, firstly, attaches 54 letters written either by himself or others on his behalf. These include a Human Rights Commissioner, a Member of Parliament and the Chairman of Grain South Africa. After listing these letters he says “I have not summarised the contents of the aforementioned communications in order not to render this affidavit even more voluminous, but I pray that the contents of all the annexures to this affidavit be read as if therein incorporated”.

[96] The applicant then lists and describes 27 letters exchanged between his attorneys and (mainly) junior officials in the departments of the respondents.

He then says the following:

> "The letters mentioned above are self-explanatory and manifest the litany of requests and applications I have made to the South African Government for assistance (diplomatic or otherwise) in relation to my predicament *vis-á-vis* the Zimbabwean Government. I pray that their contents be regarded as if herein incorporated."

[97] In his able address, Mr Mtshaulana argued that this method of presenting this particular portion of the applicant's case, could fly in the face of the following dictum to be found in a well-known case of *Swissborough Diamond Mines v Government of the RSA* 1999 2 SA 279 (TPD) at 324F-H:

> "Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."

The learned judge there quotes a few authorities dealing with this subject and goes on to refer to two other cases, including *Van Rensburg v Van Rensburg en Andere* 1963 1 SA 505 (A) at 509E-510B where it was held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged.

[98] As Mr Hodes convincingly argued on behalf of the applicant, there is no question whatsoever of these respondents not knowing what case they have to meet. The letters are generally short and to the point and, as is stated in the founding affidavit, self explanatory. They illustrate the case made out in the founding affidavit. Their relevance is beyond question. To summarise each of the letters as part of the affidavit would be impractical and add to the voluminous nature of the papers. It would be entirely unnecessary in these particular circumstances.

[99] I now turn to the contents of some of the letters. In my view it is neither practical nor necessary to analyse each and every letter. Details will be condensed, where possible, for the sake of brevity.

[100] On 24 March 2002 (and when it was obvious that his efforts in the Zimbabwean courts were fruitless) the applicant wrote a long letter to

the second respondent himself. He points out that he is a fifth generation South African citizen of Scandinavian and Scottish descent. He deals with the half a century of investments in Zimbabwe. All the dividends flowing from his investments were re-invested in that country. All companies had now been taken over by settlers and one by a high profile politician, without any compensation. There is no legal system to which he can appeal in Zimbabwe. There is no law. The so-called war veterans are a law to themselves. The applicant has always believed in a fair and just society. Before the 1994 election he gave premises for the ANC in Bothaville even though he was branded as a sell out by his own society. He appealed to the State President (second respondent) for assistance.

[101] Almost two months later, in May 2002, Administrative Secretary E Ndlovu in the Presidency, acknowledged receipt of the letter and said that "since the matter you have raised falls under the jurisdiction of the Minister of Foreign Affairs, it has been forwarded to her for further attention. You may expect a reply from the Minister's office."

[102] On 14 May 2002, Dr Boy Geldenhuys, a member of parliament, wrote to the President (second respondent) on behalf of the applicant.

Part of the letter reads as follows:

> "Mr Von Abo is a well-known upstanding South African citizen fully committed to a non-racial democratic South Africa. Besides playing an influential role in the South African agricultural sector he also invested heavily in the farming industry of Zimbabwe with the full knowledge and assistance of the Reserve Bank of Zimbabwe. Due to the unlawful occupation of industrial farms by so-called war veterans without any compensation, Mr Von Abo stands to lose millions of rands.
>
> If Mr Von Abo as a South African citizen could be assisted by your good offices to a more just settlement, it will be highly appreciated."

[103] On 22 May 2002 the presidency <u>again</u> acknowledge receipt of the first letter written in March and repeated the advice that the letter would be forwarded to the Minister for Foreign Affairs. This time the author of the letter was administrative assistant to the Legal Advisor Nonqaba Tshotsho. It is clear that she was unaware of the first letter written by Administrative Secretary E Ndlovu.

[104] On 6 June 2002, Deputy Minister Pahad replied to the letter of Dr Boy Geldenhuys MP in the following terms:

> "As soon as my department became aware of the fact that the re-settlement programme was affecting South African owned properties, companies and investments in Zimbabwe, it commenced to engage with the Zimbabwean authorities through diplomatic channels. The last discussions were held as recently as 11 June 2002 between the South African High Commissioner to Zimbabwe and Zimbabwean Principal of Lands. The possible protection of South African owned property and investments in Zimbabwe within the context of a Bilateral Agreement on the Protection of Investments was one of the issues discussed. In fact, the Department of Trade and Industry has been involved with the Zimbabwean authorities in this regard since 2001.
>
> I would, therefore, wish to give my assurance that the South African Government is fully aware of the situation and will endeavour to do its utmost to safeguard South African owned property, companies and investments. As soon as it is possible to take up the specific case of Mr Von Abo, we shall do so." (Emphasis added)

This letter is also riddled with hearsay evidence. Moreover, it is another example of a BIPPA, or similar agreement, already promised

in 2002 but never becoming a reality.

[105] On 27 June 2002 the applicant wrote to the South African High Commissioner in Harare appealing for assistance. He details the farming interests held by him, and asks for assistance by the Foreign Minister.

[106] On 27 June 2002 the applicant writes to the second respondent, pointing out that to date he had not heard anything from the Foreign Minister (despite the consecutive promises made in writing by the Administrative Secretary and the Administrative Assistant to the Legal Advisor respectively).

[107] On 17 July 2002 Administrative Secretary Maritz, in the office of the Ministry of Foreign Affairs, apologises for the delay and says “I also wish to assure you that the matter is receiving attention and that you will shortly receive a formal response from our department”.

[108] On 24 July 2002 the applicant writes to the South African High Commissioner in Harare referring to his previous letter of 27 June. He complains about the confiscation of his property and singles out one property by saying:

"The property, Duiker Flat, was taken by the governor of Mashonaland Central, Mr Elliot Manyaka. Please refer to appendix 2 which is a copy of a letter from the office of the district administrator, Vendura, advising that the ministry of lands, agriculture and rural resettlement had accepted Mr Manyaka's application to lease the farm from the Government – whilst this property still belongs to me.

The proposed acquisition of the Nuanetsi properties was opposed, and the matter was withdrawn by the Minister of Lands. Despite this, the ranches are fully occupied by settlers and their cattle. Poaching is rife.

My farm managers on the Mazoe properties have been evicted, and they have been barred from returning. It must be noted that due to the government not adhering to its own prescribed legal time frame in serving acquisition documents, all of the acquisition orders are null and void.

I therefore appeal to the South African Government to protect my rights as a South African citizen and intervene, on my behalf, to ensure that my rights are reinstated."

[109] On 30 July 2002 the applicant again writes to the High Commissioner in the following terms:

> "Since our letter to you on the above I have received a letter from the invaders of Fauna Ranch addressed to my manager Mr Willem Kloppers.
>
> I am sending you a copy of the letter, which I have typed for easier reading for your urgent attention. I have no doubt that you would agree that this is not just anarchy but that could be seen as pure piracy.
>
> I also include a list of the names of the people who have invaded the ranch and the cattle that they have brought in."

[110] On 30 July 2002 the applicant sent copies of the aforesaid letters to the High Commissioner to Administrative Secretary Maritz at the Ministry of Foreign Affairs in Cape Town. He concludes the letter in the following terms:

> "As you will see from the documentation it amounts to pure piracy. I would be grateful if this could receive your and your minister's most urgent attention."

[111] On 30 August 2002 a reminder is sent to Administrative Secretary Maritz.

[112] On 10 September 2002 Deputy Minister Pahad writes to Niewoudt and Partners in Bothaville, presumably the applicant's attorneys in that Free State town, in the following terms:

> "I acknowledge receipt of your letter dated 6 September 2002.
>
> The South African Government, through its High Commission in Zimbabwe, has been and will continue to, interact with the Zimbabwean Government in the protection of South African nationals interests in Zimbabwe. In this regard, I attach herewith the press release on the actions that the South African Government has taken, with particular reference to Mr Von Abo's situation. As can be seen from the attached press statement the South African Government has in fact in its interactions with the Zimbabwe Government, extended diplomatic protection to Mr Von Abo." (Emphasis added)

The press release is not in evidence. As I have indicated, no details of the so-called diplomatic protection and the effect thereof, have been

forthcoming.

I regret to say that it is difficult to resist the conclusion that the respondents were simply stringing the applicant along, and never had any serious intention to afford him proper protection. Their feeble efforts, if any, amounted to little more than quiet acquiescence in the conduct of their Zimbabwean counterparts and their "war veteran" thugs.

As I understand the pronouncements of the Constitutional Court, infra, this conduct from the authorities will not pass Constitutional muster.

[113] On 11 September 2002, Dr PJ Von Abo, a son of the applicant, writes to the Department of Foreign Affairs in the following terms:

> "As you are aware Mr CL Von Abo is to appear in Court at Mwenezi Zimbabwe on Wednesday the 18th of September 2002 since he has only been released on bail on the 20th of August 2002. The charges against him are unknown. We ask for the Department's help and assistance in this regard which had been offered previously but did not realise.
>
> We ask for your assistance in particular to the following: all the

properties that we own in Zimbabwe are illegally occupied and taken over by so-called war veterans. We ask that the businesses either be released or that we are fully compensated for what is due to us. Furthermore we ask for protection that we are not illegally arrested and harassed on our own properties. We also ask for the normal diplomatic protection and assistance that any South African citizen can expect from our Government.

I take this opportunity as citizen of South Africa to ask for your assistance since I will be travelling with him and we rely on your help in this regard. We will be leaving for Zimbabwe on 16 September 2002 via Beitbridge to attend to the matter."

[114] On 12 September 2002 the applicant writes a reminder to the South African High Commissioner in Harare pointing out that no acknowledgment or response had been forthcoming from that office. I also point out that this letter, and others to the High Commissioner, were hand delivered and written receipts form part of the papers.

[115] On 13 September 2002 the Acting Director-General of the Department of Foreign Affairs writes to the applicant's son, Dr PJ Von Abo, in the following terms:

"The South African High Commission in Harare has been notified accordingly and is in the process of attending to your request. They have conveyed the contents thereof to the Zimbabwean authorities by means of a diplomatic note.

No reply has been receive as yet from the Zimbabwean authorities about the charges laid against Mr CL Von Abo nor about what kind of assistance and protection is to be granted to both of you."

[116] On 20 September 2002 the applicant writes another letter to the South African High Commissioner listing further details of damages suffered on other farms of his in the Glendale district. This letter was also delivered by hand.

[117] On 30 September 2002 the applicant again writes to Administrative Secretary Maritz of the Ministry of Foreign Affairs pointing out that his request of 24 March 2002 had not yet been attended to.

[118] On 22 October 2002 Deputy Minister Pahad writes to the applicant in the following terms (only extracts quoted):

"I apologise for any misunderstanding that may have arisen

from the perceived lack of response from the Department of Foreign Affairs to your letters requesting assistance regarding your properties in Zimbabwe. I would, however, like to draw your attention to the fact that there has been a steady flow of information between the Department of Foreign Affairs and persons who approached us on your behalf. In replying to these persons, it had been assumed that you were being kept informed by the recipients of our replies …

Please be assured that your request to the President has been noted and that 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."

[119] On 25 October 2002 the applicant writes to the Deputy Minister telling him that the High Commissioner has not responded to his appeals and that movable property on his farms have been seized illegally. He also says the following to the Deputy Minister:

"I, as an individual cannot force the Zimbabwean Government to uphold my rights, but the South African Government can do just that under International Law; but it needs the will to do just that;

as land owners of other nationalities have been protected by their Governments." (Emphasis added)

[120] On 29 November 2002 the applicant writes to the second respondent, sending him details of earlier correspondence and saying the following:

"I do believe Honourable President that you will agree that these responses are highly unsatisfactory responses to an urgent and very serious matter. To be informed by the Deputy Minister a full seven months after my initial appeal to you that the South African High Commissioner is interacting with the Zimbabwe authorities without specifying in any way what is meant thereby and what results have been obtained is grossly insufficient.

While recognising that comparisons are often odious, I still wish to draw your attention to the discrepancy between my own position and that of two neighbours, a Mr Piere Emrick and a Mr Rolf Saldan, respectively French and German nationals who have enjoyed the full protection of their Governments and whose properties have not been affected in any way. In the Mazoe Valley, a Ms Nisliv, a Danish national, and in the Centenary district the Austrian owner of Forester Estates comprising 65 000 acres is likewise enjoying the protection of

their Government.

These are merely a few examples of very many foreign investors whose agricultural property rights are still respected by the Zimbabwean authorities. In stark contrast to this, hundreds of South African investors have lost their entire livelihood in Zimbabwe including their agricultural equipment and even their household goods in some instances. It is quite clear that South African investors are being lumped together with white Zimbabwean farmers for expropriation without any compensation by the Zimbabwean Government.

I once again appeal to you Honourable President to take our plight to heart as many of us have already been ruined financially and others are on their way there." (Emphasis added)

[121] On 22 January 2003 Human Rights Commissioner Leon Wessels writes to Deputy Minister Pahad on behalf of the applicant, urging the Deputy Minister to provide diplomatic support. Commissioner Wessels follows this up with a reminder on 11 February 2003 because there was no response.

[122] On 13 February 2003 Mr H J Botma, Chairman of Grain South Africa, writes a long letter to the second respondent. He deals with the whole saga and says *inter alia* "we repeatedly hear from our Government that the interest of South African investors in Zimbabwe are in fact being protected, but in reality the processes to which they are being exposed indicate that there is a complete breakdown in the rule of law in that country".

He goes on to say that Grain South Africa is committed to a farmer development programme that already impacts positively on the livelihoods of over 10 000 black farmers and it will continue to be part of this programme that should ensure sustainable land and agricultural reform. He urges the State President to take a firm stand on this whole issue of the Zimbabwean atrocities and to protect the South African farmers. He points out that many South Africans have made commercial investments in agriculture in Zimbabwe in an industry that contributed 60% to the GDP of that country.

[123] On 10 March 2003 Deputy Minister Pahad writes a short, cryptic letter to Human Rights Commissioner Wessels in the following terms:

> "Attached please find a copy of the letter forwarded to Mr Von Abo in this regard. As you will notice from the letter, the status

of all South African owned farms in Zimbabwe is discussed as a single issue and not as individually owned properties by the South African Government during its interactions with the Zimbabwean Government."

[124] On 12 March 2003 the applicant writes the following letter to Deputy Minister Pahad:

"I thank you for your letter dated 10 March 2003, which is most assuring. I am very grateful to you and the South African Government for the action taken to secure our investments in Zimbabwe. I can assure you that it is most appreciated and it certainly reassures me that we have future in a democratic South Africa.

I would, however, like to place on record what has happened to me and what is still happening to me in Zimbabwe.

1. Chief Chewezi moved into a house of mine on the farm Mshawa, part of Lochnagar Estates in Centenary district, 2002, cut the padlocks of the tobacco sheds and sold 30 000kg of my tobacco worth R1 million for his account. Told my manager that if he would report this to the police,

he would regret it.

2. Elliot Manyika (Governor Mashonaland Central) took over Duiker Flats, a farm in the Dindura district, part of Linabo Estates belonging to me. Totally illegally even in Zimbabwean terms. Letter attached.

3. All the implements, tractors, fuel, vehicles equipment etcetera have been seized on Von Abo Estates and Brecon, Glendale district. List attached.

4. Fauna and Flora Ranches in the Mwenezi area have been taken over by more than 300 so-called settlers. They have totally decimated the ranches which is part of a conservancy area. They snared and killed off all the game namely the following:

400 Eland

150 Giraffe

70 Tsessebe

80 Sable

9 Oryx

15 Waterbuck (there are others)

The underground pipeline supplying water to the different padlocks has been dug up and vandalised for kilometres.

At present the 20% of my cattle that is still on the property is being slaughtered at the rate of four to five per week.

5. Dunbartom Estates Centenary district has been taken over completely. A high developed tobacco concern with 60 hectare of drip irrigation. Tobacco facilities worth millions is totally out of commission. The earning capacity was more than a US dollar million per year.

I am enclosing a list of the properties their production figures, sworn valuation and loose assets taken, for your attention.

What is, however, of great concern to me is what is meant by 'would be delisted in accordance with the laws and regulations of Zimbabwe' and who is going to be held responsible for my losses and how am I going to be compensated for that."

I have pointed out that promises that farms would be "delisted" never materialised. I have pointed out that not one of the respondents

bothered to furnish an affidavit to explain their conduct, or lack thereof.

[125] On 15 March 2003, Mr Wilfried Pabst, a German businessman, wrote a long e-mail message to the Deputy Foreign Minister. I quote a few short extracts:

> "By introduction kindly be advised that I am a German businessman with substantial investments in South Africa and in a wildlife Sanctuary on Zimbabwe. Your Minister of Tourism and Environment, Mr Valli Moosa, has met with me and is informed about our venture in Zimbabwe, my trepidations about it and our hopes to be part of the Trans Frontier Conservation Area.
>
> The problems I am facing in Zimbabwe are very similar to those experienced by Mr Von Abo. However, my German Government, my Parliament and my Ambassadors have all been most forthcoming in intervening on my behalf with Zimbabwean politicians and authorities. I personally have known President Mugabe for eight years and met half of the country's Ministers and Vice President of the last three or four years in the defence of my investment. My Ambassadors, German Politicians and I have taken numerous actions at

ministerial and vice presidential level, which have ensured that my staff and my land are safe."

(He does, however, express reservations of what might happen still in future) and then says:

"With all due respect to the South African Government, Honourable Minister, the protection you have actively offered on the ground case by case have been most unsatisfactory. Your High Commission in Harare does not have remotely the same authority to deal case by case with politicians in Zimbabwe as do my ambassadors … Your Minister of Foreign Affairs, Ms Zuma, visits Zimbabwe, spends no time with members of the opposition, farmers or other interest groups and returns to South Africa to accuse the media of having made up the problems facing Zimbabwe …"

[126] On 12 May 2003 the applicant writes to the Deputy Foreign Minister enquiring about the promised delisting of properties and telling him that he is still out on bail after having been arrested on one of his properties in August 2002. He says "up to date I have had no assistance from your department regarding my arrest, and I would like to place that on record".

[127] On 17 June 2003 the Deputy Minister writes to the applicant telling him that farms listed under the Zimbabwean Land Reform Programme owned by nationals from SADC member states and/or countries with BIPPAs would be delisted. He ends the letter with his regulation promise that the Government will continue its endeavours to find the solution for the problems.

[128] On 2 December 2003 the Deputy Minister writes to Mr Boy Geldenhuys MP telling him that the BIPPA was in the process of being negotiated.

[129] On 11 December 2003 the applicant writes to the second respondent in the following terms:

> "The South African Government is well aware that despite the assurance and guarantees given by them, my total investment in Zimbabwe has been unlawfully confiscated by Zanu PF supporters, without any intervention by the South African Government. On the contrary, statements have been made by the South African authorities that actually condone the confiscation of property, assets and investments by the Mugabe regime.

I was arrested August 2002 without a warrant on one of my properties, Fauna Ranch Mwenezi. I have had to attend court hearings five times during the past eighteen months and have to be back in court on the 21st of January 2004 in Zimbabwe as I am still out on bail. I have repeatedly requested the South African Government to assist me to deal with this unlawful arrest. Up to this day I have had no assistance from the South African authority, despite the assurance that was given to this effect by the South African Government in March 2002.

I hereby place it on record that I hold the South African Government responsible for my losses in Zimbabwe which was valued by professional valuators as well as my loss of income all attributable to inaction on the part of the South African Government.

Should my personal safety be in jeopardy on my next court appearance in Zimbabwe I shall hold the South African Government directly responsible for neglecting to give me any diplomatic assistance despite assurances to the contrary."

[130] On 5 January 2004 the Deputy Minister writes to the applicant telling

him that he had noted the plight of the applicant and his next court appearance and he told the South African High Commission in Harare about this. He says "the latter will, from a consular point of view, continue to monitor and attend your court cases, as and when possible" (emphasis added).

The Deputy Minister then assures the applicant that a BIPPA had been negotiated and that "the process is in its final stages".

On 19 February 2004 the Deputy Minister again writes a letter to one Mr MacKenzie telling him that the BIPPA is in its final stages and that it is envisaged that the agreement would be signed within the first quarter of 2004.

[131] I indicated that the process of dealing with all these letters is a cumbersome one and a full analysis of every letter is, in my view unnecessary.

In my opinion, what has already been quoted and analysed is a fair reflection of the whole sorry saga.

Later requests for ICSID involvement was turned down flat. A request to inspect the draft BIPPA was refused. Many letters were

acknowledged "with gratitude" by junior officials, but nothing of substance was forthcoming from the respondents.

[132] Perhaps the applicant's tortured journey can be concluded, for present purposes, with the following startling concession made by Ambassador Mamabolo Deputy Director-General: Branch Africa on behalf of the Department of Foreign Affairs as late as March 2005:

> "In terms of the Zimbabwean Government's policy, land owned by nationals from countries with BIPPAs would be delisted. As these abovementioned agreements have been signed by a number of countries with Zimbabwe, it seems that the South African farmers, at present, do not enjoy the same level of protection as the farmers of such other countries which have signed agreements with Zimbabwean Government, a situation which the South African Government has been actively working to change. Hence the South African Government is ready to conclude and sign the BIPPA." Amen.

The applicant's damages

[133] In his founding affidavit, the applicant, in clear and emphatic terms, listed the estimated damages suffered by him. The damages were properly assessed and neatly specified in the founding affidavit.

[134] The total conservatively calculated damages, in respect of six farming units, amount to between 9.6 million and 11.4 million US dollars, or something in the order of R50 to R60 million. The details are not disputed on the papers.

The legal position: guidelines received from the Constitutional Court

[135] Understandably, counsel for the applicant, in their comprehensive argument, strongly relied on the judgment in *Kaunda and Others v President of the Republic of South Africa and Others* 2005 4 SA 235 (CC) ("*Kaunda*").

[136] *Kaunda* appears to be the leading South African authority on diplomatic protection and the state's duty under the Constitution towards its nationals who claim protection for injuries suffered abroad at the hands of a foreign government.

[137] At the outset, counsel for the applicant point out that in *Kaunda*, paragraph [29], the majority, per CHASKALSON CJ, states that "the prevailing view is that diplomatic protection is not recognised by International Law as a human right and cannot be enforced as such" and, therefore, that claimants, such as the applicant, "cannot base their claims on Customary International Law".

[138] It is then submitted on behalf of the applicant that he does not base his claims for relief on Customary International Law, although Customary International Law is relevant to the determination of the jurisdictional facts underpinning the applicant's claim, *supra*.

[139] The applicant's claim was premised on the Constitution when the requests for diplomatic protection were made to the respondents.

[140] In this regard it is convenient to quote the following words of the Learned Chief Justice:

> "[64] When the request is directed to a material infringement of a human right that forms part of Customary International Law, one would not expect our Government to be passive. Whatever theoretical disputes may still exist about the basis for diplomatic protection, it cannot be doubted that in substance the true beneficiary of the right that is asserted is the individual.
>
> [65] The founding values of our Constitution include human dignity, equality and the advancement of human rights and freedoms. Equality is reflected in the principle of

equal citizenship demanded by section 3.

[66] The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution and informs the manner in which Government is required to exercise its powers. To this extent, the provisions of section 7(2) are relevant, not as giving our Constitution extraterritorial effect, but as showing that our Constitution contemplates that Government will act positively to protect its citizens against human rights abuses.

[67] The entitlement to request diplomatic protection which is part of the Constitutional guarantee given by section 3 has certain consequences. 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."

[141] The applicant therefore had a right to apply for diplomatic protection, and the respondents, at a minimum, were under a Constitutional duty at the very least to properly (that is rationally) apply their minds to the

request for diplomatic protection.

The Learned Chief Justice puts it as follows in paragraph [69]:

> "There may thus be a duty on Government, consistent with its obligations under International Law, to take action to protect one of its citizens against gross abuse of International human rights norms. A request to the Government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by Government, but if it were, the decision would be justiciable, and the court could order the Government to take appropriate action."

[142] Inasmuch as it may have been argued on behalf of the respondents (although not with great force) that the question of diplomatic protection falls in the domain of the Executive, so that a court ought not to interfere, given the principle of the Separation of Powers, regard should be had to the following words of the Learned Chief Justice:

> "[77] 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 matter 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.

[78] 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 enquiry are justiciable. This also applies to an allegation that Government has failed to respond appropriately to a request for diplomatic protection.

[79] 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 …

[80] 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." (Emphasis added)

[143] From these guidelines provided by the Constitutional Court it appears that there need not be an actual refusal on the part of Government to grant diplomatic protection before a court will intervene. In an appropriate case, a court can also come to the assistance of the aggrieved national where Government "fails to respond appropriately" or "deals with the matter in bad faith or irrationally".

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 fifty 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.

[144] In *Kaunda*, the Learned NGCOBO J, in his concurring judgment, also provided valuable guidelines for purposes of adjudicating upon a case of this nature.

[145] *Inter alia*, the Learned Judge concentrated on the construction of sections 3(2) and 7(2) of the Constitution in the context of cases of this nature.

The relevant provisions in section 3 read as follows:

"3(1) There is a common South African citizenship.

(2) All citizens are -

(a) Equally entitled to the rights, privileges and benefits of citizenship; and

(b) Equally subject to the duties and responsibilities of citizenship."

The relevant provisions in section 7 read as follows:

"7(1) The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[146] I find it convenient and helpful to quote extracts from the remarks made by the Learned Judge:

"[175] The starting point in the determination of the question whether there is a duty to provide diplomatic protection is

section 3(2)(a). This section provides that all South African citizens are 'equally entitled to the rights, privileges and benefits of citizenship'. This provision is the source of the rights, privileges and benefits of citizenship to which South African citizens are entitled under our Constitution.

[176] What section 7(2) does, on the other hand, is to bind the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Here it must be borne in mind that the right to citizenship is constitutionally entrenched in the Bill of Rights. It is clear from section 3(2)(a) that, in addition to certain rights, there are benefits and privileges to which South African citizens are entitled. In this sense, sections 3(2) and 7(2) must be read together as defining the obligations of the Government in relation to its citizens.

[177] Section 3(2)(a) therefore confers a right upon every citizen to be accorded the rights, privileges and benefits of citizenship. This provision also makes it clear that citizenship should be treated equally in the provision of rights, privileges and benefits. This, of course, does not

mean that citizens may not be treated differently where there are compelling reasons to do so …

[178] Flowing from this, a citizen has the right under section 3(2)(a) to require the Government to provide him or her with rights, privileges and benefits of citizenship. The obligation of the Government is to consider rationally such request and decide whether to grant such request in relation to that citizen. If the Government decides not to grant such request its decision may be subject to judicial review. This is so because such a decision is taken in the exercise of public power and the exercise of public power must conform to the Constitution. The question whether the exercise of public power conforms to the Constitution must be determined by the courts.

[179] The question that must be considered next is whether the rights, privileges and benefits comprehended in section 3(2)(a) include the right, privilege and benefit to request diplomatic protection …

[188] I conclude therefore that diplomatic protection is a benefit within the meaning of section 3(2)(a). It follows therefore

that sections 3(2)(a) and 7(2) must be read as imposing a constitutional duty on the Government to ensure that all South African nationals abroad enjoy the benefits of public protection. The proposition that the Government has no constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the Governments' own declared policy and acknowledged constitutional duty." (Emphasis added)

[147] In her judgment in *Kaunda*, O'REGAN J said the following about section 3:

"[242] In my view, therefore, to the extent that section 3 entitles citizens to the privileges and benefits of citizenship, this obliges the state to provide diplomatic protection to citizens at least in circumstances where citizens are threatened with or have experienced the egregious violation of International human rights norms binding on the foreign state that caused or threatened to cause the violation."

[148] Against this background I debated with counsel for the applicant the remedy sought and the nature of the relief called for.

What is left, after the ICSID prayer and the review prayer had been abandoned, is declaratory, mandatory and supervisory relief. This appears from the notice of motion, as it now stands, *supra*.

[149] I enquired from counsel whether the provisions of section 38 of the Constitution could come into play.

Section 38 provides that "anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights …" (emphasis added).

My question was whether section 38 could be applied in view thereof that section 3 is, strictly speaking, not part of the Bill of Rights.

I was referred to the words of NGCOBO J, *supra*, that section 3 and section 7 (which is part of the Bill of Rights) should be read together for purposes of deciding this issue of diplomatic protection.

I was also referred to *Minister of Health and Others v Treatment Action Campaign* (No1) 2002 5 SA 703 (CC) at 708D where the following is stated:

> "[7] Section 38 of the Constitution empowers a court to grant appropriate relief when it concludes that a breach or threatened breach of a person's rights under the Bill of Rights has been established. This provision is mirrored in section 172 of the Constitution, which similarly empowers a court when deciding a Constitutional matter within its jurisdiction to grant 'just and equitable' relief." (Emphasis added)

If the application were to succeed, the provisions of section 172 must, for obvious reasons, come into play.

From the aforementioned analysis, I must conclude that section 38 is applicable, and, even if it is not, section 172 is to be interpreted as providing the same wide discretion when it comes to deciding what "appropriate relief" or "any order that is just and equitable" would be in the specific circumstances of the case.

What may then serve as a useful guide, would be the well-known words of ACKERMANN J in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) at 799F where the following is said with regard to the corresponding provisions in the interim Constitution:

"[19] Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."

[150] On the same subject, it is convenient to quote what was said in *Mohamed and Another v President of the RSA and Others* 2001 3 SA 893 (CC) at 921G-922H when it comes to the question of appropriate relief:

"[69] … With regard to the prayer for mandatory relief in the form of an order on the Government to seek to intercede with the United States authorities regarding the wrong done to Mohamed, the Government's opposition to any form of order was even more forceful. More specifically it was submitted that any such an order would infringe the separation of powers between the Judiciary and the

Executive. In substance the stance was that Mohamed had been irreversibly surrendered to the power of the United States and, in any event, it was not for this Court, or any other, to give instructions to the Executive.

[70] We disagree. It would not necessarily be futile for this Court to pronounce on the illegality of the Governmental conduct in issue in this case …

[71] Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequence of prejudice caused to him. To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights."

[151] The footnote introduced by this court after stating "the Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our constitutional duty …" reads as follows:

> "Under section 7(2) read with sections 38 and 172(1)(a) of the Constitution." (Emphasis added)

[152] It can do no harm to bear the provisions of two other related sections in the Constitution in mind:

Section 232 provides that Customary International Law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Section 237 provides that all Constitutional obligations must be performed diligently and without delay.

[153] As to appropriate relief, the Constitutional Court has also been known to grant supervisory relief in the sense that the offending organ of state must report progress back to the court – see *Sibiya v Director of Public Prosecutions, Johannesburg* 2005 5 SA 315 (CC) at 337G-338G.

In the judgment, YACOOB J says the following:

> "[62] This Court has the jurisdiction to issue a *mandamus* in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order. It is appropriate in this case for this to be done. The question of a supervisory order was raised with counsel at the hearing of the case. None raised any objection to a supervisory order."

See also *Kiliko and Others v Minister of Home Affairs and Others* 2006 4 SA 114 at 129C-130I.

[154] In all the circumstances I have come to the conclusion that the applicant has made out a proper case for appropriate relief.

[155] The certification process, as described by section 172(2)(a) of the Constitution will be attended to, in the normal course, by the applicant in cooperation with the respondents.

Costs

[156] Counsel for the applicant urged me, in the event of the applicant succeeding, to grant the costs flowing from the employment of three

counsel and also to grant the costs on a punitive scale.

[157] They made compelling submissions in this regard. They argued that the respondents failed to comply with the requirements of section 165(4) of the Constitution which instructs organs of state to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. The opposing affidavit of Stemmet was filed out of time. No diligent effort was made to deal with the argument as to inadmissibility of the evidence, *supra*, mentioned in the replying affidavit. The affidavit of Deputy Minister Pahad, such as it was, was handed up a year after the replying affidavit was filed and on the morning when the proceedings commenced. There was no application for condonation. The South Africa / Swiss Bilateral Treaty, *supra*, was tendered for inspection on the second day of the hearing without compliance with the rules. The BIPPA was not shown to the applicant.

[158] It was argued that the respondents' truancy in this litigation is cause for concern, given that they are no ordinary litigants, but organs of state, with unlimited resources available for the purposes of litigation.

[159] Nevertheless, although these submissions are not without merit, it also occurs to me that a substantial portion of the time and costs flowing

from these proceedings was devoted to the ICSID argument and the review portion of the initial relief sought. This was abandoned. Although the ICSID submissions were not without relevance, I consider it equitable to take this issue into account when deciding whether or not a punitive cost order would be appropriate.

[160] In all the circumstances, I have decided against awarding the costs of three counsel and making a punitive cost order.

The Order

[161] I make the following order:

1. It is declared that the failure of the respondents to rationally, appropriately and in good faith consider, decide and deal with the applicant's application for diplomatic protection in respect of the violation of his rights by the Government of Zimbabwe is inconsistent with the Constitution, 1996 and invalid;

2. It is declared that the applicant has the right to diplomatic protection from the respondents in respect of the violation of his rights by the Government of Zimbabwe.

3. It is declared that the respondents have a Constitutional

obligation to provide diplomatic protection to the applicant in respect of the violation of his rights by the Government of Zimbabwe.

4. The respondents are ordered to forthwith, and in any event within 60 days of the date of this order, take all necessary steps to have the applicant's violation of his rights by the Government of Zimbabwe remedied.

5. The respondents are directed to report by way of affidavit to this court within 60 (sixty) days of this order, what steps they have taken in respect of paragraph 4 above, and to provide a copy of such report to the applicant.

6. The applicant's claim for damages against the respondents, subject to effective compliance with paragraphs 4 and 5 above, and as formulated in the notice of motion, is postponed *sine die*.

Leave is granted to all parties to supplement their papers prior to the hearing of this claim for damages, if appropriate.

7. The respondents are ordered, jointly and severally, to pay the costs of the applicant, which will include the costs flowing from

the employment of two counsel.

W R C PRINSLOO
JUDGE OF THE HIGH COURT

3106/2007

Heard on:	6-8 May 2008
For the Applicant:	Adv Peter Hodes SC, A Katz & M Du Plessis
Instructed by:	Messrs W J Herbst, c/o J V Penzhorn
For the Respondent:	Adv P M Mtshaulana SC & M Sello
Instructed by:	The State Attorney
Date of Judgment:	29 July 2008