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

CASE NO: 20320/2002

Date of Judgment : 20 July 2005

REPORTABLE

In the matter between:

JOSIAS VAN ZYL	1ST Applicant
JOSIAS VAN ZYL and GAIL VAN ZYL N.N.O. (Cited in their capacities as Trustees for the time being of THE BURMILLA TRUST NO. TMP 4027)	2ND Applicant
JOSIAS VAN ZYL and GAIL VAN ZYL N.N.O. (Cited in their capacities as Trustees for the time being of THE JOSIAS VAN ZYL FAMILY TRUST NO. TMP 4028)	3RD Applicant
SWISSBOROUGH DIAMOND MINES (PTY) LTD	4TH Applicant
PATISENG DIAMONDS (PTY) LTD	5TH Applicant
MOTETE DIAMONDS (PTY) LTD	6TH Applicant
RAMPAI DIAMONDS (PTY) LTD	7TH Applicant
MATSOKU DIAMONDS (PTY) LTD	8TH Applicant
ORANGE DIAMONDS (PTY) LTD	9TH 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 OF THE REPUBLIC OF SOUTH AFRICA	3RD Respondent
THE DEPUTY MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA	4TH Respondent

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JUDGMENT

PATEL, J

A. General Introduction

Preface

[1] This case is about the applicants' claim to an alleged right to diplomatic protection from the respondents. I am strained by the sheer shipment of documents contained in forty-odd lever arch files comprising of almost sixteen thousand paginated pages and argument that lasted no less than seven days in court.

[2] A draft judgment was completed during the administrative recess of June-July 2004. However, the Constitutional Court's judgment in ***Kaunda and Others v President of the RSA and Others (2)***[1] was handed down on 4 August 2004. On studying the judgment, it became apparent that the judgment of the highest Court had some bearing on the present matter, thus I invited the parties to file written submissions. The applicants filed their submissions on 15 November 2004 and the respondents delivered their submissions on 26 November 2004. These submissions comprise of about 425 pages in total. The submissions were requested and received so as to work on the draft judgment during the administrative recess of December 2004 – January 2005. The first applicant, Josias van Zyl during the recess delivered, on 15 December 2004, to the security officer at the Palace of Justice, three volumes of further submissions "in an attempt to correct the many inaccuracies and distortions of the facts and application of law as contained in the respondents' submissions …". Each of these volumes comprise of approximately 370 pages. They were received by me on 24 January 2005. It has been a daunting

[1] 2004 (1) BCLR 1009 (CC).

task, requiring rigour and industry to deal with the volume of material as well as the magnitude, novelty and complexity of the issues concerning diplomatic protection and the breadth of the respondents' application to strike out.

Introduction

[3] This is an application for the review and setting aside of decisions taken by certain organs of the South African state in declining to afford diplomatic protection or *effective* diplomatic protection to the applicants in their longstanding dispute with the Government of the Kingdom of Lesotho ("GoL") concerning the expropriation without compensation of their properties in Lesotho by the GoL. The factual milieu that gave rise to the dispute between the applicants and the GoL are discernable from two comprehensive judgments[2]. This application does not involve an inquiry into or determination on the validity of action taken by GoL in Lesotho. It is fundamentally concerned with reviewing the decisions of the organs of the state and a direction to the executive of the Republic of South Africa to provide diplomatic protection and more so to provide *effective* diplomatic protection to the applicants.

Parties

[4] The parties to these proceeding are nine applicants. They are the first applicant Josias van Zyl married to Gail van Zyl, both of them are South African citizens. They are the trustees of the second and third respondents, namely the Burmilla

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[2] *Attorney General of Lesotho and Another v Swissborough Diamond Mines (Pty) Ltd and Others* [1997] 8 BCLR 1122 (CA); *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1992 (2) SA 279 (T) at 287F-299H/I.

Trust and Josias van Zyl Family Trust. The forth, fifth, sixth, seventh, eighth and ninth applicants are Swissborough Diamond Mines (Pty) Ltd, Patiseng Diamond (Pty) Ltd, Motete Diamonds (Pty) Ltd, Rampai Diamonds (Pty) Ltd, Matsoku Diamonds (Pty) Ltd and Orange Diamonds (Pty) Ltd. These latter six applicants are companies registered in terms of the Company Rules of the Kingdom of Lesotho and collectively referred to as *Swissborough*. The first applicant owns 5% of the issued shares in the fourth applicant. The Burmilla Trust, the second applicant owns 90% of the issued shares in the fourth applicant and holds 99% of the issued shares in the fifth to ninth applicants. The Josias van Zyl Family Trust owns 5% of the issued shares in the fourth applicant and holds 1% of the issued shares in the fifth to ninth applicants. The directors and shareholders of the six companies in the Swissborough group are South African citizens. However, the six companies in the group are Lesotho companies incorporated in that country for purposes of diamond mining.

[5] The first respondent is the Government of the Republic of South Africa. The second, third and fourth respondents are the President, the Minister of Foreign Affairs and the Deputy Minister of Foreign Affairs. They are collectively referred to as *the respondents* or *the executive* unless it is necessary to identify them in particular.

Preliminary issue

[6] At the outset of the hearing of the application there was an indication by the applicants' lead counsel Mr Dugard SC, appearing with Mr Katz and Mr Du Plessis, that the respondents wish to introduce an application to strike out certain

portions of the applicants' replying and supplementary replying affidavits. Mr Grobler SC, the respondents' lead counsel together with Mr Raath SC and Mr Mphaga, signified that he would do so and wished to hand up an application to amend the respondents' application to strike out which was served on the applicants on 24 October 2004 and which document did not find its way into the court file. Mr Grobler indicated that they were only informed in a cursory manner about the applicants' preliminary objection to the late filling of the respondents application to strike out. Mr Dugard insisted that the applicants wish to argue the preliminary issue by contending that the respondents' application to strike out is not properly before the Court.

[7] Thereafter, Mr Katz, for the applicants, handed up a document headed: "*applicants' note on how this court should deal with the respondents' application to strike out applications*". Counsel submitted that in terms of section 173 of the Constitution this Court has the inherent power to protect and regulate its own processes by having regard to the interest of justice. The emphasis was that the interest of justice required this Court not to entertain the respondents' striking out application separately from the main application, because *first* in order to determine the merits of the striking out application the Court is required to consider the merits of the main application as well. This requires full ventilation of the international law, constitutional law and other submissions. *Secondly* the manner and timing of the launching of the striking out application constitutes an abuse of the process of the court.

[8] I shall deal first with the timing of the striking out application. The applicants' replying affidavit was filed on 5 May 2003. Subsequently, on 11 June the

applicants addressed a letter to the Deputy Judge President confirming, *inter alia*, that the matter is ripe for hearing and no supplementary papers have to be filed and also intimated that the respondents' attorney had confirmed that the duration of the proceedings and that the respondents' counsel were in a position to have the matter heard from 27 to 31 October 2003. In response to the applicants' attorney's letter, on 13 June, Stafford DJP directed that all the papers for the main application and any ancillary applications must be completed, paginated and indexed at least before 5 September 2003 and filed with the clerk of the third court. By 5 September the respondents did not file any ancillary application, such as the application to strike out. However, a month later, on 6 October, the respondents served and filed their application to strike out together with their heads of argument. It was argued for the applicants that the respondents failed to comply with the Deputy Judge President directive and they failed to tender any explanation for their failure to apply for condonation. Consequently, Mr Katz submitted that the respondents' failure to tender an explanation or to seek condonation constitutes an abuse of the process of court and the respondents' strike out application should be dismissed with costs let alone hearing it separately from the main application.

[9] Mr Katz also contended that in order to determine the merits of the strike out application properly then there has to be full ventilation of the international law and constitutional laws issues. And for this Court to consider the arguments on the striking out application, it would have to consider in some detail all the affidavits and supporting annexures. It was submitted that since the respondents would have it that the striking out application is to be argued first, then a ruling on it would have to be given and only thereafter would the parties proceed to argue the main application. This procedure would be unfair to the applicants and certainly not in

the interest of justice. Consequently, the approach advocated by the respondents would mean that the Court would effectively have the merits of the main application argued twice, first during the striking out application and also during the hearing of the main application. Mr Katz, in my view, rightly submitted that the main application and the striking out application should be heard together rather than separately. Mr Grobler, on behalf of the respondents, conceded and it was not necessary to make a ruling. The entire application proceeded on the basis that the application to strike out would be considered together with the main application. The Court assured respondents' counsel that an opportunity would be afforded to them to highlight any aspects of the striking out application.

[10] Suffice to point out that the purpose of an *ad hoc* directive, such as the one issued by the Deputy Judge President, is to ensure proper case management and to facilitate full ventilation of the real issues so as to ensure that justice is done. A directive by its very nature is designed to meet the needs of a specific matter. It is in essence a refinement of the general procedures directing that litigants to come to grip with the real issues between them so that they are fully ventilated in a just and a fair manner. An *ad hoc* directive should not be considered as something akin to a rule of law by virtue of section 173 of the Constitution and section 43 of the Supreme Court Act 59 of 1959. A court is empowered to protect and regulate its own processes by taking account of the interest of justice and it is competent to condone non-compliance with an *ad hoc* directive even where specific time limits are set for the delivery of any processes in respect of any particular matter. Whether a substantive application for condonation is required will depend upon the nature, the importance and the complexity of the case. Even when there is no substantive application for condonation for non-compliance with a particular *ad*

hoc directive the court's inherent power to regulate its own processes *may be* invoked in the interest of justice.

B. Application for review and mandamus

Salient underlying facts

[11] Briefly, the salient underlying facts pertinent to the present purposes are in the decisions of the respondents as a consequence of the applicants' request for diplomatic protection. The request for diplomatic protection arose out of the expropriation by the GoL of the applicants' property rights in execution of the Lesotho Highlands Water Projects. The expropriation was effected by the GoL through various measures which resulted in litigation in the Lesotho High Court and culminated in an appeal[3].

[12] As a consequence of the expropriation of the applicants' property rights, they maintained that the GoL violated the *International Minimum Standard* in its treatment of the applicants *allegedly* with the knowledge and support of the first respondent. It is against this synoptic backdrop that the applicants initially from October 2000 to March 2001 requested diplomatic protection from the respondents.

[13] On 3 April 2001, the fourth respondent advised the second applicant that the third respondent was unable to accede to their request for diplomatic protection or mediation in the second applicant's dispute with the GOL. On 7 August 2001, the

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[3] *Attorney General of Lesotho and Another v Swissborough Diamond Mines (Pty) Ltd and Others* [1997] 8 BCLR 1122 (CA) at 1126 [E], 1129 [C]-[E].

applicants' renewed their request for diplomatic protection and the second respondent's legal adviser, Adv Gumbi advised as follows:

> "...
> ...
>
> I have been directed to inform you that the South African Government is unable to grant your request for the 'diplomatic protection' you asked for in relation to your private commercial dispute with the Government of Lesotho.
>
> The President has from time to time on request by South African companies raised matters of this nature with other Governments. This is done clearly for purposes of allowing the parties to explore possible settlement, not as a matter of fight.
>
> Reasons for the Government's inability to intervene has of right in this matter is that no such right to 'diplomatic protection' of commercial transactions exist in law.
>
> You have, correctly, pursued this matter through the judicial system in Lesotho. We encourage you to continue in that manner.
>
> We trust that this matter has now been settled."

[14] Subsequently, the applicants again renewed their request for diplomatic protection to the second respondent. The latter informed the applicants in a letter of 20 July 2001 and again on 6 November 2001 that a *note verbale* was transmitted on 5 March 2002 by the first and third respondents, at the request of the second respondent, to the GoL. The *note* reads as follows:

> "The Department of Foreign Affairs of the Republic of South Africa presents its complements to the high commission of the Kingdom of Lesotho and have the honour to submit, for the attention of the Lesotho Government, copies of correspondence directed to the ... of the Republic of South Africa by Mr Josias van Zyl, chairman of the Board of trustees of the Burmilla trust. The Department of Foreign Affairs has been requested by the presidency to bring the matter to the attention of the Government of Lesotho.
>
> The Department of Foreign Affairs of the Republic of South Africa avails itself of this opportunity to renew to the high commission of the Kingdom of Lesotho the assurance of its highest consideration."

Relief sought by the applicants

[15] The substantive relief that the applicants seek are:

> "(1) Reviewing and setting aside the decision of second respondent taken on or about 6 November 2001 to refuse to afford diplomatic protection to applicants in their disputes with the government of the kingdom of Lesotho concerning the cancellation of mining leases in Lesotho and what amounted to expropriation without compensation of applicants' ... by the government of the kingdom of Lesotho ('the disputes');
>
> (2) Reviewing and setting aside the decision of the second respondent taken on or about 6 July 2001 to refuse to afford diplomatic protection to applicants in the dispute;
>
> (3) Reviewing and setting aside the decision of the third, alternatively fourth respondent taken on or about 3 April 2001 to refuse on behalf of the first respondent to exceed to the applicants' request for diplomatic protection in the dispute;
>
> (4) Declaring the above decisions to be null and void and of no force and effect;
>
> (5) Directing the respondents to take all steps necessary to vindicate the rights and claims of the applicants, including but not limited to providing diplomatic protection to applicants to applicants as a consequence of the government of the kingdom of Lesotho's violation of applicants' rights pertaining to the mining leases granted to fourth applicant and registered in 1988 and the extension mining leases granted to fourth applicant during 1990;
>
> (6) Granting further and/or alternative relief;
>
> (7) Directing respondents to pay applicants' costs of suit;"

What is diplomatic protection?

[16] At the heart of this matter is the applicants' complaint that the decision by the respondents in refusing diplomatic protection is unlawful. This raises the question: what is diplomatic protection? The appellation *diplomatic protection* is not a

precise term of art.[4] The classical formulation of diplomatic protection was enunciated by the Permanent Court of International Justice in the ***Mavrommatis***[5] case that:

> *"It is an elementary principle of international law that a State is entitled to protect its subject, when injured by acts contrary to international law committed by another State, from which they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its rights to ensure, in the person of its subject, respect for the rules of international law."*[6]

[17] At the request of the General Assembly of the United Nations, the International Law Commission (ILC) was tasked to examine the nature and scope of diplomatic protection because the exercise of diplomatic protection has generally been regarded as the right of the State and any reliance on that right is within the absolute discretion of states[7]. This right is premised on the fiction that an injury to an individual is an injury to the State of nationality. The discretionary character of diplomatic protection has attracted trenchant criticism since it is regarded as incompatible with an international legal system committed to human rights.[8] Although free from controversy, it has been suggested that the right to diplomatic protection should be viewed as being the right of the individual with the State merely being the agent.[9] Presently, Professor John Dugard is tasked to initiate reports and codification proposals on the topic of diplomatic protection. He has submitted four reports on the subject dealing, *inter alia*, with the duty to extend

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[4] *Kaunda v President of the RSA* 2004 (10) BCLR 1009 (CC) para [26] at 1018B/C.

[5] *Mavrommatis Palestine Concessions, Judgment No 2,* 1924 *PCIJ,* Ser A, No 2.

[6] Id at 12.

[7] Phoebe Okowa, chapter 15: "*Issues of Admissibility and the Law on International Responsibility*" 472 at p 477, in *International Law*, (2003) edited by Malcolm D Evans.

[8] Id at p 478.

[9] M. Bennouna, *Preliminary report on Diplomatic Protection*, (1998), United Nations Document A/CN. 4/485, paras 34-37; 65-66; J. Dugard, *First Report on Diplomatic Protection*, (2002), United Nations Document A/CN 4/506, paras 17; 61-74.

diplomatic protection to nationals, the exhaustion of local remedies and the diplomatic protection of corporations and shareholders.[10] The most fundamental aspect of diplomatic protection at an international level is the right for a State to bring a claim to an international tribunal on behalf of its nationals whose rights have been violated by another State. Diplomatic protection is a hallmark of nationality status, an aspect I will consider later.

The Dugard proposal

[18] In the *Report of the International Law Commission on the work of the fifty-second session*[11], the Special Rapporteur is of the view that the traditional position has changed or at least has been undermined by more modern State practice. Professor Dugard noted:

> "Developments in international human rights law, which elevate the position of the individual in international law, have further undermined the traditional doctrine. If an individual has the right under human rights instruments to assert his basic human rights before an international body, against his own State of nationality or a foreign State, it is difficult to maintain that when a State exercises diplomatic protection on behalf of an individual it asserts its own right."[12]

The *Report* examines State practice on the conditions under which states exercise diplomatic protection[13] and concludes:

> "In sum, there are signs in recent State practice, constitutions and legal opinion of support for the view that states have not only a right but a legal obligation to protect their national abroad. This approach is clearly in conflict with the traditional view. It cannot, however, be dismissed out of

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[10] J. Dugard, *First Report on Diplomatic Protection*, fn. 10 above, para 36. See: *Kaunda v President of RSA* 2004 (10) BCLR 1009 (CC) para [28] at 1018F-G/H.

[11] *The Report*, 1 May – 9 June and 10 July – 18 August (2002) A/55/10.

[12] Id at para 66.

[13] Id at paras 78-86.

> hand as it accords with the principal goal of contemporary international law – the advancement of the human rights of the individual rather than the sovereign powers of the State. This issue is therefore one that needs to be considered, if necessary by way of progressive development."

[19] In the *Report*, Professor Dugard proposed *de lege ferenda*, that is that a State should have a legal duty under general international law to exercise diplomatic protection on behalf of the injured national upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State[14]. According to Professor Dugard,

> "If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad"[15]

After debate, the ILC rejected the Dugard proposal regarding Article 4 and decided instead that:

> "The issue was not yet ripe for the attention of the Commission and that there was a need for more State practice, and, particularly, more *opinio juris* before it could be considered."

[20] The applicants' argument, in these proceedings, is not predicated on any international law obligation which the respondents may be under to provide diplomatic protection, but flows instead from its basis in South African law and particularly constitutional law. It is contended that while international law may not have reached a point where states are under an international law duty to provide diplomatic protection to their nationals, the applicants submit that the their case is part of the movement which Professor Dugard identified in his *Report* to the ILC. It is further submitted that this Court is at liberty to review the scope and ambit of

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[14] Draft Article 4(1).

[15] *The Report*, fn 10 above, paras 87-89.

diplomatic protection under the Constitution notwithstanding international law's slow state of progress.[16]

Applicants' claim to "right" to diplomatic protection

[21] The applicants' claim to diplomatic protection is two-fold. *First*, that the Constitution imposes a positive obligation on the respondents to remedy the violation of the applicant's property rights by the GoL. It is contended that the first respondent is under a duty in terms of section 7 of the Constitution to promote, secure and protect the rights in the Bill of Rights. It was argued that the omission by respondents to exercise diplomatic protection on behalf of applicants as against Lesotho bears a causal nexus with the continuing harm that applicants suffer in respect of their right to property under the Constitution. That omission is particularly repugnant in respect of the second respondent, given his oath of office under the Constitution to "*protect and promote the rights of all South Africans"*, to "*do justice to all*", and to devote himself "*to the well-being of the Republic and all its people*". The continued failure by the first respondent and its officials, since 1994, to diplomatically protect applicants in their dispute with the GoL is a violation of the Constitution's injunction in section 237 that the Government is to "*diligently and without delay"* carry out "*all Constitutional obligations*". In support of this argument counsel for the applicants relied on ***Mohamed and Another v President of the Republic of South Africa***[17], where the Constitutional Court held that the South African government should have acted positively by securing an undertaking from the US government that Mohamed would not risk

[16] See *Kaunda* 2004 (10) BCLR 1009 (CC). See para [41] below. See also: *Abbasi and another v Secretary of State for Foreign affairs and Another* [2002] EWCA Civ 1598 paras 41 and 69.

[17] 2001 (3) SA 893 (CC).

being put to death and to protect his constitutional rights through the engagement of diplomatic channel. It was submitted that likewise the respondents ought to act positively to protect the applicants' rights through the exercise of effective diplomatic protection in terms of both the *International Minimum Standard*, as well as section 25(2)[18] of the Constitution, since the applicants have a right to compensation where their property rights have been expropriated.[19]

[22] *Secondly*, that the Constitution entrenches the right to citizenship as a basic human right.[20] This right to citizenship is one of few rights expressly reserved for South Africans. It was contended that in a substantive sense the "*rights, privileges and benefits of citizenship*" include the right to remain in and return to South Africa, to enjoy the protection of its laws, the right to have a passport (which is expressly provided in section 21(4) of the Constitution) and the right of adult citizens to vote and stand for office. At international law, not just any individual is entitled to diplomatic protection since nationality is a prerequisite. It is the bond of nationality between the State and the individual that confers the protection under customary international law. It was submitted that in a world consisting of nation

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[18] Section 25(2) of the Constitution provides:

"*Property may be expropriated only in terms of law of general application.*

(a) for a public purpose or in the public interest; and

(b) *subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.* "

[19] In respect of the right to compensation arising from an expropriation in breach of the international minimum standard: see Dugard *International Law – A South African Perspective* (2000) 2nd Ed, p 225. In respect of the right to compensation arising from an expropriation in breach of section 25 of the Constitution: see the judgment of Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 788 (CC) at paras 57-59.

[20] Section 3 read with section 20 provides 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.

(3) National legislation must provide for the requisition, loss and restoration of citizenship."

"S.20 *No citizen may be deprived of citizenship.*"

states, citizenship (or nationality) creates a legal link between a State and the people who are its nationals.

[23] Hence, it was argued that the vulnerability of applicants is plain since their rights are being violated and thereby entitling them to request and receive diplomatic protection as citizens of South Africa fundamentally for three reasons. *One*, the applicants' right under customary international law (which as asserted is part of South African law through section 232 of the Constitution) regarding treatment by a foreign State, in that latter State in accordance with the *International Minimum Standard*, has been violated through the acts of expropriation by the GoL without compensation having been paid. *Two*, the applicants' right to property under the South Africa Constitution has been, and continues to be, violated by means of various stratagems to which the South African Government has been involved in or acquiesced in the violation of applicants' property rights. After 1994, that continued involvement or acquiescence amounted to a violation of applicants' property rights under the Interim, and the Final Constitution. *Three*, applicants' right to equality has also been violated.

[24] On 20 July 2001, the second respondent's office addressed a letter to applicants in which it advised that:

> "the South African government is unable to grant your request for the 'diplomatic protection' you ask for in relation to your private commercial dispute with the Government of Lesotho."

The second respondent proceeded to indicate that on occasions on request by South African companies matters of this nature were raised with other governments. This was done purely for purposes for facilitating the parties to explore possible

settlement. It is not as a matter of right. Hence the applicants submitted that the exercise of public power in this fashion is discriminatory and unconstitutional since it gives the impression that the President exercises his public power in order to protect the unlawful conduct of the first respondent in the execution of the Lesotho Highlands Water Project ("LHWP") Treaty to avoid paying of compensation to the applicants. Such compensation is a water transfer cost related expense in the LHWP Treaty for which the first respondent is liable and that it **"**would set an unhealthy precedent for other businesses to request diplomatic intervention from the South African government in their disputes with foreign governments."

[25] It was also submitted that a democratic society based on a supreme Constitution, the advancement of human rights and freedoms, and which constitutionalises citizenship as a fundamental right indeed places a legal duty on the State to offer its citizens diplomatic protection against foreign powers and in this regard Professors Erasmus and Davidson are of the view that:

> "Citizenship should, logically, also include entitlement to diplomatic protection. Without this dimension it will lose an essential part of its meaning and effect. Citizenship is also about the link between the state and its citizen vis-à-vis other states [this much is evidenced by the very existence under international customary law of the doctrine of diplomatic protection whereby states are entitled to advance claims against other states for violations of their nationals' rights]. It cannot have a restricted, internal meaning such as the right to vote. … South African constitutional law clearly does not relegate citizenship to an inferior status or a right to be 'enjoyed' only with the leave and licence of state officials. Neither does it suggest that South Africans lose their rights or claims to their state's obligation to protect them if they engage in international travel or commerce. As a matter of fact, the constitution expressly recognises that they are entitled to travel and trade." [21]

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[21] Erasmus and Davidson '*Do South Africans have a right to diplomatic protection*', (2000) 25 SAYIL, 112, at 126. See: *Kaunda v President of RSA* 2004 (10) BCLR 1009 (CC) paras [58]-[67] at 1026B/C-1027F; fn 47 at 1027H-I.

Principles relevant to analyse the facts

[26] For purposes of analysing the factual matrix of this matter it is necessary to allude broadly to the pertinent principles of international law. Private individuals or companies are proper subjects of international law[22] and they benefit from the protection of international law when specific status are conferred upon them in treaties or agreements between states whereby rules of international law may sometimes govern the relationship between states and such individuals or companies.[23] The proper subjects of international law are sovereign States and international organizations with international legal personality. They are designated of possessing international rights and duties and have procedural capacity to maintain their rights by bringing international claims before international tribunal.[24]

[27] Where a private individual or company enters into a mining lease with a sovereign State for the exploitation of mineral resources in that country, then that private individual or company acts on equal footing with the sovereign State in terms of that State's private law as any of its citizen would do when concluding a contract with it. Its remedies for breach or enforcement of the contract are those which flow from the contract and are determined by the proper law of the contract. Such contracts are not treaties merely because one contracting party is a State. Consequently a breach of that contract *per se* by a contracting State does not incur

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[22] cf: Dugard, *International Law*, pp 1-2.

[23] Id at pp 22.

[24] *Reparation for Injuries Suffered in the Service of the United Nations* 1949 ICJ Report 174 at 179.

international responsibility of the State party.[25] According to Professor Booysen that:

> "One may likewise say that there is a hypothesis that individuals usually contract on the basis of a particular national private law. This is also the case where they contract with foreign states. The particular national system is then determined by the rules of the conflict of laws. In the normal course, national law permits individuals to select the law which will govern their commercial contract. ... . Party autonomy to select the applicable law of an international contract is not only a feature of national laws, but has also been described as a general principle of law recognized by civilized states and thus a principle of international law."[26]

In contracts between States and individuals, the parties can select a non-national law like international law to govern their contract.[27]

[28] The municipal law allows the parties to make a choice of law which may include international law or by agreement it may be internationalised so that the individual or company is entitled to take its dispute to an international arbitration tribunal in terms of an arbitration clause contained in the contract or by virtue of special treaty arrangements between its State of nationality and the host State. In such arbitration tribunal, international law or a mixture of both will be applied, depending on the choice of law of the contract.[28] For example, where the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* is applicable, the individual or company may act directly against the host State in the International Centre for Settlement of Investment Disputes (ICSID)[29] or where a *Bilateral Investment Treaty* provides for the investor to take up its claim against the host State to an international arbitration tribunal or the host

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[25] cf: Dugard, *op cit*, p 229.

[26] Booysen, *Principles of International Trade Law as a Monistic System*, p 50 and p 201.

[27] Id at pp 201-203; see also Dugard, *op cit*, p 229.

[28] cf: Dugard, *op cit*, pp 229-230.

[29] Booysen, *op cit*, pp 562-563.

State subjects itself in an arbitration clause to international arbitration and the application of international law as proper law of the contract. In the instant case, there is no internationalization of the mining leases and there is no possibility of the application of international law as between the contracting parties on any dispute in terms of the mining leases. Therefore, the applicants are not subjects of international law and cannot have international law applied in any of their claims that they may have against the Kingdom of Lesotho.

[29] However, there is a remote possibility that the Republic of South Africa may have a claim based on international law against the Kingdom of Lesotho if certain necessary preconditions exist. This will be alluded to later in the this judgment. But where the claim is neither based on the mining leases concluded between the fourth applicant and the Kingdom of Lesotho, then it is not a claim with expropriation as *causa*. The *causa* of such a claim may arise from a breach of the rules of international law applicable between two states and their relationships are governed by international law. That *causa* may arise since every State has an international law obligation to treat nationals of another State according to certain international minimum standards. Conversely, every State has the right in international law that its nationals shall be treated by a host State according to those standards. Should the host State treat a foreign national in breach of those minimum standards then the State of nationality has a claim against the host State. This claim is usually exercised by means of diplomatic protection. The person or company in respect of whom the minimum standards are infringed by the host State, the person or company has no right against the host State in this relationship. The State of nationality protects its own rights which it has in its nationals by

insisting on the application of the international minimum standard by the host State.[30]

[30] The essence of the relationship is between the State of nationality, the host State and the particular national, where the international minimum standards have been breached. It was described by the International Court in the ***Barcelona Traction*** case[31] as follows:

> *"The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.*
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> *The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect as discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action."*[32]

[31] The rights of the State of nationality are relevant and it can decide on the basis of its national interests whether it will act upon the infraction of its international law rights, however, international law places no duty on such a State to protect its nationals abroad and in practice states often do not extend diplomatic protection to

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[30] Dugard, *op cit*, p 217; Booysen, *op cit*, pp 566-567.

[31] *Barcelona Traction Light and Power Co Ltd Second Phase (Belgium v Spain)* [1970] ICJ Reports, 3, at 44; 46 ILR 178.

[32] Id at paras 78-79.

their nationals.[33] The applicants conceded that there is no such duty in international law. Thus, it follows that the extent of diplomatic protection is completely within the discretion of the State of nationality. According to Jennings and Watts[34] it may take the following forms:

> "It may often be sufficient to alert the local state to the interest of the alien's home state in the treatment being accorded the alien. Thus the protecting state may, with varying degrees of formality, make inquiries of the other state as to the facts of a particular incident, or seek an explanation, or lodge a protest, or require that the wrongdoers be punished or that damages be paid to its injured national. More forceful forms of protection, such as intervention, have sometimes been resorted to, although the legality of such action is now very questionable. Since protection may ultimately result in the presentation of an international claim, even in the earlier stages of exercising protection the protecting state will usually be guided by the law relating to the international claims, particularly in such matters as the rules as to nationality of claims and exhaustion of local remedies. Nevertheless, practice shows that in the preliminary stages may take steps designed to protect or assist their nationals even when, strictly specking, no entitlement to present an international claim has arisen: thus a state will sometimes (although usually with some diffidence) make diplomatic representations before local remedies have been exhausted, or where the national status of the injured individual might not be sufficiently clearly established to justify the formal presentation of a claim, particularly in cases involving dual nationality."

In consequence of the importance of the principle of equal sovereignty of states, any form of diplomatic protection will only be lawful if the preconditions or requirements for lawful diplomatic protection have been complied with, otherwise such steps will in international law be regarded as unwarranted interference with the sovereignty of the host State.[35]

[32] Mr Grobler on behalf of the respondent argued that the applicants are seeking to have the principles of international law applicable between the Republic of South Africa and the Kingdom of Lesotho enforced as though they, the applicants are

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[33] Jennings and Watts, *Oppenheim's International Law*, vol 1, para 410 p 934.

[34] Jennings and Watts, *op cit*, p 935.

[35] Id, p 935.

subject of international law by seeking a *mandamus* to force the executive to exercise an international law right which belongs to the Republic alone and in respect of which this Court has no certainty as to whether the preconditions for its existence indeed occurred.

[33] The applicants, however, allege that the international minimum standards were violated by the Kingdom of Lesotho because certain mining leases were expropriated without compensation. Thus, it is critically important to draw a distinction between the initial acquisition of rights and the treatment of those rights after they came into existence. Insofar as the acquisition of property or patrimonial rights are concerned the receiving State may restrict the ability of a foreign national to own land or acquire rights and thereby treating them less favourably than its own nationals. Where the foreign entity is a commercial enterprise then the acquisition of property is likely to assume the character of an economic investment. The terms and conditions on which such an investment is permitted are usually for the determination of the State and may be subject to its treaty obligations. It is not obliged to accord national investor treatment to foreign investors. A differential treatment as between the national and foreign investment is permissible and it is not necessarily contrary to the State's international obligations.[36]

[34] The acquisition of private rights of patrimonial nature is governed exclusively by the municipal law of the receiving State in matters relating to ownership and other rights *in rem*, the *lex rei sitae* alone can apply.[37] In this present case, the *lex loci actus* would be the same as the *lex rei sitae* since the deed's registry is in Maseru

[36] Id at p 933.

[37] Garcia-Amador *et al, Recent Codification of the Law of State.*

this embraces the rule both in South African and Lesotho municipal law. The formal validity of any act or instrument creating rights pertaining to an immoveable is likewise also determined by the *lex rei sitae*. Thus, the proper law of the mining lease contracts was the municipal law of Lesotho. It would be the same as the *lex loci contractus* which would apply to formalities concerning ordinary commercial contracts.[38] The GoL granted mining rights by way of mining leases. These were registered in the deeds registry at Maseru. Therefore, the applicable law would certainly be the law of the Kingdom of Lesotho since these mining leases were not internationalized and thereby making international law applicable as the proper law of choice.

[35] Once a foreign national has acquired property within the host State or concluded an investment contract with that State, then that is obliged to respect such rights in conformity with the requirements of international law. The host State may by international law indeed expropriate such property lawfully:

> "Traditionally this right has been regarded as discretionary power inherent in the sovereignty and jurisdiction which the State exercises over all persons and things in its territory, or in the so-called right of 'self-preservation' which allows it, *inter alia*, to further the welfare and economic progress of its population."[39]

International norms pertaining to expropriation

[36] Traditionally international norms governing expropriation may be for public purposes but adequate and effective compensation should be paid and no discrimination should take place between foreigners and nationals of the host State. These norms, however, have been challenged by developing states by replacing the

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[38] *Ex parte Spinazze and Another NO* 1985 (3) SA 651 (A).

[39] Garcia-Amador *et al*, *op cit*, p 46*;* Dugard, *op cit*, pp 225-228.

compensation standard with their own national standards.[40] The international minimum standards pertaining to expropriation of property are not to be equated to the international minimum norms pertaining to international human rights violations. This is what the applicants seem to be doing. However, the right not to be deprived of ones property *may* constitute an infringement of international human rights norm.

[37] Article 17(2) of the *Universal Declaration of Human Rights* provides that:

> "No one shall be deprived of his property."

And Article 14 of the *African Charter on Human and Peoples' Rights* provides that:

> "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

Both, the Republic of South Africa and the Kingdom of Lesotho are bound by the provisions of the *Universal Declaration of Human Rights* and the *African Charter* since they have ratified these fundamental instruments.

Further, the first paragraph of Article 1 of the *First Protocol: Enforcement of Certain Rights and Freedoms to the European Convention for the Protection of Human Rights and Fundamental Freedoms* reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public

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[40] Brownlie, *Principles of International Law* (1973) pp 518 *et seq.*

> interest and subject to the conditions provided for by law and by the general principles of international law."

And Article 21(2) of the *American Convention on Human Rights* provides that:

> "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

[38] It is clear that there is an international norm not to deprive anyone of her or his property except in terms of general principles of property. The fundamental instruments certainly contemplate the law deprivation of property in the interest of the community or the public or for reasons of public utility or social interest. Only the *Protocol to the European Human Rights Convention* provides for "by law and by the general principles of international law". These are international human rights law principles pertaining to the confiscation or expropriation of property of foreign nationals and the compensation that must be paid for such deprivation. Nationalization or expropriation in international law may take place by way of a judgment of a court, a legislative act or an executive act. If a court of law were to give effect to legislation and thereby deprive a foreigner from his or her title to property, then the court order will be an act of expropriation. It is characterized 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 is been taken. [41]

[39] The general rule of customary international law is that where the host State has expropriated property of a foreigner then prompt, adequate and effective

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[41] *Oilfields of Texas v Iran* 1986 (12) *Iran* – USCRT 308 at 318 *et seq.*

compensation must be paid in the case of expropriation of specific property.[42] Full compensation including *lucrum cessans* and even *restitutio in intergrum* is required in the case of unlawful expropriations.[43] According to Professor Singh:[44]

> "International Covenant on Economic, Social and Cultural Rights of 1966 provides that developing countries, with due regard to human rights and their national economy, may determine to what extent they will guarantee to non-nationals the economic rights recognized in the Covenant. In its resolution on permanent sovereignty over natural resources, adopted on 17 December 1973, the United Nations General Assembly affirmed that each nationalizing State, by virtue of its sovereignty to safeguard its natural resources, is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes should be settled in accordance with the domestic legislation of that nationalizing State. An affirmation in somewhat similar terms appears in the Charter of Economic Rights and Duties of States, adopted by the general Assembly in 1947; this contains a reference to the payment of 'appropriate compensation', and provides for the settlement of any controversy by the domestic tribunals of the nationalizing State, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."[45]

[40] Neither the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* provides for the protection of property rights. The underlying reason for the weak protection of property rights on the international sphere is because of the *New International Economic Order* expressed in numerous resolutions of the General Assembly of

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[42] Christie, *What constitutes a taking of property under international law?* [1968] BYIL 307 at 310; See also: *German Interests in Polish Upper Silesia* [1926] PCIJ, Scr. A, No 7; *Norwegian Shipowners Claim* [1922] 1 United Nations Report of International Arbitral Awards 307.

[43] Bowett, *'State Contracts of Aliens: Contemporary Developments in Compensation for Termination of Breach'* [1988] 59 BYIL 48 at 73.

[44] See: *Chorzow Factory* [1928] PCIJ, Ser A, No 17; *Topco v Libiya* [1979] 53 ILR 389 at 507.

[45] Gurdip Singh *International Law,* (2003) 1st ed, pp 124-125; See also: Article 2, para 2(c) *Charter of Economic Rights and Duties of States (UN General Assembly Resolution 3281 (XXIX of 1974),* [1975] (4) ILM 251:

the United Nations.[46] These resolutions emphasised the sovereignty of status of states over their natural resources. In principle there is no support for the thesis that an international human right to protection of property is recognised as such in international law. However, it appears that it is for states to protect by way of diplomatic protection their rights which they enjoy in respect of their nationals. According to Okowa:[47]

> "There is here a presumption that nationals were indispensable elements of a State's territorial attributes and a wrong done to the national invariably affects the rights of the State."

[41] Thus, the question is, do the principles of the ***Kaunda***[48] decision apply in respect of deprivation of property rights of a national in a foreign country. That decision is distinguishable from the issue in the present matter on several bases: *First*, in the ***Kaunda*** case the alleged infringement was an egregious one, that is gross and flagrant infraction of international human rights such as physical abuse and torture which is different from expropriation. Chaskalson CJ stated:

> "*[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.*" [49]

And the learned Chief Justice also indicated:

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[46] Resolution on Permanent Sovereignty over Natural Resources (General Assembly Resolution 1803 (SVIII) of 1962); The Declaration on the Establishment of the New International Economic Order of 1974 (General Assembly Resolution 3201 (S-VI); The Programme of Action on the Establishment of the New Economic Order of 1974 (General Assembly 3202 (S-VI)); Charter of Economic Rights and Duties of States of 1974 (General Assembly 3202 (S-VI)); Charter of Economic Rights and Duties of States of 1974 (General Assembly Resolution 3281 (XXIX)). See also: Booysen *op cit*.

[47] Phoebe Okowa, *op cit* p 477.

[48] 2004 (10) BCLR 1099 (CC).

[49] Id at 1027B.

> "*[70] There may even be a duty on a government in extreme cases to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstances, on becoming aware of the breaches, the government may well be obliged to take an initiative itself.*"[50]

Secondly, the true beneficiary of international human rights is the individual and such rights do not vest in juristic persons such as companies like the fourth to ninth applicants. *Thirdly*, there is indeed a fundamental difference between an infringement of international human rights on the one hand and breaches of international minimum standards in respect to property on the other. The latter essentially constitutes an international delict.

[42] On applying the principles of the *Kaunda* decision, one must be mindful of the important and crucial differences between the present matter and that case. In the final analysis, furthermore, Chaskalson CJ was emphatic that:

> "*Currently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such. To do so may give rise to more problems than it would solve.*"[51]

Therefore, in any application of the ***Kaunda*** principles, one must ensure some measure of caution because different emphasis are discernable since the present matter is about *alleged* breaches of the applicants' property rights by the GoL and certainly not an egregious and material infringement of international human rights. Thus, on this particular aspect the two cases are distinguishable from each other.

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[50] Id at 1028D. See also: para [217] at 1064 B/C.

[51] Id para [29] at 1019 A/B.

Respondents' decision under review

[43] The applicants requested the second respondent to afford diplomatic protection to them. The request was for the second respondent, in his executive capacity as the President to take diplomatic action on behalf of the Republic of South Africa against the Kingdom of Lesotho. It was argued by Mr Dugard that the President was under a duty towards the applicants on the basis alleged by them to extend "*effective*" diplomatic protection. This argument is untenable because a further phase of the Lesotho Highlands Water Project is under construction in Lesotho in terms of the Treaty and it could possibly jeopardize its construction. Under the circumstances, the President would have had no choice but to act against his better judgment. The President dispatched a *Note Verbal* to the GoL drawing its attention to the applicants' claim and in doing so he adopted a nuanced approach upon having considered the applicants' request and reacted appropriately.[52] The government has a broad[53] and extremely wide discretion and as how best to provide what diplomatic protection it can offer.[54] The choices and considerations open to the President were and are within the exclusive purview of foreign relations between the first respondent and the GoL. The exercise of the discretion is invariably influenced by political and economic considerations rather than the legal merits of the particular claim.[55] It is essentially a matter pertaining to foreign relations as will become apparent in this judgment.

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[52] Id para [79] at 1030A.

[53] Id para [81] at 1030E/F.

[54] Id para [275] at 1083G.

[55] See: *Barcelona Traction* fns. 31 and 32 above.

[44] Now, the pertinent question is whether the second respondent's decision and the decisions of the third and respondents are reviewable and if so, on what basis and to what extent. This depends upon the nature of the powers and functions of the executive in conducting foreign relations on behalf of the Republic of South Africa and that invariably depends on the provisions of the Constitution since all public power and actions, whether executive or otherwise, are only legitimate if lawful:

> *"The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law."*[56]

[45] Central to our constitutional order is that both the legislature and executive in any sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the principle of legality is implied within the Constitution. Even pertaining to executive action, which does not constitute administrative action within the meaning of section 33 of the Constitution. The principle of legality is necessarily implicit in the Constitution.

[46] The second respondent, as the President is the Head of the State as well as the head of the national executive. [57] He has the powers entrusted upon him by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive. [58] The executive authority of the Republic is vested in the President[59] and he exercises that authority, together with the other members of the Cabinet, *inter alia* by performing any executive

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[56] 2004 (10) BCLR 1099 (CC) para [77] at 1029F/G-H.

[57] Section 83(a) of the Constitution.

[58] Section 84(1) of the Constitution.

[59] Section 85(1) of the Constitution.

function[60] provided for in the Constitution or in national legislation.[61] In doing so, the President promotes that which will advance the aspirations and interests of the Republic.[62] This duty is a strong constitutional imperative in his decision-making and executive actions. Historically, the executive authority had the power and function to conduct foreign relations of the Republic with other states, however this power and function is not specifically mentioned in the Constitution.[63]

[47] Section 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. The Constitution recognizes that the Republic of South Africa is a subject of international law and the executive is responsible for negotiating and signing international agreements, an important element in the conduct of foreign relations. This presupposes that the responsibility, power and function of the executive, with the President as its head is responsible for foreign policy and to conduct foreign relations on behalf of the Republic. This responsibility, power and function indeed vest in the national executive by virtue of the Constitution through, item 2(1) of Schedule 6 which provides that all law that was in force when the *new* Constitution took effect continues in force subject to any amendment or repeal and inconsistency with the Constitution. Consistency with the Constitution requires that the common law powers are now regulated by the Constitution. The

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[60] Section 85(2)(a)-(d) of the Constitution.

[61] Section 85(2)(e) of the Constitution.

[62] Section 83(c) of the Constitution.

[63] By virtue of sections 84(1)(h) and (i) and section 231(1) the President is responsible for receiving and recognizing foreign diplomatic and consular representatives an for appointing ambassadors, plenipotentiaries and diplomatic and consular representatives. Furthermore, the negotiating and signing of all international agreements is stated to be the responsibility of the national executive.

Constitutional Court in ***Pharmaceutical Manufacturers of South Africa: In* re *Ex parte the President of the Republic of South Africa***[64] categorically pronounced:

> *"Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution. Thus, in President of the Republic of South Africa and Another v Hugo the power of the President to pardon or reprieve offenders had to be dealt with under s 82(1) of the interim Constitution and not under the common-law principle of ultra vires. In SARFU 3 the President's power to appoint a commission and the exercise of that power had to be dealt with under s 84(2) of the 1996 Constitution and the doctrine of legality, and not under the common-law principles of prerogative and administrative law."*

[48] These common law powers are now incorporated by virtue of section 84(1) read with section 85(2) (e) and item 2(1) of Schedule 6 of the Constitution as constitutional powers and functions and also as the common law cannot be seen as distinct from the Constitution. In this regard the Constitutional Court in ***Pharmaceutical Manufacturers*** observed: [65]

> *"There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."*

[49] The nature of these powers and acts performed are essentially executive and not administrative and, therefore, section 33 of the Constitution and concomitantly the provisions of the Promotion of Administrative Justice Act 3 of 2000 are not the mechanisms of control regarding executive powers. A series of considerations may be pertinent in determining whether an action is administrative or executive.

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[64] 2000 (2) SA 674 (CC) para [41] at 695.

[65] Id para [44] at 696. In *President of the Republic of south Africa and Another v Hugo* 1997 (4) SA 1 (CC) paras [8] – [10], the Constitutional Court held that the prerogative powers under the previous constitutions were now those enumerated in the new Constitution.

The source of the power is a relevant factor and so is the nature of the power as well as its subject matter. The question is whether it involves the exercise of a public duty and, if so, how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is administrative. [66] Undoubtedly the powers and functions to conduct foreign relations and foreign policy are by source, origin, nature and description essentially executive powers and intrinsically involved with policy considerations. Professor Singh observed:

> "... foreign policy which is formulated by Government, not by diplomats. In order to carry out its policy, a government will need to manage and adjust its international relations by applying different forms of pressure. However, in normal circumstances, it will conduct its international intercourse by negotiations. This is diplomacy. Persuasive argument, if applied skilfully and sensitively at the right time, certainly leads to better result than pressure technique backed by the threat of force. The latter may provoke resistance and finally lead to war." [67]

Therefore, within the panoply of diplomatic protection the executive has a reasonably wide choice to –

> "Consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retortion, severance of diplomatic relations, [and] economic pressure." [68]

The executive in invoking the form of diplomatic protection is required to make an informed choice invariably exercising a discretion based on "the application of intelligence and tact to the conduct of relations between the governments of independent States, … or more briefly still, the conduct of business between States

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[66] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para [143] at 67. See also: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para [48] at 514F/G-515C.

[67] Singh, International Law, 210.

[68] Dugard, *The Report*, fn at 10 above.

by peaceful means".[69] This then raises the fundamental question to what extent is the exercise of executive powers, whether it is diplomatic or otherwise, be subject to control by the court?

[50] *First*, it must not infringe any provision of the Bill of Rights and *secondly* it is clearly constrained by the principle of legality and *thirdly*,

> *"… it is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers."*[70]

These constraints arise from the *constitutionalisation* of administrative justice and moreover by virtue of the provisions of the Promotion of Administrative Justice Act 3 of 2000. This statute expressly disavows applicability to executive powers and functions including those mentioned in section 85(2) (e) of the Constitution. Undoubtedly, the Constitution is the supreme law of the Republic and any conduct inconsistent with it is certainly invalid.[71]

[51] In England the prerogative powers were historically beyond the reach of the courts however the exercise of some powers, not all of them, has been subjected to judicial review. In the landmark case of ***Council of Civil Service Unions and Others v Minister of the Civil*** Service[72] it was held that a decision-making power derived from the common law and not a statutory source is not "for that reason only" immune from judicial review and that is so in respect of prerogative

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[69] Singh, *op cit*, 210.

[70] *South African Football Union*, 2000 (1) SA 1 (CC), para [48] at 70-71.

[71] Section 2 of the Constitution.

[72] [1985] 3 AC 374 (HL).

powers.[73] It is not the source but the subject matter which determines whether the exercise of such a power is subject to review. Lord Roskill stated:

> *"But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject-matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm ... are not, I think, susceptible to judicial review because their nature and subject-matter are such as not to be amenable to the judicial process. The Courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or parliament dissolved on one date rather than another."*[74]

In ***R v Home Secretary, ex parte Bentley***[75] Watkins LJ restated the principle:

> *"The question is simply whether the nature and subject-matter of the decision is amenable to the judicial process. Are the Courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so?"*

[52] Our Constitutional Court, however, decided that the principle whereby the review of the exercise of prerogative powers is qualified by the question whether the subject-matter of the power is justiciable, does not apply in our constitutional dispensation. In ***President of the Republic of South Africa and Another v Hugo***[76] Goldstone J stated:

> *"The interim Constitution obliges us to test impugned action by any organ of State against the discipline of the interim Constitution and, in particular, the Bill of Rights. That is a fundamental incidence of the constitutional State which is envisaged in the Preamble to the interim Constitution ... . In my view, it would be contrary to that promise if the exercise of the presidential power is above the interim Constitution and is not subject to the discipline of the Bill of Rights."*

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[73] Id, at 410C-D; 411B-C; 417G-418B.

[74] Id 418A-C; see also Lord Scarman at 407B-C.

[75] [1993] 4 All ER 442 at 452j-453c.

[76] 1997 (4) SA 1 (CC) para [28] at 17 B/C and D/E.

But, the learned Justice alluded that it may well be that because of the nature of the executive power or the manner in which it is exercised, the provisions of the Constitution:

> *"provide no ground for an effective review of a presidential exercise of such a power. The result, in a particular case, may be the same as that in England, but the manner in which that result is reached in terms of the interim Constitution is a different one. On the English approach the Courts, in certain cases, depending on the subject matter of the prerogative power exercised, would be deprived of jurisdiction. Under the interim Constitution the jurisdiction would be there in all cases in which the presidential powers under s 82(1) are exercised."*[77]

[53] The conduct of foreign relations may be one of the rare instances where the Constitution and Bill of Rights provide no ground for an effective review. This will be the case where the decision does not limit any fundamental rights and is concerned primarily with the conduct of foreign relations. Even if a court may not agree with the merits of the decision or the grounds on which it was taken or its wisdom, then the basis for review lies in the principle of legality and the rule of law. There may be cases when a decision may be set aside but that should not second guess the exercise of executive discretion. The Constitutional Court in ***Hugo's*** case Goldstone J noted:

> *"This is what happened in* R v Home Secretary, ex parte Bentley, *but even then the Court declined to issue a mandamus or a declaration. It simply invited the Home Secretary to consider the case again in the light of the decision that he had misconstrued his powers. As it was put by WILSON, J in* Operation Dismantle Inc v The Queen*: 'the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of State.' Equally, however, it is important to realize that judicial review is not the same thing as substitution of the Court's opinion on the merits for the opinion of a person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has*

[77] Id para [28] at 17E-F/G.

the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power." [78]

[54] The Canadian Supreme Court in ***Operation Dismantle Inc v The Queen***[79] was asked to review and set aside the decision by the Government to allow the testing of United States cruise missiles in Canada. Wilson J said:

> *"I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the Courts to 'second guess' the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so."*[80]

And her Ladyship held that:

> *"… the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of State. Equally, however, it is important to realise that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.*
>
> *It might be timely at this point to remind ourselves of the question the court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s.91(7) of the Constitution Act, 1867 and that the federal executive has the powers conferred upon it in ss.9-15 of that Act. Accordingly, if the court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution."*[81]

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[78] Id para [29] at 18 B/C.

[79] [1985] 18 D.L.R. (4th) 481.

[80] Id at 504.

[81] Id at 503-504.

[55] In the present matter, having regard to the *dicta* quoted above, the decisions attacked by the applicants will only be reviewable on the extremely limited basis pertaining to foreign policy and foreign relations. However, a court should not be deterred in exercising review jurisdiction when necessary. The Constitutional Court in ***Kaunda*** stressed:

> "*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 ... are justifiable. This also applies to an allegation than the government has failed to respond appropriately to a request for diplomatic protection.*" [82]

And Chaskalson CJ stated[83]:

> "*If government refuses to consider a legitimate request, or deals with it in bad faith or irrationality, a court should 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.*"[84]

[56] Thus, counsel for the respondents, in my view, rightly submitted that this Court should not substitute its decision for that of the President by issuing a *mandamus* because, *first*, the conduct of foreign relations and policy as well as matter pertaining thereto cannot be properly evaluated or determined by this Court. *Secondly*, the functions and powers of decisions pertaining to the conduct of foreign relations. It is entrusted to the executive who has to determine foreign relations on policy considerations which at times may be sensitive. The executive has a broad discretion in such matters which must be respected by the courts. The courts surely cannot assume the role of a super-executive in matters which are

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[82] 200d (10) BCLR 1009 (CC) para [78] at 1029H/I – 1030A.

[83] Id para [80] at 1030D-E.

[84] Id para [81] at 1030E/F.

peculiarly and exclusively within the domain of the executive. Chaskalson CJ, in ***Kaunda***, stated:

> "*A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.*" [85]

And Ngcobo J said:

> "*The conduct of foreign relations is a matter which is within the domain of the executive. The exercise of diplomatic protection has an impact on foreign relations. Comity compels States to respect the sovereignty of one another; no State wants to interfere in the domestic affairs of another. The exercise of diplomatic protection is therefore a sensitive area where both the timing and the manner in which the intervention is made are crucial. The State must be left to assess foreign policy considerations and it is a better judge of whether, when and how to intervene. It is therefore generally accepted that this is a province of the executive, the State should generally be afforded a wide discretion in deciding whether and in what manner to grant protection in each case and the judiciary must generally keep away from this area. That is not to say the judiciary has no role in the matter.*"[86]

In the English case of ***R v Secretary of State Foreign Affairs, ex parte Ferhut Butt,*** Lightman J said:[87]

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[85] Id para [77] at 1029F-G/H. See *Rudolph Hess* 90 ILR 386 at 395; According to Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 2nd edn, p 154: *Hess* underscores the broad discretion enjoyed by governmental organs in dealing with political matters: "The breadth of this discretion in foreign affairs has its basis in the nature of foreign relations", said the Second Senate … In order to facilitate the realisation of the federation's political goal within the framework of what is constitutionally permissible … the Constitution confers considerable discretion on foreign affairs agencies in assessing the practicality and feasibility of certain policies or actions. The First Senate reached a similar conclusion in *Schleyer Kidnapping* case (1977)."

[86] Id para [172] at 1053G-1054A.

[87] [1999] EWHC Admin 624 (1st July 1999] 1 para 12 at 6.

> "*The general rule is well established that the courts should not interfere in the conduct of foreign relations by the Executive, most particularly where such interference is likely to have foreign policy repercussions (see* R v Secretary of State for Foreign and Commonwealth Affairs **ex parte** Everett *[1989] 1 QB 811 at 820). This extends to decisions whether or not to seek to persuade a foreign Government to take any action or remind a foreign Government of any international obligation (e.g. to respect human rights) which it has assumed.*"

[57] The question to accede or not to accede to a request for diplomatic protection or intervention is pre-eminently within the province of the executive. Executive action in such matter which is often determined by material foreign policy considerations and the sensitive nature and impact on foreign relations. Thus, the courts should act with circumspection and a high degree of deference in matters of foreign relations conducted by the executive. Sir John Donaldson MR in ***R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Phirbhai*** [88] aptly cautioned:

> "*It can rarely, if ever, be for judges to intervene where diplomats fear to tread.*"[89]

Basis of the respondents' decision

[58] The applicants' requested diplomatic protection from the second respondent and it was based on an alleged right to effective diplomatic protection that was not attributable to an impression on the part of the respondents that there existed no such thing as diplomatic protection in international law. A perusal of the various advices and submissions received by the respondents upon which they made their decisions shows this clearly. The applicants from the outset asserted that they were entitled to diplomatic protection as of right. In their letter of

[88] 107 ILR 465 (1985).

[89] Id 479 quoted in *Abassi v Secretary of State for Foreign Affairs, op cit,* para 37(1).

15 December 2000 two bases were laid for this, *first*, that the first respondent (by way of the letter of the State Attorney of 15 May 1995):

> "... committed itself to mediation, thereby expressing its willingness to provide the diplomatic protection to the Swissborough group albeit for such mediation to be subject to certain conditions, which conditions have now been fulfilled."

Secondly, it was also contended in the letter that:

> "We have been advised that the State is under constitutional obligation to provide diplomatic protection to its citizens. He does, however, enjoy a measure of discretion as to the methods it will employ to comply with that obligation. The discretionary element, under customary international law, of the decision is not whether to afford diplomatic protection, but rather what form of intervention is most appropriate and effective in the circumstances. The State is obliged to pursue the matter to a conclusion that will give effect to its citizens' rights."

This latter contention was repeated in further correspondence and memoranda, as well as at a meeting on 10 August 2001, to the second respondent's legal advisor Ms Gumbi, which was also attended by applicants' advisors on international law. The legal advice received by the respondents was that international law does provide for the right on the part of a State to claim protection from another State under suitable circumstances and the claim, however, belongs to the State and not to its national on behalf of whom it may be acting. Such a national, therefore, does not have any right to diplomatic protection Whether diplomatic protection should be afforded is a matter of discretion to be decided as a matter of policy.[90] The respondents were advised as to the considerations of policy on the basis of which it was recommended not to exercise their discretion in favour of the

[90] Phoebe Okowa, *op cit*, p 477: "Since the exercise of diplomatic protection is generally viewed as a right of the State, the argument has consistently been made that reliance on that right is within the absolute discretion of States (Borchard, 1915, p 29; Greig, 1976, p 523, Oppenheim, 1992, p 934). It is further accepted that the decision whether to exercise the discretion or not is invariably influenced by political considerations rather than legal merits of the particular claim." And see also: *Barcelona traction, op cit,* paras 78-79.

applicants and to refuse to intervene. In this regard the first opinion was given by the Senior State Law Advisor, an expert on international law, of the Department of Foreign Affairs. In paragraph 3 he opined that:

> "The question relating to international law in this matter can be reduced to the following: is the South African Government under an obligation to provide diplomatic protection to the (applicants) ... all of them being South African citizens/nationals in their respective capacities of natural/juristic persons? If the question is in the affirmative, the minister of the President will have to grant the relief sought by Mr Van Zyl and the two trusts. ... . If there is no such obligation under international law, the decision whether to accord diplomatic protection or not, will be a policy decision, on which we cannot comment."

The opinion in paragraph 4 stated:

> "It can be emphatically stated that a right to diplomatic protection does not exist in international law: 'diplomatic protection of both an individual and a corporation lies within the sole discretion of the national state.'"[91]

According to Parry and Grant in *Encyclopedic Dictionary of International Law* noted:

> "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 protection or international judicial proceedings on its behalf, a state is in reality asserting its own rights – its rights to ensure, in the person of its subjects, respect for the rules of international law."[92]

[59] The advice was conveyed to the third respondent, the Minister of Foreign affairs, on 22 March 2000. The legal advice and the fact that according to the opinion that there was no obligation on the part of the first respondent to afford diplomatic

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[91] With a reference to Dugard: *International Law:* 2000, p 213.

[92] Id at p 93.

protection and any decision to intervene was a policy decision. In paragraph 2.5 it recommended that the policy decision should be based upon the following:

> "The Swissborough Group/Burmilla Trust has, by its own admission, 'exhausted its local remedies'. What they fail to mention is that these constituted court proceedings in Lesotho, which they lost. Therefore, mediation or intervention by the South African Government *would imply a lack of faith in the judicial system of a sovereign state. This would be potentially damaging to the already sensitive nature of the relations between the two countries.* Moreover, this would set an unhealthy precedent for other businesses to request diplomatic intervention from the South African Government."

The recommendation regarding the applicable policy considerations was repeated later in the submissions to the second respondent.

[60] On the basis of the advice received the fourth respondent, the Deputy Minister of Foreign affairs, in a letter stated that "... regrettably the South African Government is unable to accede to your request ...." The inability cannot be attributable to the view that it was legally impossible to accede to the applicants' request but the position taken was as a result of a policy decision. That decision was made within the ambit of exercising the relevant discretion. Subsequently, the applicants approached the second respondent. Consequently another advice was obtained from the Chief State Law Advisor in the Department of Justice. The opinion opens by stating the applicants' view which were that:

> "... both in international law and in terms of the South African Constitution, a right to diplomatic protection exist, and that the South African Government is under a legal obligation, both in terms of international and South African constitutional law, to accord diplomatic protection to them."

The applicants' assertion once again raised the question whether a right to diplomatic protection exists in the sense contended by them in their earlier submissions to the respondents that they enjoy a claimable right to diplomatic

protection. From this opinion it was clear that international law does provide for diplomatic protection as a right claimable by a State on behalf of its nationals vis-à-vis another State but not one claimable by its nationals themselves.[93]

The Chief State Law Advisor's opinion to the respondents concluded by stating that:

> "It should be noted that there is a clear distinction between the right of diplomatic protection acknowledged by international law, and the right to diplomatic protection *as claimed by the applicants in this matter*. The international law acknowledges the right of diplomatic protection. As illustrated above that right lies with a state, and entails that when a national of a state suffers an injury at the hands of another state, the state of nationality may take up the claim. When taking up the claim, the claim becomes that of the state itself. ... . The decision to exercise the right of diplomatic protection lies within the discretion of the national state. The international law therefore recognizes the right of diplomatic protection that lies with a state *and does not recognize a right to diplomatic protection as claimed in the present matter*."[94]

The opinion also stated:

> "We are ... of the opinion that the constitutional right to diplomatic protection as claimed by the applicants does not exist."[95]

Finally, in paragraph 15 of the opinion it was stated:

> "We therefore conclude that although a right of diplomatic protection that lies with a state exists in the international law, a 'right to diplomatic

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[93] Dugard that:

> "Diplomatic protection of an individual and a corporation lies within the sole discretion of the national state. In deciding whether to exercise this discretion the national state obviously will be guided by political considerations, chief of which will be its relationship with the defendant state. Should a state refuse to intervene on behalf of its national, the latter has no remedy under international law. Municipal law may lay an obligation on the state to protect its nationals abroad and may confer upon a national to demand the performance of that obligation, but this is entirely a question of municipal law. Although there is no South African authority on this subject, Prof Booysen has suggested that there is no obligation on the executive to protect a national in such case."

[94] Italics is not that of the writer but my emphasis.

[95] See: *Kaunda v President of RSA* 2004 (10) BCLR 1009 (CC) para [35] at 1020D: "The Bill of Rights is extensive and covers conventional and less conventional rights in detail. A right to diplomatic protection is a most unusual right, which one expects to be spelt out expressly rather than be left to implication."

> protection' as averred by the applicants is not presently acknowledged in the international law. In the South African municipal positive law the alleged right has also not been acknowledged, and we have serious reservations whether such right will be acknowledged by a competent court. However, in view of the fact that this question is still "open" in our positive law, it cannot be excluded that a competent court may, in proper and particular circumstances and in terms of the Constitution, find that a 'right to diplomatic protection' exists. Whatever the contents and scope of such a right may be, if acknowledged, is at this stage open to speculation."

During argument Mr Grobler meticulously dealt with the various opinions upon which the respondents relied and submitted that the theme of "a right to protection" within the context of the claim asserted by the applicants, that is that they are entitled diplomatic protection as of right exist (in the sense of a benefit claimable as of right).

[61] The applicants transmitted a further submission to the third and fourth respondents. The latter prepared a submission to the second respondent in which reference was made to applicants' request and the fact that:

> "It is claimed that they are entitled to such diplomatic protection in terms of international law, as well as in terms of the Constitution of the Republic of South Africa ...."

This resulted in a letter from the second respondent's the legal advisor to applicants, dated 20 July 2001, in which she stated:

> "... the South African Government is unable to grant your request for 'diplomatic protection' ...."

[62] On an evaluation of the evidence it is clear that the respondents refused to afford diplomatic protection to the applicants as of right. It was an informed and carefully considered product of a policy decision and not simply based on a perception that diplomatic protection does not exist at all in international law. The

decision was reached after receiving opinions from both the legal advisors of the Departments of Foreign Affairs and Department of Justice.

[63] This was then followed by the meeting of 10 August 2001 with Ms Gumbi, *inter alia*, raising questions as to the effectiveness of any possible intervention on the part of the first respondent. Thus, further correspondence and submissions flowed from the applicants including a supplementary memorandum as well as more correspondence that culminated in the applicants changed stance by asking the respondents to withhold the payment of all further royalties to the Kingdom of Lesotho:

> "... pending the Government of Lesotho's decision in respect of our settlement offer which expires on 30 November 2001. Should the settlement offer be accepted the payment of the settlement amount of R89 065 828.00 to be made from such royalties being withheld."

To this was added a threat that:

> "The refusal and/or failure by the RSA Government to withhold the payment of such royalties to the Government of Lesotho will leave us with no alternative but to launce an urgent application in the high court of Pretoria to freeze all royalties the Government of Lesotho is entitled to receive from the RSA Government."

The applicants saw no limits to their *assumed* claimable right. They even sought to comprise the first respondent by asking him to act in breach of the Republic's international duties in terms of the treaty on the Lesotho Highlands Water Project with the GoL. Ms Gumbi properly and correctly advised the second respondent that the form of intervention which applicants sought to withhold the payment of royalty to the GoL was not permissible. Accordingly the second respondent again

decided not to accede to the applicants' request and informed them in the letter of 6 November 2001 that "... such protection does not exist as a matter of law ...".

[64] The applicants made reference to diplomatic protection as of right but quite clearly the second respondent's refusal was not based upon the view that international law does not provide for diplomatic protection at all but upon the view that it does not provide for a right to diplomatic protection as sought for by the applicants. Nor does the Constitution provide for such a claimable right. International law acknowledges that states have the right to protect their nationals beyond their borders but are under no obligation to do so.[96]

[65] The applicants also contend that the ground that the second respondent's decision is based on a wrong understanding of the law insofar as diplomatic protection exists in international law. It is clear that the President fully appreciated his discretion in international law in terms of which he could take policy considerations into account which he did by having proper and due regard to the nature of the relations between the Republic of South Africa and the Kingdom of Lesotho. This the President did in his decision of 6 July 2001 when he refused to act and later on reconsideration on 6 November 2001 he decided to despatch the *Note Verbal*. Thus, it is clear that the President acted fully within his powers, and Mr Grobler rightly submitted that the President did not misunderstand the power or discretion according to international law. What the President quite correctly understood was that the applicants did not have an *enforceable right to effective diplomatic protection* as asserted and sought for by the applicants. What is clear is that a request for diplomatic protection was received from the applicants, it was

[96] *Barcelona Traction, op cit,* fn 31 above.

considered on the basis of policy and it was decided on that basis to despatch a *Note Verbal* to the GoL. This was certainly in compliance with what was decided in ***Kaunda***.

[66] Further, like the President, the third respondent in her capacity as Minister of Foreign Affairs indeed had the power to take the decisions which she did and it was lawful for her to take into account policy considerations relevant to the relationship between the Kingdom of Lesotho and the Republic of South Africa. The submissions advanced on behalf of the applicants by Mr Katz that the decision of the third respondent was objectively irrational and not rationally related to the purpose for which the power was granted is wrong. The third respondent appreciated the international legal position. Further, the applicants' assertion that the respondents did not apply their minds to the request is also based on the supposition that the respondents wrongly understood the law. They were correctly advised and they certainly appreciated their powers and the extent of their discretion. They did not exercise their power on the basis of wrong understanding of the law. The exercise of their powers was neither arbitrary as alleged by the applicants. The applicants furthermore have not shown any limitation or infringement of their fundamental rights. Thus having regard to the applicable policy considerations which were of such a nature that the respondents rationally determined that they could not accede to the applicants' request for diplomatic protection as of right. Therefore, none of the grounds upon which the applicant seek to have the decisions of the respondents set aside as prayed for in prayers 1, 2 and 3 and in seeking a declarator in terms of prayer 4 can be sustained.

Alleged international delict and Violation of International Minimum Standards

[67] It is common cause that for an international delictual claim entitling the Republic of South Africa to exercise diplomatic protection vis-a-vis the Kingdom of Lesotho two fundamental pre-requisites must objectively exist: The foreign person or company wronged by the Kingdom of Lesotho must have nationality of the Republic of South Africa and as a result of the wrong concomitantly the treatment by the Kingdom of Lesotho of the South African national regarding the alleged expropriations is in violation of international minimum standards and that national must have exhausted all legal remedies available in terms of the municipal law of Lesotho. It is only then the Republic will be entitled to elevate the dispute to the international level on the basis that the international law rights of the Republic with respect to the treatment of its national have been infringed upon. In this regard the respondents brought certain facts to the Court's attention in the answering affidavit. These facts are that out of the five mining leases that were cancelled by the fourth to ninth applicants claiming damages from the GoL and instituted an action which is still pending. The Rampai mining lease and the tributing agreement were expropriated in terms of legislation conforming to the international minimum standards for expropriation and any damages claimed was preserved by such legislation.

[68] Justifiably the respondents' complaint is that the mining leases concluded between Swissborough and the GoL were not annexed to the applicants' founding papers. By its failure to do so the applicants seek to create the impression that the leases are international investment agreements or international concessions and that the principles of international law are applicable to the leases on that basis. What is

crucial is to analyze the mining leases in order to determine the true nature thereof and also to determine whether the leases entered into between a company incorporated in the Kingdom of Lesotho and the GoL were subject to the municipal law of that country or some other municipal regime or an international law. The first applicant, the deponent on behalf of all the applicants, alleges that the five mining leases are identical, except for the areas to which they are applicable and the rental payable. The Rampai lease reveals that the law of the Kingdom of Lesotho was accepted by the parties as the law governing the contract. The heading states that it was entered into in terms of sections 6 and 15 of the Mining Rights Act 43 of 1967. Further, the meaning of certain terms in the contract shall have the meaning assigned to them by section 1 of the Mining Rights Act, 1967. Swissborough as lessee undertook to faithfully comply with all the provisions and regulations of the Mineral Rights Act and the Constitution of Lesotho (clause 6.2). It also undertook to comply with all the regulations in respect of explosives (clause 11) and to pay compensation for any damage to the surface area in terms of section 19(5) of the Mineral Rights Act upon the expiration or termination of the lease (clause 13.3). It was further stipulated that the mining lease would be registered in the Deeds Registry of Maseru in accordance with the provisions of the Deeds Registry Act, 1967 and provided that the plan relating to the lease area was endorsed by the Mining Board and framed and approved in accordance with the regulations (clause 16). Both parties choose their *domicile citadel et executants* in Maseru, Lesotho. The contract was signed at Maseru and was to be executed in Lesotho under supervision of Lesotho authorities (clauses 7, 8, 10 and 12). Clause 4 stipulated that the rental was to be paid in the currency of Lesotho, in the amount 100 Maloti per square kilometre of the lease area or part thereof per annum.

[69] On an analysis of the mining lease it is apparent that there appears to be no internationalization because *first*, the contract was to be registered and performed in terms of the laws of the Kingdom of Lesotho. *Secondly*, although there is an arbitration clause (clause 14) and there is no reference to international arbitration or application of international law to the arbitration. Therefore, there is no foreign or international element whatsoever in the contract. *Thirdly*, a real right in land is conferred by the lease. In the main clause it stipulated that "... the STATE hereby grants the LESSEE which accepts the sole and exclusive right to prospect for and to mine and dispose of Precious Stones in the RAMPAI are ..." the mineral rights. What was granted is a real right in land. It was registered against the land when the mining lease was registered in the Maseru deeds office, in terms of the Deeds Registries Act.[97] The exercise of these mineral rights entitle Swissborough to go onto the land to prospect for and if precious stones are found to mine and dispose of them. Swissborough becomes owner of all diamonds thus found.[98] From this exposition it is clear that the mining leases granted to Swissborough created rights in property. The mining leases and the real rights created in terms thereof were subjected to the municipal law of Lesotho which would apply in respect of the questions, first, whether the mining leases were valid; secondly, pertaining to any disputes arising from these mining leases such as the cancellation thereof and rights arising from breach of contract; and thirdly, whether any real rights indeed came into existence; and if so the expropriation thereof. Furthermore, the tributing agreements were nothing but subleases and for their existence dependent upon the validity of the mining leases and existence of the real rights. In essence these subleases conferred the right to exercise the mineral rights created by the mining

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[97] *Trojan Exploration Co (Pty) Ltd v Rustenburg Mines Ltd* 1996 (4) SA 499 (SCA) at 509G-J.

[98] Id, at 528J-529C; 534F-535B.

leases. These leases were also entered into between companies incorporated in Lesotho. The analysis of the mining leases equally applies to the tributing agreements, or subleases and contain no foreign element in them.

[70] With that contracted backdrop the first consideration is, was there any violation of international standard by the GoL. I am mindful of the following *dicta* of Lord Nichollas in ***Kuwait Airways Corporation v Iraqi Airways Co (Nos. 4 and 5)***:[99]

> "*An English court will not sit in judgment on the sovereign acts of a foreign government or state. It will not adjudicate upon the legality, validity or acceptability of such acts, either under domestic law or international law. For a court to do so would offend against the principle that the courts will not adjudicate upon the transactions of foreign sovereign states. This principle is not discretionary. It is inherent in the very nature of the judicial process: see* Buttes Gas and Oil Co v Hammer (No. 3) [1982] AC 888, 932."[100]

But,

> "*This is not to say an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law. Lord Wilberforce himself accepted this in the* Buttes *case, at p 931D. Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the* Buttes *litigation doe not arise. The standard being applied by the court is clear and management, and the outcome not in doubt. That is the present case.*"[101]

[71] In principle our courts adopt the same position as the English courts. However this Court is invited by the applicants to determine whether or not an international

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[99] [2002] 2 WLR 1353.

[100] Id para 24 at 1362.

[101] Id para 26 at 1362.

delict has been committed by the Kingdom of Lesotho for the Republic of South Africa to invoke diplomatic protection. The applicants make vague allegations about the so-called "expropriation" of the mining leases and tributing agreements. The concept "expropriation" is used in an extremely wide sense so as to include the purported cancellations in October 1991 by the Commissioner of Mines of the five mining leases, which were set aside on 20 March 1995 by the High Court of Lesotho and also in respect of the four leases which were already cancelled by Swissborough on 11 March 1993, but excluded the Rampai mining lease. The Revocation of Specified Mining Leases Order revoked all the mining leases on 20 March 1992 and it was set aside by the Lesotho High Court on 27 September 1994 and the Lesotho Court of Appeal on 13 January 1995. The formal expropriation of the Rampai mining lease and the Rampai tributing agreement occurred on 17 August 1995 that was after Act 5 of 1995 and had taken effective respectively on 16 August 1995 and 17 August 1995. In the order of the Lesotho High Court whereby the Rampai mining lease was declared to be void *ab initio* on 28 April 1999 and confirmed by the Appeal Court of Lesotho on 16 October 2000 remain unexplained.

[72] It was argued on behalf of the respondents that there can be no possible expropriation without the relevant right or agreement having been expropriated at least in the sense of being terminated. It is common cause that the fourth applicant cancelled the four mining leases, excluding the Rampai mining lease after having accepted the purported cancellation by the Commissioner of Mines as a result of a material breach of contract. It is also common cause that the Rampai mining lease was declared void *ab initio* and that a formal expropriation of the Rampai mining lease had taken place. However, the dispute turns on the question whether the

cancellation of the mining leases by the fourth applicant, the declaration of invalidity of the Rampai mining lease and its formal expropriation, all without the relevant applicants having received damages or compensation, amount to a violation of minimum international standards of treatment of the applicants by the GoL. The gist of the applicants' arguments is that the cancellation of the four mining leases "was nothing more than *a forced ex contractu* cancellation in response to the international wrong perpetrated by the GoL". These four leases were mining leases concluded in terms of the Lesotho Minerals Act, 1967. They were made subject to the law of Lesotho. Under the Law of Contract of Lesotho, Swissborough had an election whether to accept the purported cancellations by the Commissioner of Mines of the mining leases as a material breach of contract in the form of repudiation and to cancel the leases on the basis of such breach, or to retain these leases and to enforce the provisions thereof. In respect of the four leases Swissborough elected to cancel them and claim damages, whereas, in the case of the Rampai lease, it elected not to cancel and to enforce the terms thereof. Mr Grobler submitted that the argument advanced by Mr Dugard on behalf of the applicants that there was an international wrong perpetrated by the GoL in the purported cancellation of the leases is without legal substance because before such a wrong could be established, the internal remedies in terms of the municipal law of Lesotho had to be exhausted and that no damages would be paid by the GoL. To elevate a breach of contract to an international wrong in respect of a contract with no international element is certainly bad in law.

[73] The third applicant issued summons for breach of contract on 2 June. The applicants alleged that their "cancellation was nothing more than a *forced ex contractu* cancellation in response to the international wrong perpetrated by the

GOL". This argument is also bad in law. It is also factually incorrect. The applicants' argument supposes that an individual can in law avail itself on the national law level of any international law violation by the State. The argument also presupposes that international law relating to the responsibility of States is part of national private law and particularly of national law of contract. Such an argument obviously takes the theory that "international law is part of national law" to absurd extremes.

[74] Thus, there is no authority that it was the intention with section 232 of our Constitution that all the rules of state liability must automatically form part of municipal private law.[102] If this were true, then it would mean that the entire private law and the law of contracts would be transformed drastically and concomitantly uncertainty would prevail. Such an intention cannot be attributed to the Constitution. The international rules of state liability are rules applying between States. If individuals and private legal entities are to apply these rules in respect of states, the nature of the rules is changed because the subjects are changed. This means that the rules are now applied by analogy. There is no reason why such an infusion of private law should be assumed. Section 232 of our Constitution provides that customary international law is part of the law of the Republic unless it is inconsistent with the Constitution or an Act of Parliament. There is, however, no indication that the leases of the applicants were ever subject to South African law. South African law cannot, therefore, be applied to the leases and to their cancellation. This also means that customary international law cannot through South African law become applicable to the leases and their cancellation. Section 232 of the Constitution is simply not applicable to these leases and their

[102] Booysen: *The Administrative law implications of the "customary international law is part of South African Law" doctrine* 1997 (22) SAYIL 46 at 51.

cancellation, neither can it be applicable to the Lesotho law of contract which regulated the cancellation of the mining leases.

[75] In the applicants' heads of argument reference is made to the nature of their leases with the Lesotho Government. They are described as "concession agreements" or "long term international economic agreements". It is a general principle of international law that parties to an international transaction can select the law governing their transaction.[103] This rule is generally and widely adhered to and may also be regarded as a customary international law rule. It is also a rule recognized by South African law.[104] An international transaction is subject to the law chosen by the parties. If they have not expressly chosen a law, then there may be a tacit choice of law. According to our law, if there is a reference to an Act of Parliament of a particular country, this is taken as evidence of a tacit choice of that country's law.[105] If there is no tacit choice of law, the law of the place where the contract was concluded is applicable.[106] Whatever test is applied, it is clear that all leases were concluded subject to the law of Lesotho. The applicants could have chosen international law to govern their agreements with the GoL, but they chose not to do so. According to the principle of *pacta sunt servanda*, which is also a principle of international law, they are bound by the choice according to international law.[107] Further, the parties to the leases, namely Swissborough Diamond Mines (Pty) (Ltd) and the Lesotho Government, have not internationalise their concession agreement. Although the leases can be regarded as long-term

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[103] Booysen: *International Trade Law* , 201.

[104] See Forsyth: *Private International Law*, 3rd ed (1996) 278ff and especially at 280.

[105] See *Stretton v Union Steamship Company Ltd* (1881) 1 EDC 315; Forsyth *op cit*, p 284.

[106] See *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 at 185; Forsyth *op cit*, p 287.

[107] *Amco v Indonesia* 89 ILR 366 at 495.

investment agreements, they do not contain any of the recognized features of an internationalized contract such as a stabilisation clause, international arbitration clause or the selection of international law as proper law.[108] Further, the four cancelled leases are different contracts with an independent legal existence. They cannot merely be grouped together or be made dependent on what happened to another lease such as the Rampai lease. Their cancellation must have been followed with proper legal action in order to fulfil the requirements of the exhaustion of local remedies before any international wrong could have been committed by the GoL. In this regard the applicants' submissions are incorrect since the cancellation of the four leases brought them to an end without any violation of the minimum international standards. What is apparent is that there were no expropriations as the applicants seemed to contend.

[76] The Rampai lease was void *ab initio.* However, the right that was granted to Swissborough was a *ius in rem.* It was the right to prospect for and to mine precious stones and dispose of them. Thus, it is the *lex situs* that is the municipal law of Lesotho which regulates whether this real right came into existence. The mining lease creates an obligation to deliver this real right by means of registration according to the Lesotho Deeds Registries Act. It is the law of Lesotho which determines whether this mining lease itself came into existence. According to international law these questions of initial acquisition have to be determined in accordance with the law of Lesotho. There is no international element in the contract in terms of which the real right was delivered and registered. Since the initial contract was not internationalized and no foreign proper law was determined, therefore, the question whether international law or some other

[108] Booysen: *op cit*, ff 488.

municipal system is the proper law of the contract regulating the original conclusion of the mining lease or the grant of the real right certainly does not arise.

[77] Arbitration tribunals appointed by consent of states to adjudicate their disputes act as international adjudicators. They are not subject to the legal constraints placed by public international law on states and their courts to adjudicate the sovereign acts of a foreign State. This would be the case with ICSID arbitration. In terms of the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, the jurisdiction of the Centre is based on double consent: consent of the State to the treaty and consent to submit the particular dispute to ICSID.[109] Principles of customary international law applied by such tribunals are, therefore, not necessarily apt to be applied by national courts. This is particularly true as far as the adjudication of the acts of a friendly foreign government is concerned.[110] The International Court of Justice in the ***Barcelona Traction*** case,[111] echoed the principle that the awards of arbitration tribunals do not necessarily contain customary international law principles:

> *"The Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case."*[112]

[78] Since there is no indication that the parties to the leases intended to subject their concession agreements to the principles of international law, thus international law

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[109] Article 25 of the ICSID Convention. See also: Booysen: *International Trade Law*, 818f.

[110] *Elettronica Sicula* case 1989 ICJ Reports 15 at 46 and 74 where the dichotomy between international tribunals and national courts and the difference in law they apply are considered.

[111] Fn 31above para 63 at 40.

[112] Id para 63.

requires that the concession agreement must be judged according to the law of Lesotho. Therefore, according to international law it is the law of Lesotho which must apply in determining the validity of the Rampai concession agreement. Hence, the applicants' argument based on ***Amco* v *Indonesia***[113] does not really enhance their case but actually supports respondents' view that Lesotho law should govern the validity of the Rampai lease. What the arbitration tribunal found in that case was that the authorisation given by the Indonesian Government to the investor was binding and that, according to Indonesia law such binding authorisation could not be withdrawn. The authorisation was binding according to the principle of *pacta sunt servanda* it could not be withdrawn by the Indonesian State except by law. [114] Thus, the ICSID arbitration tribunal noted:

> "*These acquired rights could not be withdrawn by the Republic, except by observing the requisites of procedural conditions established by law and for reasons admitted by the latter. In fact, the Republic did withdraw such rights, not observing the legal requisites of procedure, and for reasons which, according to law, did not justify the said withdrawal."*
>
> *It is, therefore, a recognition that Indonesian law and its procedures govern the investment. Clear rights were acquired and these rights needed protection. It is tantamount to saying that a validly issued license cannot simply be withdrawn by the state because, by accepting the licence, the licensee has received vested rights. Such a proposition is not denied by the respondents. In the present case, however, to use the analogy again, no valid license has ever been issued with the result that no rights could have been acquired.*" [115]

[79] Mr van Zyl characterised the counter application by the LHDA for a declaratory order that the Rampai lease was void *ab initio* as a "procedural attack". It is of the essence that the Lesotho property law regarding all land and real rights in that country vest in the nation. All rights to the use of land or to the exploitation of

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[113] 89 ILR 366.

[114] Id para 247 at 497.

[115] Id at 497.

mineral resources are granted by way of either a lease or a mining lease. The consent of the chiefs, under whose jurisdiction the land in question falls as being local custodians of the nation, is therefore of the essence of the Lesotho property law. Kheola, CJ in the judgment in the counter application, stated:

> *"It seems to me that the executive functions referred to in Order 1 of 1970 was only in regard to the upper echelons of government in the execution of particular acts. Such acts do not include allocation of land or grants of rights in land which is a function of the King and Chiefs under customary law. That these rights are derived from the customary law and not from their executive functions is confirmed by section 93(1)(ii) of the 1966 Constitution which reads as follows:*
>
> *'(1) The power to allocate land that is vested in the Basotho Nation, to make grants of interests or rights in or over such land, to revoke or derogate from any allocation or grant that has been made or otherwise to terminate or restrict any interest or right that has been granted is vested in the King in trust for the Basotho Nation.*
>
> *(2) The power that is vested in the King by subsection (1) of this section shall be exercised by him and, on his behalf, by the Chiefs in accordance with the provisions of this Constitution and any other law and the King and the Chiefs shall, in relation to the exercise of that power, be subject to such duties and have such further powers as may be imposed or conferred on them by this Constitution or any other law."*
>
> *'Law' is defined in section 139 of the 1966 Constitution as including the 'customary law of Lesotho and any other unwritten rule of law'. 'Any other law' in subsection (2) refers to customary law."*
>
> *It is in view of this essential imperative of the Lesotho property law that section 6 of the Mining Rights Act provides that a mineral title may be granted "in the manner prescribed in this Act, but not otherwise". KHEOLA, CJ then comes to the conclusion "that the provisions of section 6 of MRA are mandatory and the 'grant of the lease' which does not conform to the requirements of that subsection is no grant at all. It is in fact a nullity, and no duty to act can flow from such nullity. See* Ondombo Beleggings v Minister of Mineral and Energy Affairs *1991 (4) S.A. 718 (A) at p. 725."*[116]

The essential character of the Lesotho property law is also the basis of the judgment of the Court of Appeal. Beck, AJA said:

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[116]Annexure AP14 at p 1185.

> *"... the dictates of both common sense and of deeply rooted tradition enshrined in customary law concerning grants related to land point to prior consultation with, and agreement of, the relevant Chiefs being an absolute necessity."*[117]

[80] The Rampai lease did not come in existence because it was contrary to the very essence of the Lesotho property law which is the *lex situs* governing the acquisition of the real rights by Swissborough to prospect for and to mine precious stones and dispose thereof. Since the relevant real rights not having come into existence, in terms of the essence of the Lesotho property law, therefor no question of the expropriation can arise. As far as the so-called extension leases are concerned, the applicants' argument again breaks down at the acquisition stage, and they are in an even worse position. The evidence proffered by the applicants in the founding affidavit is in essence that they made a "reasonable" offer to settle the conflict arising from the fact that the Rampai lease was registered right across the area where the Katse Dam was to be constructed and the land was to be submerged by water. Kheola, CJ held that no witness could answer how it came about that a 15 year mining lease was “granted" right in the dam basin which was planned to be filled with water within five years after the "grant" of the Rampai mining lease.[118]

Further, from the judgment of Joffe, J in the ***Swissborough***[119] case it is also clear that the LHDA had commended its construction by July 1988 whereas the Rampai mining lease was signed a month later and registered in October 1989. The applicants waited until 1991 when the construction activities had progressed to an advanced stage before they brought their initial interdict application. It was this conflict which Mr van Zyl then sought to settle with the proposal that extension

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[117] Annexure AP1 at p 1235.

[118] Annexure AP14.

[119] 1992 (2) SA 279 (T).

leases be granted in other areas in exchange for relinquishing the Rampai lease. The history of these so-called "extension leases" shows that negotiations to settle this conflict never went beyond the draft agreement or where some of the relevant authorities had indicated their willingness to conclude such an agreement. Mr van Zyl did not accept these terms and negotiations broke down. No extension leases were ever concluded and no meeting of minds took any final form.

[81] According to the Mineral Rights Act, 1967, a mining lease can only take effect once it is signed and registered in the deeds office. Thus, the applicants' arguments that although there never came into existence any extension mining leases by final agreement or by Lesotho law, but that international law would recognize such “investment contract" is incomprehensible. Further, the evidence pertaining to the “extension leases” which the applicants seek to adduce in their replying affidavit by means of documentary evidence should have been in the founding affidavit. The respondents are only required to answer the case in the founding affidavit. The disputes in this application are determined on the basis of the facts stated in the founding affidavit and answered to by the respondents. The applicants cannot make out a new case or attempt to adduce *facta probantia* in their replying affidavit which should have been alleged in the founding affidavit. This aspect is considered in determining the respondents’ application to strike out below.

[82] The applicants’ further assertion that the GoL are liable for damages suffered to be determined by international law arbitration dispute resolution procedures is without substance. The applicants are not subjects of the international law. They are neither competent to hold the sovereign Kingdom of Lesotho liable in any international proceedings, nor can seek to apply international law principles in their domestic dispute with the GoL. Their reliance on the Treaty on the LHWP

and the protocols to that agreement is legally untenable. The applicants derive no rights from that Treaty since they are not international law subjects.[120]

[83] The applicants contended that the expropriation of the Rampai mining lease and the tributing agreement was in terms of legislation conforming to the international minimum standards for expropriation and any damages claim was preserved by such legislation. The facts pertaining to the expropriation on 17 August 1995 of the Rampai mining lease and the attendant tributary agreement in terms of Act 5 of 1995 as read with Act 6 of 1995. The applicants argued that the expropriation was unnecessary because by encroaching upon the Rampai mining lease area, an expropriation had taken place in terms of the Lesotho Highlands Development Authority Order 23 of 1986 and compensation had to be paid in terms of the compensation regulations. It was submitted on behalf of the respondents that apart from being legally incorrect the applicants' argument is self defeating as no unlawful encroachment on the Rampai lease area would then have resulted from the activities of the LHDA in construction of the dam. However, that order empowered the LHDA to acquire property and interests in land in accordance with the Land Act, 1979. This statute did, however, not deal with mining leases or mineral rights but those were dealt with by the Mining Rights Act, 1967. Consequently the Land Act did not empower the acquisition of the Rampai mining lease, hence, in April 1990 the Government of the Kingdom of Lesotho promulgated the Lesotho Highland Water Project Compensation Regulations, 1990. Joffe, J in ***Swissborough*** described these regulations as follows:

> *"The nature of the compensation claims envisaged by these regulations are those of a rural present community obliged to vacate their land."* [121]

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[120] Id at 327C~330C. See also: *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A) 161B-D.

[84] After the Revocation of Specific Mining Leases Order 7 of 1992 was set aside by the Lesotho High Court and confirmed on appeal by the Lesotho Court of Appeal and after the cancellation by the Mining Commissioner of the five mining leases was set aside, it was clear that the LHDA had to expropriate the Rampai mining lease and the concomitant tributing agreement. This was done by means of Acts 5 and 6 of 1995 which authorized the LHDA to expropriate a mining lease. The compensation provisions in Act 5 of 1995 are clearly for proper compensation namely for *full and prompt compensation*.[122] The formula by which this compensation was to be assessed is contained in the new section 46A (8). The formula for full compensation was that it shall not exceed the aggregate of an amount which a willing buyer would have paid to a willing seller in the open market immediately prior to the expropriation date that is the market value thereof and an amount to make good any actual financial loss caused directly by any activity of the authority. This formula of compensation is accepted in most open and democratic societies as the formula which should be applied in assessing equitable compensation and the rules in assessing such compensation in order to strike a balance between the interests of the community on the one hand and the expropriatee on the other, are usually also contained in expropriation legislation..[123] The rules for compensation found in section 46A (10) bears a resemblance to the internationally accepted rules for assessing compensation and contain the equitable ***Pointe Guarde*** principle[124] in section 46A (10)(g). In a

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[121] 1992 (2) SA 279 (T) at 291C.

[122] Section 38A(3) as inserted by section 4 of Act 5 of 1995. See: annexure AP8 at p 1107.

[123] Cf The South African Expropriation Act 63 of 1975, s 12(1) as read with s 12(5) thereof. See also Gildenhuys: *Onteieningsreg*, 2nd ed, pp 154-161 with respect to claims for compensation in western democracies and the origin of the rules of compensation from English law at p 34.

[124] *Pointe Guarde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565 (Tri & To) at 572; and see Gildenhuys, *op cit*, par 9, p 256.

nutshell "compensation for compulsory acquisition of land cannot include an increase in value which is due to the scheme underlying the scheme". There is no doubt that Act 5 of 1995 conforms to the international minimum standards as far as the determination of compensation is concerned. The applicants conceded to this submission.

[85] Mr van Zyl however detected a conspiracy in Act 5 of 1995. That conspiracy, according to him, lies in the definition of *holder* in relation to a mineral right, which is defined as "*a person in whose favour a duly granted and executed mineral right is registered in terms of the Deeds Registries Act* 1967", i.e. that by virtue of section 38A(3) and (8) only such a person will be entitled to compensation. Mr Grobler for the respondents argued that should Swissborough's mining lease thus prove to be void *ab initio* then no compensation will be claimable because Swissborough and the tributing companies waited until 22 July 1996 before instituting their claims for compensation, the former in the amount of R49,647,630.00 and the seventh applicant R475,198,918.00. These claims were never pursued and the LHDA, being the compensating authority in terms of Act 5 of 1996, had a clear interest in bringing the counter application. LHDA had in consequence of the declaration of invalidity not paid compensation to Swissborough and Rampai Diamonds. However, any claim for damages which Swissborough and Rampai Diamonds may have had against the GoL in respect of the invalidity of the Rampai mining lease was preserved by section 2 of Act 6 of 1995. This provides that the validation is subject to any accrued or vested right to damages. Indeed, a claim in this regard had been anticipated in the summons issued on 20 May 1996 for damages pertaining to the cancellation by Swissborough of the other four leases. This action has been pleaded to and is ripe

for hearing. Thus, it is clear that no minimum international standards have been violated by the GoL regarding the expropriation of the Rampai lease.

[86] Assuming that an international wrong has been committed by the GoL, then the litigant must satisfy two pre-requisites, namely requirement of nationality and exhaustion of local remedies to prosecute a claim before an international tribunal.

Requirement of Nationality

[87] The first is the requirement of nationality. Professor Singh noted that:

> "According to the practice of States, arbitral and judicial decisions and opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[125]

Chaskalson CJ in ***Kaunda***[126]said:

> "*South African citizenship requirements are such that citizens invariably, if not always, will be nationals of South Africa. They are entitled, as such, to request the protection of South Africa in a foreign country in case of need. Nationality is an incident of their citizenship which entitles them to the privilege or benefit of making such a request. Should there ever be an exceptional case where the citizen's connection with South Africa is too remote to justify a claim of nationality, it would be a legitimate response to such a request to say that South Africa is not entitled to demand diplomatic protection for that person. But apart from that, the citizen is entitled to have the request considered and responded to appropriately.*"[127]

[88] The holders of the mineral leases and of the mineral rights conferred by those leases by registration in the deeds office in Maseru are nationals of the Kingdom of Lesotho, namely the fourth applicant who was the contracting party and the recipient of the real rights in respect of all five leases and the fifth to ninth

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[125] Singh *op cit* pp 128-129.

[126] 2004 (10) BLLR 1009 (CC).

[127] Id paras [62]-[63] at 1026G/H-1027A.

applicants who concluded subleases namely tributing agreements respectively in respect of each of the mining leases held by the fourth applicant. In ***Barcelona Traction***,[128] the International Court of Justice concluded that the nationality of a company had to be determined by reference to the laws of the State in which it is incorporated. The majority were of the view that the fact of incorporation under the law of a State was conclusive. Moreover, it was not necessary to lift the corporate veil in order to determine the economic reality of a company, and whether this indicated links with a State other than that of incorporation. Thus, the Court in rejecting Belgium's claim to exercise diplomatic protection in respect of a wrong done to a Canadian company in circumstances where the majority shareholders were Belgian. The Court held that the reality was that the company as an institution of municipal law was an entity distinct from its shareholders. It stated:

> "*Thus whenever shareholders' interests are harmed by an act done to the company, it is to the latter he must look to institute appropriate action; for although the separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.*"[129]

The Republic of South Africa can on no basis have a right of diplomatic protection against the Kingdom of Lesotho in respect of acts performed within its own territory against companies incorporated in Lesotho.

[89] Inasmuch as the second applicant may have taken cession of the rights of these Lesotho companies the second applicant does not thereby secure advantage of diplomatic protection of its State of nationality. According to Professor Brownlie:

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[128] fn 31.

[129] Id para 44 at p 3.

> "... from the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the State by whom it is put forward, and (b) not having the nationality of the State against whom it is put forward. "[130]

The cession of the claim and concomitant actions arising from the alleged actions by the GoL and the LHDA, therefore, disqualifies the fourth to ninth applicants as well as the second applicant from claiming diplomatic protection. Further, none of the registered mining leases and tributing agreements were ceded to the second applicant. Except for the Rampai lease, in the other instances as Mr Dugard rightly acknowledged that the cessions after the alleged violation. This then is fatal to the Republic's right to diplomatic protection.

[90] The second basis upon which the requirement of nationality is not complied is that the first and third applicants, who are nationals of the Republic of South Africa, are not entitled to diplomatic protection from the Republic of South Africa merely by virtue of their shareholding in the companies which are incorporated in Lesotho. None of their shares were expropriated. Nor is it alleged that the control of the companies were interfered with. Their only interest in the fourth to ninth applicants is their shareholding. They do not hold any mining leases, tributing agreements or mineral rights. No basis was alleged or proved for the corporate veil of the third to ninth applicants to be pierced in this regard. Inasmuch as an expropriation purportedly amounting to an alleged delict by the GoL however such delict has not been committed against the first and third applicants. They are accordingly not entitled to diplomatic protection.

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[130] Ian Brownlie: *Principles of Public International Law*, 4th ed, p 481.

[91] Mr Grobler further submitted that it will be against the principle of the sovereign equality of States as enshrined in Article 2(1) of the *Charter of the United Nations*[131] for a South African court to force the South African government to follow an international practice *vis-à-vis* another State, such as the Kingdom of Lesotho, to which neither State has explicitly consented or which is not a recognized practice between the two States. There is no proof tendered by the applicants that the Kingdom of Lesotho has recognized the right of diplomatic protection by the Republic of South Africa in respect of shareholders of companies incorporated in the Kingdom of Lesotho. The applicants conceded that the Government of the Kingdom of Lesotho did not answer the respondents *Note Verbale* is an indication that the Kingdom of Lesotho does not recognize such a practice. In ***Nduli and Another* v *Minister of Justice and Others,***[132] it was held that our courts only apply universally recognized customary international law rules or rules which have received the assent of South Africa. The fact that neither State to this dispute wishes to take the matter further, shows that there is no crystalisation of any practice between them. If the rights of shareholders are directly the subject of a State's injurious acts, the national State of the shareholders will be entitled to diplomatic protection[133]. This will occur when a company is nationalized or if the rights of its shareholders are usurped.[134]

[92] Mr Dugard submitted on behalf of the applicants that the applicants' "rights and interests" under the relevant mining leases were violated, but in response Mr Grobler pointed out that in this regard there is a lack of legal clarity and

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[131] "The Organization is base don the principle of the sovereign equality of all its members."

[132] 1978 1 SA 893 (A) at 906. See also S v *Petane* 1988 3 SA 51 (C) at 64.

[133] Booysen: *International Trade Law*, p 61 reached by Beyer in his study of this aspect, *Der Diplomatische Schutz der Aktioniire im Volkerrecht*, (1977) at 194; *Barcelona Traction* case, supra, p 36, par 47, P 41, par 66.

[134] *El Triunfo* case 15 UNRIAA 467 at 476.

understanding of municipal and international law. The first to third applicants could not have had any rights or legal interests under the relevant mining leases, neither according to Lesotho law nor in terms of international law. Only the fourth to ninth applicants which are incorporated juristic *persona* according to Lesotho law could have had any possible legal rights or legal interests in the mining leases and/or tributing agreements. This flows from the fact that in international law, as well as in municipal law, shareholders have no rights or legal interests in the property or rights of their companies. The principle that a legal person such as a company has a personality distinct from that of the shareholders is clearly accepted by international law. In ***Standard Oil Company Tanker***[135] case the arbitration tribunal held that the injury inflicted on a property of a company cannot in law be regarded as an injury to the shareholders:

> *"Whereas in fact the decisions of principle of the highest courts, of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and, after its winding up, a proportional share of the assets."* [136]

And:

> *"Whereas to state that a physical person, a legal person or a group of physical or legal persons exercise a preponderating influence over a given legal person is obviously not equivalent to declaring or admitting that they have a right of ownership in the property of the latter."* [137]

The arbitration tribunal emphasized that a shareholder has no right in the property of the company. This principle is unaffected by the number of shares which are owned.

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[135] (1926) RIAA 744 at 782.

[136] Id at 787.

[137] Id at 789.

[93] In ***Kaunda*** Chaskalson, CJ and the minority proceed from an analysis of section 3 of the Constitution pertaining to a national seeking diplomatic protection. The learned Chief Justice indicated that a national has an entitlement to request diplomatic protection. This entitlement to request diplomatic protection is found to be part of the constitutional guarantee accorded by section 3 of the Constitution.[138] The finding proceeds from the premise that the requirements for citizenshp under South African law are such at "*citizens invariably, if not always, will be nationals of South Africa. They are entitled as such to request the protection of South Africa in a foreign country in case of need.*"[139] However, the same premise cannot be applied to companies who are legal persons, since they are not citizens and enjoy no rights or privileges in terms of section 3 of the Constitution. In consequence, the guarantee to citizens under section 3 of the Constitution which gives rise to the entitlement to citizens who are nationals to request diplomatic protection, does not apply to companies. Therefore, the ratio of the ***Kaunda*** judgment provides no basis upon which it can be found in the present case, that companies that have been expropriated without compensation in Lesotho in contravention of the relevant international norms, have the same entitlement to request diplomatic protection as that held by a citizen. However, where a company is a national and that company seeks diplomatic protection, then the executive is obliged to consider that request and has to exercise its discretion to afford diplomatic protection or not. In that circumstances the source of the duty to consider in the case of a company, is constitutional accountability as evidenced by section 41(1)(a), (b) and (c) of the Constitution.[140] Further, the ambit of the discretion is prescribed by customary international law. This duty to consider and the ambit of the discretion are

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[138] Cf para [67] at 1027E-F/G; see paras [58]-[63] at 1026D-1027B.

[139] Id para [62] at 1026H.

[140] Section 41(1)(a), (b) and (c) provides as follows:

underscored by the responsibility of the President as head of the executive, to promote that which will advance the Republic of South Africa in conducting foreign relations with other states. Thus, in the final analysis, the fourth to ninth applicants which held the mining leases and tributing agreements are certainly not nationals of the Republic of South Africa even though some of the shares held in them are held by the first to third applicants who are South African nationals. These South African shareholders in those companies are not entitled to diplomatic protection.

Exhaustion of Local Remedies

[94] The second pre-requisite for admissibility of a claim at an international level is the rule on exhaustion of local remedies. The rule can be traced back to the aspect of sovereignty of the host State. Amerasinghe explains:

"*41. (1) All spheres of government and all organs of state within each sphere must –*
(a) preserve the peace, national unity and individuality of the Republic.;
(b) secure the well-being of the people of the Republic;
(c) *provide effective, transparent, accountable and coherent government for the Republic as a whole*."

This section should be read with section 83(c) and section 85(1) and (2)(b) and (e) of the Constitution. Section 83(c) reads:

"*The President –*

(a)…

(b) …

(c) promotes the unity of the nation and that which will advance the Republic."

And section 85(1) and (2)(b) and (e) provides as follows:

"*(1) The executive authority of the Republic is vested in the President.*

(2) The President exercises the executive authority, together with other members of the Cabinet, by -

(a) …;

(b) developing and implementing national policy;

(c) …;

(d) …;

(e) *performing any other executive function provided for in the Constitution or in national legislation.*"

> "The rule sprang up primarily as an instrument designed to ensure respect for the sovereignty of host States in a particular area of international dispute settlement. Basically this is the principle reason for its survival today and also for its projection into the international system of human rights protection. Whether in the modem law of diplomatic protection or in the conventional law of human rights protection, the raison d'ètre of the rule is a recognition given by members of the international community to the interest of the host State, flowing from its sovereignty, in settling international disputes of a certain kind by its own means before international mechanisms are invoked."[141]

The function of the rule is described as follows by the International Court of Justice in ***Interhandel case (Switzerland v United States)***: [142]

> *"The 'rule of local remedy' ensures that the state where the violation has occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."*

[95] The contention advanced by the applicants is that the exhaustion of local remedies is irrelevant. This reveals a clear lack of understanding of the concept of diplomatic protection. The rule of the exhaustion of local remedies is a customary international law rule.[143] It is also regarded as a substantive law rule. This means that an international wrong is only regarded as being committed when the injured person cannot obtain redress through local remedies. Even if it is regarded as a rule of a procedural nature, its effect remains the same as far as the facts of this case are concerned, namely the rule precludes recourse to diplomatic protection if its

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[141] *Local remedies in International Law* 359, reproduced in Henkin, Pugh *et al*: *International Law*, p 588.

[142] 1959 ICJ 6

[143] *Panevezys-Saldutiskis Case (Estonia v Lithuania),* 1939 PCIJ Reports, Series A/B No 764 at 18; *Interhandel case* 1959 ICJ Reports 6 at 27; *Electricity Company of Sofia Case* 1939 PCIJ Series A/B no 77 64 at p 78.

conditions are not fulfilled. The rule requires that all remedies must be exhausted. According to Doehring:[144]

> "Undisputed and long-standing international legal practice confirms the principle that the exercise of active diplomatic protection is precluded as long as all the remedies available under domestic law have not been exhausted by the private party involved."

[96] In ***Panevezys-Saldutiskis Railway Case (Estonia v Lithuania)***[145] it was argued that since there was a decision of the highest court of Lithuania that was adverse to the parties' case and it was not necessary to exhaust local remedies. But the Permanent Court of International Justice's response to this argument was:[146]

> *"[I]f the Esimene Company instituted proceedings in the Lithuanian court as to their right to be regarded as the owners and concessionaires of the Panevezys-Saldutiskis Railway, the parties to the suit would not be the same as those in the (appeal court case) - so that no question of res judicata could arise: nor is there anything to show that the Esimene Company would find itself confronted by a course of decisions ... of the Lithuanian courts which would render the Company's suit hopeless, despite the difference of parties."*

The Court, therefore, found that the exhaustion of local remedies rule was applicable. In view of this decision, the applicants' argument pertaining to the non-applicability of the exhaustion of local remedies rule is unacceptable. Further, summons was issued for damages regarding the cancellation of four leases by Swissborough against the GoL. The action has been pleaded and the case is ripe for hearing. For that very reason the applicants have not exhausted local remedies in Lesotho.

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[144] Doehring: *Local Remedies, Exhaustion of*, in Bernhardt: (ed) *Encyclopaedia of Public International Law* vol 3 (1997) 238 at p 240.

[145] 1939 PCIJ Reports Series A/B No. 764.

[146] Id at 21.

[97] Mr Grobler, in my view, rightly submitted that the first applicant, Mr van Zyl was perfectly happy with the quality of jurisprudence and justice meted out by the Lesotho High Court and the Lesotho Court of Appeal when the judgments were in the applicants' favour. It is rather ironical that after having been afforded the opportunity of more than fifty court days of leading evidence on the validity of the Rampai mining lease, the Lesotho High Court and the Lesotho Court of Appeal declared the mining lease invalid, now those very same courts are berated as meeting out injustice. There is simply no ground upon which it can be objectively found that the quality of justice dispensed by the Lesotho High Court and the Lesotho Court of Appeal does not meet the minimum international standard. The judgments of both courts are of exceptionally high quality and standard of jurisprudence and justice is beyond question. There is no basis whatsoever for finding that the applicants can have no confidence in courts of Lesotho. Mr van Zyl in particular and the applicants generally are grossly mischievous in seeking this Court, as an organ of the Republic of South Africa, as well as the President, as head of the executive to critically undermine the courts of Lesotho. To answer to such a call would in essence tantamount to infringing the sovereignty of the Kingdom of Lesotho.

Conclusion on international delict and the pre-requisites to prosecuting a claim for diplomatic protection

[98] The elements of an international delict which would vest the right in the Republic of South Africa to act against the Kingdom of Lesotho on the basis of diplomatic protection for the applicants have not been satisfied by the applicants and that no such right vests in the Republic of South Africa. Nor have they satisfied the two essential pre-requisites for the admissibility of a claim for purposes of diplomatic

protection. Thus, it follows that the *mandamus* as requested by the applicants to act in diplomatic protection against the Kingdom of Lesotho in prayer 5 of the notice of motion cannot be granted.

Legitimate expectation

[99] Briefly, one last aspect regarding the main application needs to be considered. The applicants' argument based upon legitimate expectation. It rests upon two bases. *First*, reliance is placed on the letter of the State Attorney of 15 May 1995 and secondly, on various pronouncements of certain office-bearers of the first respondent regarding foreign policy. However, this did not form part of the applicants' case at all. Counsel for the respondents rightly submitted that the State Attorney's letter did not constitute any representation which was clear, unambiguous and devoid of relevant qualification, however, no reasonable expectation could have been induced by the letter. Insofar as the pronouncements of foreign policy is concerned the applicants rely upon a *substantive* legitimate expectation. It was argued that this expectation arose from various expressions of foreign policy made on behalf of the first respondent. The applicants' counsel in their heads of argument submitted that:

> "At a minimum, the policy expressed creates a legitimate expectation that the respondents' commitment to promoting economic stability and increasing investor confidence will inform the respondents' exercise of discretion regarding the provision of diplomatic protection to applicants."

In response Mr Grobler rightly submitted that no such legitimate expectation is to be found in the application papers. The applicants' argument is simply to wax forth by simply adding new elements to an unpleaded case. The pronouncements of foreign policy relied upon did not give rise to a legitimate expectation in the true

sense. Further, our law does not recognize a doctrine of legitimate expectation which gives rise to substantive rights as asserted by the applicants. Finally, the applicants' purported claim based on legitimate expectation does not advance their case for any of the relief sought in the notice of motion.

C. Respondents' strike-out application

Introduction

[100] The respondents served an application to strike out on 6 October 2003 notifying the applicants of their intention to move for the striking out of certain paragraphs contained in the replying and supplementary replying affidavits as well as annexures thereto. Subsequently, a day prior to hearing of the matter the respondents served an amendment to the striking out application intending to add further paragraphs under prayer 1 of the application to strike out and also tendered the costs for the ensuing amendment. The grounds, for the application to strike out, are set out in annexures "A" and "B". The respondents also served comprehensive heads of argument. Their papers comprise of no less than 200 pages.

[101] Prior to the hearing, the applicants neither filed any notice to oppose the strike out application nor intimated their intention to raise any preliminary issue. At the outset of the proceeding the applicants raised in essence a point *in limine* contending that the application to strike out was not before the Court and should not entertain it separately to the consideration of the main application or at all since the respondents failed to comply with the time specified in the Deputy Judge President's directive. After some debate the issue was resolved that the matter

proceed on the basis that the main application and the application to strike out should be heard simultaneously. .Thus, it was not necessary to make a ruling.[147]

[102] In deliberation to what was said earlier regarding *ad hoc* directives,[148] I am of the view and without laying down a rule that any non-compliance with a directive, particularly an *ad hoc* one, a party ought not to take advantage by simply raising the issue of non-compliance without affording the other party to file a condonation application. Further, in a matter of complicity and multiplicity of intricate issues such as this one, a party wishing to raise a preliminary issue ought to have the courtesy to timeously alert the other party of any intended point *in limine* to be taken. It is unreasonable for a party to wait until the last moment to stand upon his or her rights under the directive.[149]

Applicants introduced a new case in reply

[103] The main thrust of the respondents' application to strike out is aimed at applicants' conduct in the presentation of their case in reply. It is characterised by a complete disdain of the most basic rules of procedure and of evidence as well as by a disdain of the censure previously meted out to them by the courts, both in Lesotho and this country, for exactly the same behaviour. The respondents submitted that the applicants' conduct smacked of contumacy. The respondents' counsel, Mr Raath argued that the applicants' defiance of those rules, and of the previous judgments against them find expression, *inter alia*, in paragraph 32 of the founding affidavit that:

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[147] See paragraph [9] above.

[148] See paragraph [10] above.

[149] See *Gutman N.O. v Standard General Insurance Co Ltd* 1981 (4) SA 114(C) at 122E-G; *Webster v Webster* 1992 (3) SA 729 (E) at 734G.

> "The merits of applicants' disputes with the Government of Lesotho are not directly in issue in this application. … What is in issue is the failure by the respondents to exercise their power (to decide to afford applicants diplomatic protection) in a constitutionally permissible manner.
>
> I have been advised that it is, however, necessary to briefly describe the events in Lesotho which lead up to applicants' applications/requests for diplomatic protection."

This statement is prefatory to everything which followed in the remainder of the founding affidavit. It is submitted that it was calculated to bring the respondents under the impression that they were dealing with a case presented, as is normally done for purposes of review proceedings, on the basis that only the proper execution by a functionary of his or her duties is in issue, and not the merits, as if by way of an appeal. Further, the respondents were assured in the founding affidavit that they are not facing any further allegations of conspiracy on the part of the first respondent with the GoL. Thus, applicants did not refer to first respondent at all where they define "combination" at paragraphs 92 and 93 of the founding affidavit. Furthermore, the founding affidavit is emphatic that the actions against the first respondent were withdrawn and that a press statement was made:

> "… in which it was stated that the African National Congress which controls the Government of the Republic of south Africa was not responsible for the harm caused to and the financial damages suffered by applicants resulting from the conduct from the GoL – and that this was done in order to 'pave the way' for the first respondent to afford the applicants diplomatic protection."

However, in the replying affidavit new material is extensively introduced in an attempt to prove the merits of applicants' claim against the GoL as well as the first respondent's involvement in a conspiracy with the GoL. Mr Raath submitted that it is a blatant attempt to resurrect nothing less than a dominating theme and it pertains also to the first respondent under the ANC.

[104] In ***Swissborough***[150] Joffe J referred to ***Imprefed (Pty) Limited v National Transport Commission***[151] regarding the more complex the dispute between the parties the greater precision is required in the formulation of the issues even in motion proceedings. In ***Imprefed***[152] the Appellate Division quoted with approval from ***Kali v Incorporated General Insurances Limited***[153]that:

> "*… a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.*"

This is precisely what applicants endeavoured to do since in the founding affidavit expressly move away from the RSA conspiracy theme but the replying affidavit imports it in its full vigour. In this regard the following passage from ***Triomf Kunsmis (Edms) Bpk v AE&CI BPK en andere***[154]is apposite:

> "*Hier is nie sprake van slegs 'n tydelike bevel pendente lite nie en dit is by uitnemendheid ook die soort geval waar die volgende stelling wat Regter Nestadt R in Shepard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at 177 aanhaal, van toepassing is:*
>
> > *'It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits or the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out.'*
>
> *Verder aan:*
>
> > *'This is not however an absolute rule. It is not the law of Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This*

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[150] 1999 (2) SA 279 (T) at 324C-D.

[151] 1993 (3) SA 94 (A) at 106-107.

[152] Id at 107H.

[153] 1976 (2) SA 179 (D) at 182A.

[154] 1984 (2) SA 261 (W) at 269B-G.

> *indulgence, however, will only be allowed in special or exceptional circumstances.'*
>
> *Dit is interessant dat wanneer Nestadt R sê dat dit nie 'n absolute reel is nie, hy praat van 'n diskresie*
>
> *'… to allow new matter to remain in the replying affidavit.'*
>
> *My indruk is dat hierdie reëls soos Aldus geformuleer hoofsaaklik van toepassing is op wat gewoonlik beskou word as 'new matter', wat nie sinoniem is met 'n nuwe oorsaak van aksie nie. In die geval van 'n nuwe oorsaak van aksie wat die bestaande een vervang kan ek my kwalik omstandighede indink wat nie die onvermydelike gevolg het dat die proses, soos op daardie stadium, afgewys word nie. Dit is een ding om slegs ekstra feite ter ondersteuning van 'n bepaalde oorsaak van aksie, of te onderstreep, of vir die eerste keer aan te haal in 'n repliserende verklaring. Dit is 'n ander ding om geheel en al bollemakiesie te slaan ten opsigte van die gedingsoorsaak wat die gedingvoering in 'n totaal verskillende rigting stuur.*"

[105] What is clearly apparent that the applicants manifested procedural innocence by stating in paragraph 32 of the founding affidavit that, as the merits of their case against the GoL was not in issue, but what was to follow was merely presented as a brief outline of the history of the matter and thereby disavowing any reliance on the RSA conspiracy theme. Mr Raath submitted that the founding affidavit was marked by brevity rather than superfluity. The respondents, however, proceeded to put forward their case on that basis. But, what followed is a lengthy replying affidavit attempting to prove the merits of applicants' claims against the GoL by introducing the RSA conspiracy theme. The founding affidavit comprised of 91 pages, similarly the answering affidavit also comprised of 91 pages but in comparison, the replying affidavit runs for a full 535 pages). What is also apparent that the founding affidavit was calculatedly offered in feigned procedural innocence from the outset as part of a ruse to snare the respondents so that the RSA conspiracy theme could surface in the replying affidavit without the respondents having an opportunity to deal with it. An applicant who wishes to rely upon exceptional circumstances in justification of the introduction of new matter in the replying affidavit should do so by way of an application begging leave to

supplement his or her papers. In the absence of such an application, not even an invitation to the respondent to file a second set of affidavits will suffice,[155] nor is the respondent entitled to file further affidavits without the leave of the court.[156]

[106] The applicants rather than seeking leave to supplement their founding affidavit chose to use their replying affidavit as a vehicle to introduce a new case mainly based upon the RSA conspiracy theme. The Deputy Minister of Foreign Affairs in his answering affidavit indicated:

> "*Mr van Zyl the deponent to the founding affidavit omits to mention material facts which are decisive of the matter. Nowhere in his affidavit or annexures thereto does he set out these material facts.*"

[107] Mr Katz on behalf of the applicants argued that the applicants provided the respondents detailed documentation setting out all the material facts including those the fourth respondent contends that the applicant failed to mention. Counsel submitted that this failure by the respondents (at the time the impugned decisions were taken) to notice the material facts were disclosed in the applicants' request for diplomatic protection. This was made worse for the applicants by the fourth respondent's assertion in his answering affidavit that the former failed to mention the "material facts" in the founding affidavit and the annexures thereto. Mr Katz also submitted that the conspiracy theme is but one example of the background facts which may assist this Court in understanding the first respondent's decision-making process regarding the applicants' request for diplomatic protection and which may have relevance in confirming the irrationality of the decision-making

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[155] *Strauss v Strauss and another* [1998] 4 SA 656 (A) at 660D-E.

[156] See also *James Brown and Hamer (Pty) Ltd v Simmons N.O.* 1963 (4) SA 656 (A) at 660D-E.

process for the purposes of the review application. And for that reason alone, the conspiracy issue ought not to be struck out.

[108] I am not persuaded by the convoluted argument advanced by Mr Katz that the conspiracy theme that pervade in the replying affidavit should not be struck out for essentially those reasons. *First*, the applicants failed to heed what was said by Joffe J in ***Swissborough***[157] that:

> "*Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required I the identification of the portions thereof no 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. See Lipschitz and Schwarz N.N.O. v Markowitz 1976 (3) SA 772 (W) at 775H and Port Nolloth Municipality v Xahalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C) at 111B-C.*"

[109] *Secondly*, the applicants latched onto some of the averments made in the answering affidavit for example the fact that applicants did not mention therein that they themselves cancelled four of the five mining leases. They then proceed to deal over many pages as well as referring to voluminous documents to make out a case that these facts were known to the respondents' predecessors. They then introduce a new case mainly based upon the RSA conspiracy theme. It has no relevance to the aspects raised in the answering affidavit. A perusal of the replying affidavit reveals that an averment of a few lines in the answering affidavit triggered a substantial number of pages of response in the replying affidavit. It shows that in doing so the applicants attempted to generate a whirlwind of contentious issues, having little or no relation to the averments made in the answering affidavit

[157] 1999 (2) SA 279 (T) at 345F-H.

presumably in the hope by importing a new case in reply. And such a case may somehow be subsumed in the enormous breadth of the massive material (including speculation, argument) and voluminous annexures by which the respondents and the Court are inundated. Suffice to say that in comparison the applicants' founding affidavit is characterised by relative sparsity but the replying affidavit scatters as widely as possible in anticipation of reaping a brand new case with a crop of new matter which the respondents never had the opportunity to deal with. This is exactly what was done in ***Swissborough*** and drew criticism from the learned Judge. In spite of the criticism expressed in ***Swissborough*** and in flagrant disregard of the most basic rules of procedure and of evidence, the applicants rely in their heads of argument on new matter imported into the replying affidavit by way of inadmissible evidence tendered in the proceedings in Lesotho in order to establish their case on the RSA conspiracy theme.

[110] *Thirdly*, it is remarkable that the "material facts" themselves are not in contention. What is apparent that the parties are not in dispute with each other a far as the factual allegations are concerned. It concerns only two aspects: one, whether it was mentioned in the founding affidavit and/or annexures thereto, and two, that the respondents assert that they were not aware of those facts when they made their decisions. Despite this, applicant seek in hundreds of pages of the replying affidavit and the proliferation annexures to offer material in order to demonstrate that those "material facts" are correct. It tantamounts to the applicants abusing the process. They could simply have indicated where these "material facts" were alluded to in the annexures to the founding affidavit. However, would not have served applicants' purpose which is now to elevate their case to prove the actual merits of their case against the GoL, and especially to introduce the RSA

conspiracy theme as the basis for their new cause of action, namely the unconstitutional behaviour on the part of the first respondent on South African soil which, *inter alia*, leads to their brand new case based upon section 25 of the Constitution on the basis that respondents thus acted unlawfully within the borders of South Africa. This is certainly a stratagem of abusing the process.

[111] *Fourthly*, regarding any references to the annexures not mentioned in the founding affidavit, a deponent to an affidavit cannot simply append annexures and tell either the opponent or the court to have regard thereto in order to find the deponent's case lurking somewhere. The deponent has to identify the specific portions of the annexure as well as the case sought to be made out on the strength thereof. It is no use for the applicants to point to some references which may be hidden somewhere in the voluminous annexures to the founding affidavit in order to respond to respondents' criticism in the answering affidavit.

[112] The applicants, in their written submissions of 8 November 2003, indicated that the case put before this Court is the case made out in their founding affidavit and that is the case both Mr Dugard and Mr Katz argued on their behalf. The critical question is what is the purpose of a catena of paragraphs in 535 pages of the replying affidavit weighted by a chain of accompanying annexures. Was it a purposeless exercise on the applicants' part? I remain unpersuaded that the conspiracy theme is merely in the reply as an example of the factual background to assist the Court in understanding first respondent's decision-making process regarding the applicants' request for diplomatic protection. It is apparent that the applicants' deponent is certainly not candid because a substantial number of paragraphs deal with the conspiracy theme and a large number of paragraphs are utilized to change the character of the application. The replying affidavit and its

annexures are replete with new matter and which cannot be raised in the replying affidavit.[158] New matter falls under the rubric of irrelevant matter and is susceptible to be struck out.

[113] The objectionable paragraphs in the applicants' replying affidavit and annexures thereto are:

(a) conspiracy theme

(i) in the replying affidavit:

Paragraphs 11.2 and JVZ C1.15.12.7 and JVZ C29 and C30; 15.24 (specifically 15.24.6, 15.2.4.8 and 15.24.9); 19; 27.10 and JVZ C1; 31.3; 31.4 and JVZ C70 and C1; 31.5 and JVZ C70; 31.6 and JVZ C70 and C71; 31.7 and JVZ C71; 31.8 and JVZ 72; 31.9 and JVZ C73.7 and C73.8; 31.10; 31.11; 31.13; 31.14; 31.15; 31.16; 31.17; 321.18; 31.19; 32.1 (only insofar as relates to JVZ C1); 32.12; 32.13; 32.15; 32.16; 32.17; 32.18; 32.19; 32.20; 32.21; 38.1 (last sentence); 42 (excluding paragraph 42.9) and JVZ C75; 76.1 (except first two sentences); 135.2; 135.3 to 135.8 as well as 135.10 and JVZ C78; 135.9 and JVZ C103 C122; 135.11 to 135.29 (specifically 135.12; 135.16; 139.19 and JVZ c104; 139.20 to 135.22 and JVZ C1; C105; C105.1; C105.3; C105.4; C106; C107; C108; 135.25; 135.26; 135.29); 135.23; 135.27 to 135.8 and JVZ C109; 139; 144; 148.2 and JVZ C1; 154 and JVC1, C110, C111, C113, C114, C115, C116 and C117; 155.2 (only

[158] Id at 338F.

portion of page 1841); 165.2 (third last and second last sentence); 165.4; 166; 168.

(ii) In the supplementary replying affidavit:

Paragraphs 2 to 3 and JVZ C1, C75 (K1); C140, C141, C142, C143, C144, C145, C146.

(b) changing character of application

Paragraphs 6 and JVZ C1; 10.3 and JVZ C1; 14.4 and 14.5 and JVZ C9, C10, C11, C12, C13, C14, C15, C16, C17, C18, C19, C20, C21, C22, C23, C24, C25 and C26; 15.6; 15.2.2 to 15.12.7 and JVZ C29 and C30; 15.14 and JVZ C31; 15.15 and JVZ C32; 15.21; 25.1 (last sentence) and JVZ C1; 27.5.2 to 27.5.6; 27.5.8; 27.5.9 and JVZ C68 and 69; 27.10 and JVZ C1; 31.2 and JVZ C1; 31.3; 31.4 and JVZ C70 and C1; 31.6 and JVZ C70 and C71; 31.7 and JVZ C71; 31.12; 130.2 to 130.7 and JVZ C1; 132.1; 133.1 and JVZ C27; 134.1 (from "I refer this Honourable Court to the evidence of Mr Labuschagne …" at page 1763) and 134.2.

Other objectionable matter

[114] Besides the new matter, there are other objectionable matter in the applicants' replying affidavit and annexures. These would be any matter which is "scandalous, vexatious or irrelevant"[159] The objectionable paragraphs that fall within any of those descriptions as well as inadmissible hearsay and another enumerated hereunder.

[159] Rule 6(15) of the Uniform Rules of Court.

(a) scandalous and/or vexatious matter

Paragraphs 17.3; 27.5 (introduction); 31.12 (last sentence at page 1522); 39.55.1 (pages 1642-45); 39.55.14 (pages 1645-46).

(b) irrelevant matter

Paragraphs 7.1 (except first sentence); 10.2 to 10.8 and JVZ C2, C3 and C4; 14.5; 19; 15.13; 15.16 to 15.21; 22.2 to 22.12; 14.1 (last sentence); 27.4; 27.5.1; 27.8; 27.9; 135.24; 135.25; 135.26; 135.27-135.28 and JVZ C109; 135.29.

(*c) other new matter*

Paragraphs 143.3 (except first sentence) and JVZ C1 and C122; 153; 154.8; 158 and JVZ C118, C119, C120, C121, C122, C123, C124, C125, C126, C127, C128, C129, C130, C131, C132, C133, C134; 139.

(d) inadmissible hearsay evidence

It is trite that the courts have declined to countenance the admission of hearsay evidence unless there is urgency or special circumstances to warrant the acceptance of such evidence in application proceedings.[160]

Paragraphs 14.5.14; 15.4 (TV reports); 15.15 and JVZ C32 (newspaper reports); 27.5.4 (evidence of Labuschagne in Lesotho trial); 27.5.5 (Labuschagne's affidavit filed in case 18474/99); 27.5.6; 31.18 (evidence adduced in Lesotho litigation); 31.19;

[160] *Swissborough Diamond Mines v Government of RSA* 1999 (2) SA 279 (T) at 336G&I-J; *Galp v Tansley N.O. and Another* 1966 (4) 555 at 558&560.

31.20; 31.21; 32.4 (except first two sentences); 32.6; 32.12; 32.20; 32.21; 36.2 (only reference to Putsounce's evidence); 36.2.1; 36.2.2; 130.2 (evidence adduced in Lesotho litigation and GoL official documents at the top of page 1756); 135.23; 154.2; 154.3; 154.4; 154.5; 154.6; 154.9; 155.2 (on the portion of page 1841); 155.3; 165.4; 166.3.1 (Labuschagne's evidence quoted at pages 1879 to 1891).

(e) no case is made out for legitimate expectation

Paragraphs 52 and JVZ C82, 83 and 84; 558.2 (third last and second last sentences).

Requirement of prejudice

[115] A court will only grant an application to strike out until it is satisfied that the party bringing the application will be prejudiced in his or her case if an order is not granted.[161] In the instant case, the prejudice sustained by the respondents is to be found in the titanic proportion of new matter introducing the conspiracy theme with the motive to change the character of the main application as well as scandalous, vexatious and irrelevant matter as well as inadmissible hearsay evidence. It is overwhelming.[162] Both the main application and the striking out application woven with exhaustive and overwhelming new matter in the replying affidavit together with a train of annexures required industry to deal with and was indeed prejudicial and certainly fall to be struck out.

Costs of striking out application

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[161] *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotel (Pty) Ltd* 1991 (3) SA 276 (SE) at 282H-283C; See also: *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733J-734C; *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566J-567B.

[162] See: *Swissborough Diamond Mines v Government of the RSA* 1992 (2) SA 279 (T) at 338C.

[116] As far as costs are concerned, the respondents seek that the applicants pay the respondents' costs, including the costs of three counsel, on an attorney and own client scale. This form of order is such as to not only indicate extreme opprobrium but also the court's intention to allow the successful party to recoup more fully than would be the case in an ordinary attorney and client scale.[163]

[117] I propose to order the applicants to pay the respondents' costs on an attorney and own client scale as a mark of disapproval of the applicants' conduct because there was a radical departure from and disregard to the most basic rules of practice and procedure and the law of evidence. In my view this kind of conduct falls within the paradigm of abusing the process of court. Further, the applicants overwhelmed the respondents and this Court, literally and figuratively, with a shipment of documents in the hope of changing the character of the main application. The respondents and this Court were inundated with irrelevant new matter, scandalous and vexatious assertions and inexplicable hearsay evidence. Thus, the applicants' conduct not only smacks of contumacy but shows utter disdain for the most fundamental rules of practice, procedure and evidence. Such conduct certainly merits censure and surely justifies an award of attorney and own client costs. Thus, in the circumstances of this particular case, it is fair and just to make such an order given the magnitude and complexity of the matter.

D. Cost of Main Application

[118] Neither parties argued against the respondents' engagement of three counsel. The respondents were represented by two silks and a junior. The services of three counsel were certainly not extravagant having regard to the novelty, complexity and magnitude of the matter as well as numerous issues of international law and

[163] *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Another* 1990 (2) SA 574 (T) at 589D-E.

constitutional law and the importance of the matter to both sides. The respondents did not pray for any special order of costs. Thus, as ordinarily the costs should follow the result.

E. Order

[119] Accordingly the following order is made:

(a) *application to strike out*

(i) The respondents' application to amend their application to strike out is granted and the respondents pay the costs tendered occasioned by the amendment.

(ii) The respondents' application to strike out is upheld and the applicants are jointly and severally, the one paying the others to be absolved, ordered to pay the costs thereof on an attorney and own client scale including the costs consequent upon the employment of three counsel.

(b) *main application*

The application is dismissed and the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth applicants are jointly and severally, the one paying the others to be absolved, ordered to pay the costs of the application including the costs consequent upon the employment of three counsel.

E M PATEL
JUDGE OF THE HIGH COURT

HEARD ON:	**27, 28, 29, 30, 31 October 2003; 4, 5 December 2003.**
FOR THE APPLICANT:	**Adv. J Dugard SC, Adv Anton Katz and Adv M du Plessis.**
INSTRUCTED BY:	**Couzyn, Hertzog & Horak Inc., Pretoria.**
FOR THE RESPONDENTS:	**Adv G L Grobler SC, R J Raath SC and M Mphaga.**
INSTRUCTED BY:	**The State Attorney, Pretoria**
DATE OF JUDGMENT:	**20 July 2005.**