How not to protect a South African-owned investment abroad: *Van Abo v Government of the RSA and Others*

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Abstract

This article considers a series of cases between Von Abo and the Government of the Republic of South Africa reported as follows: *Von Abo v Government of the Republic of South Africa & Others* (2009) 2 SA 526 (T); *Von Abo v President of the Republic of South Africa* (2009) 10 BCLR 1052 (CC); (2009) 5 SA 345 (CC); and *Government of the Republic of South Africa and Others v Von Abo* (2011) 5 SA 262 (SCA); (2011) 3 All SA 261 (SCA). These cases concerned the employment of the remedy of diplomatic protection, claimed as a right under the South African Constitution, by a South African citizen to protect his private commercial interest outside South Africa. The article observes that diplomatic protection, as of right, is a nonexistent or unsuitable remedy for an individual seeking to protect private interests in a foreign country. Other options may be useful and effective. However, the article further notes, given the exponential increase in recent years of South African-owned investments in foreign countries, particularly in other African states, that the South African government has a significant role to play in ensuring the safety and security of South African-owned investments abroad.

Introduction

During the past two decades we have seen a number of South African-owned companies emerging as prominent role players on the African continent.[1] South African companies have placed South Africa as the leading investor country in many African states, displacing companies from Europe and America.[2] This trend is particularly true in the case of South Africa's

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1 M Soko & N Balchin 'South Africa's policy towards Zimbabwe: a nexus between foreign policy and commercial interests?' (2009) *South African Journal of International Affairs* 34, footnote 16. See also 'South Africa's Business Presence in Africa' (2004) Occasional Paper 3, South Africa Foundation 13–18, available at: http://www.businessleadership.org.za/documents/SABusinessPresenceinAfrica_web.pdf (last accessed 20 October 2011).

2 *Ibid*. See also D Games 'The experience of SA firms doing business in Africa: a preliminary survey and analysis' (2003) *South African Institute of International Affairs* 6–8, available at:

immediate neighbours. For example, in Mozambique, South Africa was found to be a leading investor representing 49% of total foreign direct investment from 1997–2002.[3] Yet, an increase in a number of South African companies doing business in neighbouring and other African states does not imply that these countries offer a trouble-free and uncomplicated business environment.[4]

Indeed, each opportunity may present its own threats, as the nature of the post-modern world, its closeness and connectivity, brings associated dangers and volatility for business.[5] As observers have noted, 'investors in developing countries face political risk that is much greater than that experienced when investing in liberal western democracies'.[6] Political risk, it is submitted, includes government intervention such as increases in import or export duties, tax, regulations, and nationalisation or expropriation of the assets of the investor.[7]

South Africa's neighbour on the other side of the Limpopo River, Zimbabwe, has caused significant anxiety for many South African and other investors with assets and business interests in that country. The government of Zimbabwe has in recent years been particularly notorious for its widely reported large scale expropriation of farmland owned mainly by white farmers. The recently announced fast-track indigenisation legislation in the mining and other sectors is also likely to have a negative impact on foreign-owned investments in Zimbabwe which, it is submitted, will further weigh heavily on growth and poverty reduction prospects in that country.[8] Despite

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http://www.sarpn.org.za/documents/d0000455/P430_Business_Africa.pdf (last accessed 20 October 2011). In addition, the explosion of industries such as the mobile telecoms market has opened vast opportunities for South African companies such as MTN, which has established a strong foothold in Africa, available at: http://www.tradeinvestnigeria.com/business_in_nigeria/ (last accessed 20 October 2011).

3 N Grobbelaar 'Every continent needs an America: the experience of SA firms doing business in Mozambique' (2004) *Business Report* 2 SAIIA 1.

4 *Ibid*.

5 'Diplomatic investment in Africa' Address by then Deputy Minister of Foreign Affairs, Ms Sue van der Merwe on the occasion of the South African Chamber of Business Luncheon, Johannesburg Country Club, 28 September 2006, available at: http://www.dfa.gov.za/docs/speeches/2006/merw0928.htm (last accessed 20 October 2011).

6 PE Cameaux & SN Kinsella 'Reducing political risk in developing countries: bilateral investment treaties, stabilization clauses, and MIGA & OPIC investment insurance' (1994) 15 *New York Law School Journal of International and Comparative Law* 2.

7 *Ibid*. Qureshi also points out that 'a central problem traditionally preoccupying the international community, particularly developed states, has been the treatment of investment of capital from private investors from developed state in developing states', AH Qureshi *International economic law* (2007) 400–402.

8 See IMF's 2011 Article IV consultation on Zimbabwe, 16–30 March 2011, available at: https://imf.org/external/np/sec/pr/2011/pr11116 htm (last accessed on 20 October 2011).

Zimbabwe's myriad political and economic problems, trade and investment ties between South Africa and Zimbabwe remain strong.[9] Zimbabwe, it is submitted, has consistently been South Africa's most important trading partner on the continent, and has until recently been in the top fifteen globally, of the countries with which South Africa exchanges the greatest volume of trade.[10] This has to some extent increased the potential for risk to South African companies doing business in that country.

The threat of the economic policies pursued by the Zimbabwean government to South African-owned investments has also been noted by South African authorities. Responding to parliamentary questions by opposition parties on 'what steps will be taken to protect South African-owned property in Zimbabwe', the then South African Minister of Foreign Affairs, Nkosazana Dlamini-Zuma, replied that 'the South African government would continue to ensure the safety and security of all its citizens, their property as well as South African-owned companies operating in foreign countries'.[11] Such efforts, in my view, probably referred mainly to diplomatic measures, since legal means such as a Bilateral Investment Protection and Protection Treaty between the two countries were likely to be ineffective.[12]

Despite its promise to provide protection to South African-owned properties and companies, particularly in Zimbabwe and other foreign countries, the South African government has in some cases appeared not to live up to its word, prompting aggrieved citizens to approach courts in an attempt to obtain court orders compelling the government to take steps, notably diplomatic measures, to protect South African-owned investments in countries where they are under threat. Problems encountered by those who sought such court orders included the fact that the South African government, and in some cases even our courts, did not regard the violation of private commercial interest as sufficiently serious to justify the courts encroaching on the constitutional separation of powers by ordering the state to provide diplomatic protection, as diplomatic measures constitute what is termed, 'acts of state'.

A similar problem was encountered in the *Von Abo* and *Government of the Republic of South Africa* series of cases, heard before and decided first by the North Gauteng High Court (then the Transvaal Provincial Division),[13] then

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9 Soko & Balchin n 1 above 35.

10 *Ibid*.

11 *Von Abo v Government of the Republic of South Africa & Others* (2009) 2 SA 526 (T) par 38.

12 There are increasing perceptions that the current Zimbabwean Government does not honour treaties or laws that do not favour it.

13 Note 11 above.

by the Constitutional Court,[14] and lastly by the Supreme Court of Appeal.[15] The North Gauteng High Court, in its decision of 29 July 2008, probably became the first ever court in post-democratic South Africa effectively to find the existence of a positive duty on the government to provide a citizen with diplomatic protection, let alone diplomatic protection in respect of a private commercial interest: an area where most courts have been extremely reluctant to force the government to act.

Reluctance to provide diplomatic protection for private commercial interests

In *Van Zyl and Others v Government of RSA and Others*[16] the government declined a request for diplomatic protection by simply stating that it is unable to grant the request for diplomatic protection '*in relation to a private commercial* d*ispute*'[17] Hailing the government's decision not to provide the applicant with diplomatic protection as an informed and carefully considered decision,[18] the court concluded that neither international law, nor the South African Constitution provides for such absolute right.[19] However, in *Kaunda and Others v President of the RSA and Others,*[20] Chaskalson CJ remarked in a manner that may encourage some observers to conclude that diplomatic protection as a right may exist, when he stated that:

> there may be a duty on government, consistent with its obligation under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear, he further stated, would be difficult and in extreme cases possibly impossible to refuse.[21]

When Chaskalson's dictum was relied upon in a subsequent case involving a request for diplomatic protection in relation to a private commercial interest, Dugard observed[22] that the court distinguished that case from *Kaunda* on the basis that *Kaunda* had involved allegations of gross violations of international human rights, such as torture and physical abuse, whereas the case under consideration involved only the expropriation of property.[23] Does

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14 Note 11 above.
15 *Government of the Republic of South Africa and Others v Von Abo* (2011) 5 SA 262 (SCA); (2011) 3 All SA 261(SCA).
16 2005 (11) BCLR 1106 (T).
17 *Id* at pars 14 and 25 (own emphasis).
18 *Id* par 65.
19 *Id* par 68.
20 2004 10 BCLR 1009 (CC); 2005 4 SA 235 (CC).
21 *Id* par 69.
22 J Dugard *International law – a South African perspective* (3ed 2005).
23 *Id* 292.

this perhaps mean the violation of private commercial interests is not sufficient for the home state to intervene diplomatically?

The decision of the North Gauteng High Court in *Von Abo* may have brought false hope to many South Africans with investments abroad, that their property or commercial interests or rights are just as worthy of protection as the right to a person's security and bodily integrity. The High Court held that a citizen, in this case Von Abo, was entitled to diplomatic protection from the South African government in respect of the violation of his rights by the government of Zimbabwe and that the South African government had a corresponding constitutional obligation to provide him with diplomatic protection in respect of the violation of his rights by the government of Zimbabwe.[24] This decision was wrong in law.

The factual background in Von Abo

The applicant, Von Abo, was a South African citizen who for a period spanning over fifty years, acquired significant farming interests in Zimbabwe. He did so by incorporating private companies and procuring the registration of the farming properties into the names of these private companies, for his ultimate benefit. In 1985, he also arranged for the registration of a trust (the Von Abo Trust), which he employed in the same manner as his companies. The final decisions and actions by the relevant private companies and the Trust vested at all times in him by virtue of the fact that he always has been the managing director of the companies and the trustee of the Trust.

From 1997, the government of Zimbabwe, pursuant to its land reform programme and/or policy, began to expropriate land owned by white farmers. Von Abo's properties were among those expropriated by the Zimbabwean government without compensation being paid to him. It was common cause that he had attempted, without success, to protect his rights in Zimbabwe and the rights of the entities under his control, and that he had exhausted all remedies available in Zimbabwe. In particular, he attempted, through litigation, to protect his interests with the assistance of Zimbabwean courts, but the Zimbabwean government ignored court orders granted in his favour.

He then approached the South African government seeking diplomatic protection to safeguard his interests in Zimbabwe. His request for diplomatic protection to the South African government yielded no results, which led him to approach the High Court for a declaration, among others, that he has a right under the South African Constitution to diplomatic protection from the South African government in respect of the violation of his rights by the government of Zimbabwe, and that the South African government had a

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[24] Note 11 above at par 161(2) and (3).

constitutional obligation to provide him with diplomatic protection in respect of the violation of his rights by the government of Zimbabwe. However, he accepted from the outset that the correct approach to diplomatic protection was as stated by the Constitutional Court in *Kaunda*, namely that 'diplomatic protection is not recognised by international law as a human right and cannot be enforced as such'.[25] He instead based his application on the South African Constitution.

In what was clearly a liberal and expansive interpretation of the Constitution, the High Court found that the South African Constitution explicitly provides its citizens with the right to diplomatic protection and that the South African government has a constitutional obligation to provide its citizens with diplomatic protection.[26] This is undoubtedly the most explicit positive finding by a South African court concerning the existence of a citizen's right to receive diplomatic protection and the corresponding obligation of the state to provide such protection under South African constitutional law. Many other courts, including the Constitutional Court, have been reluctant to make findings of such nature, largely due to the unwillingness of the courts to encroach on the constitutional separation of powers, as diplomatic protection is considered to constitute what is termed an 'act of state'. In *Kaunda*, Chaskalson CJ remarked that a decision as to whether protection should be given, and if so, what protection should be given, is an aspect of foreign policy which is essentially the function of the Executive.[27] 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, he further held, are matters with which courts are ill-equipped to deal.[28]

Judging from its past decisions on similar matters, it could reasonably be expected that the Constitutional Court would, if given the opportunity to consider the case on its merits, be reluctant to endorse the decision of the High Court. Given that there was no appeal lodged by the respondents, the matter only went to the Constitutional Court as an application for confirmation of the High Court Order of constitutional invalidity,

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25 *Kaunda* n 20 above par 29.

26 Note 11 above. The court held, at par 161(2) and (3), that: '2**.** It is declared that the applicant has the right to diplomatic protection from the respondents in respect of the violation of his rights by the Government of Zimbabwe. 3**.** It is declared that the respondents have a Constitutional obligation to provide diplomatic protection to the applicant in respect of the violation of his rights by the Government of Zimbabwe.'

27 *Kaunda* n 20 above par 77.

28 *Ibid*.

specifically because the State President was also a respondent in the court *a quo*.[29]

Proceedings before the Constitutional Court

Before the Constitutional Court,[30] Von Abo only sought confirmation of part of the High Court order in so far as it affected the President, that his failure, as one of several government respondents, to consider and decide properly his request for diplomatic protection in relation to the violation of his property rights by the government of Zimbabwe, was inconsistent with the Constitution and invalid.[31] He, however, took the view that the order of the High Court relating to other parties who were cited as respondents in that court, in particular cabinet ministers, was, unless appealed against, final and binding and not susceptible to confirmation by the Constitutional Court.[32]

Considering the manner in which Von Abo structured his application (seeking a confirmation order of constitutional invalidity only in so far as the conduct of the President is concerned), and the President's contention that the decision not to grant him diplomatic protection cannot be attributed to him as President, the sole question of substance that came up for debate was whether government's failure to provide diplomatic protection constituted 'conduct of the President' as envisaged in section 172(2)(a) of the Constitution.[33] If it did, the Constitutional Court would have to consider and determine the merits of the decision of the court *a quo,* while if it did not, that finding would be dispose of the matter and the application for confirmation would be struck off the roll.[34]

The court observed that the President assigns to the Deputy President and Ministers powers and functions and that once the powers and functions have been assigned to them, they are responsible for their exercise.[35] Therefore, the court found that to categorise all national executive functions at cabinet level as 'conduct of the President' for the purposes of sections 167(5) and 172(2)(a) of the Constitution, by mere virtue of the fact that the President is the head of the national executive, is to misconstrue the true nature of the national executive function because the primary responsibility lies with the government and with the ministers to whom a specific task has been assigned

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29 In terms of Section 172(2)(a) of the South African Constitution, the Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional invalidity of any conduct of the President, but such an order has no force unless it is confirmed by the Constitutional Court.

30 Note 14 above.

31 *Id* at par 1.

32 *Id* at par 3.

33 *Id* at par 23.

34 *Ibid*.

35 *Id* at par 40.

in the Constitution.[36] Having found against Von Abo, the court, however, remarked that its finding does not go to the merits of the High Court decision and that in the absence of any appeal by the cabinet and the ministers cited in the High Court order, the order retained its full force and effect and the government's liability towards Von Abo cannot in any way be said to have been diminished.[37] After the Constitutional Court decision, parties agreed that the matter be set down for re-hearing in October 2009 in the North Gauteng High Court to consider the postponed claim Von Abo might have for damages against the government, which claim was conditional on the government's non-compliance with the initial High Court order obliging the state to provide Von Abo with diplomatic protection. The High Court found that the state had not complied with the initial order and issued another or second order obliging the state to pay Von Abo damages he suffered due to violation of his property rights in Zimbabwe by the government of that country. The government then appealed to the Supreme Court of Appeal.

Proceedings before the Supreme Court of Appeal

The government's appeal to the Supreme Court of Appeal was first, although belatedly, against the first and second orders of the North Gauteng High court.[38] The Supreme Court of Appeal upheld the government's appeal, holding that the relief sought by Von Abo and granted by the North Gauteng High Court was contrary to law.[39] An assessment of the correctness and implications of the High Court's first order, upon which the second order hinged, required a proper understanding of the nature of diplomatic protection and the South African legal framework for diplomatic protection. Here the Supreme Court of Appeal did an excellent job.

The nature of diplomatic protection

Based on the essential nature of the right to diplomatic protection, litigation or any other action aimed at enforcing this right usually arises in contexts where at a minimum two states are involved, whereby one state (usually the home state) takes action to protect the rights or interest of one or more of its subjects from an unlawful action or conduct of another state (usually the host state). From this it is clear that it would seem irregular to envisage circumstances where a claim for diplomatic protection, as of right, arises in a context where the claimant is an individual citizen of a state which has opted not to exercise this right. This is because diplomatic protection, as of right, exists only in the realm of international law and as a result an important qualification that must be satisfied in any diplomatic protection action is that the claimant is a state. It was precisely for this reason that in

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36 *Id* at par 41.
37 *Id* at paras 51 –53.
38 N 15 above.
39 *Id* at paras 23 – 24.

Kaunda, counsel for the state described the applicants' claim for a right to diplomatic protection as 'misconceived'.[40] And the Constitutional Court more than once accepted the state's argument that the applicants, in bringing a claim for diplomatic protection as of right, misconceived the nature of their rights and remedies.[41]

Constituting a privilege flowing from an individual's connection, generally through nationality, to the intervening state, diplomatic protection is the state's right in international law to protect its nationals or their property from the wrongful conduct of other states. It is considered to be the right of the state and not that of the individual and as a result the individual cannot demand diplomatic protection from the state as a right under international law.[42]

Can such a claim then even be legally made under domestic law, in particular South African constitutional law? It may be helpful to differentiate between two different sets of rights that are normally relevant when one considers diplomatic protection generally: a state's right to exercise diplomatic protection on behalf of its citizen under international law; and a citizen's right to request diplomatic protection and his right to have the request properly considered by his own state under domestic law.

In *Van Zyl*, the legal advisors for the state had this distinction in mind when they said, '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'.'[43] International law, the state submitted, 'recognises the right of diplomatic protection that lies with a state and does not recognise a right to diplomatic protection as claimed in the present matter'.[44]

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40 *Kaunda* n 20 above par 23.

41 *Id* at paras 143 and 209.

42 The Permanent Court of International Justice has provided the most classic formulation of the scope and extent of diplomatic in *Mavrommatis Palestine Concessions, Judgment No 2,* 1924 *PCIJ,* Ser A, No 2, when it said: '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.'

43 *Van Zyl* n 16 above par 63.

44 *Ibid*.

The right of a state to exercise diplomatic protection on behalf of its citizen in international law

All authorities are *ad idem* that the so-called *right to diplomatic protection* as a human right does not exist under international law. Conversely, the duty or obligation on the part of the state to provide diplomatic protection (as opposed to the duty to consider an application for diplomatic protection) does not exist either. The right to diplomatic protection, as a state right, must not be confused with human rights, as human rights do not afford protection to an ordinary individual to the same extent as diplomatic protection.[45]

Although the true beneficiary of this right is an individual citizen, the right remains personal to the state. In the case of *Mavrommatis Palestine Concessions,*[46] the Permanent Court of International Justice stated that by taking up the case of one of its subjects through diplomatic protection, a state is in reality asserting its own rights.[47] In *Van Zyl* it was accepted that when diplomatic protection is invoked, it was the right of the state of nationality which is at issue and that a state decides on the basis of its own national interests whether it will act upon the violation of the international law right it holds over its citizen abroad.[48] Premised on the fiction that an injury to an individual citizen is an injury to the state of nationality, the right to diplomatic protection is generally regarded as the right of the state and any reliance on that right is within the absolute discretion of states.[49]

It is therefore irregular for an individual to claim this form of right even under domestic law as a human right enforceable against the state, unless it can be shown that the rules of customary international law governing diplomatic protection have changed, or customary international law rules governing diplomatic protection have become part of domestic law.

It has been suggested, most prominently by Professor Dugard, that the traditional approach to diplomatic protection should be developed to recognise that in certain circumstances a state should have a legal duty to exercise diplomatic protection on behalf of its nationals.[50] However, it has been pointed out that as this is not the general practice of states, the prevailing view remains that diplomatic protection is the prerogative of the state which must be exercised at its discretion.[51]

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45 Y Dinstein 'Diplomatic protection of companies under international Law' in K Wellens *International Law Theory and Practice* (1998) 505–517, 506.

46 Judgment No 2, 1924 PCIJ, Ser A, No 2.

47 *Id* at 2.

48 *Van Zyl* n 16 above par 32.

49 *Id* at par 18.

50 *Kaunda* n 20 above par 28. See J Dugard 'First Report on Diplomatic protection' (2002) United Nations Document A/CN 4/506.

51 *Kaunda* n 20 above par 20.

It may very well be argued that in terms of section 232 of the South African Constitution, customary international law rules governing diplomatic protection have become part of South African law. Assuming that this is the case, a major obstacle for an individual citizen seeking to claim diplomatic protection as of right would be that it is customary international law itself which regards this right as a personal right of the state. This rule of customary international law has not changed. The remaining question will therefore be whether the South African Constitution has, as far as the attitude of the South African government is concerned, changed the customary international law position to provide for diplomatic protection as a new species of human right available to citizens? It is not likely. In *Kaunda*, the Constitutional Court itself accepted that international law has acknowledged that states have the right (not the duty) to protect their nationals beyond their borders, but are under no obligation to do so.[52]

Any shift from this principle would demonstrate a fundamental lack of appreciation of the true nature of diplomatic protection. If, as others argue, the South African Constitution makes provisions for citizens' right to, and states' corresponding obligation to provide diplomatic protection, such a change to the rules of customary international law would not serve any practical purpose and it is unlikely that the Supreme Court or the Constitutional Court would endorse such interpretation. For example, the level of enforcement of a citizen's right to diplomatic protection will remain in international law and private citizens will not, by virtue of a provision in South African law, have international legal personality. As Patel J observed in *Van Zyl*, 'private individuals or companies are not proper subjects of international law, but the proper subjects of international law are sovereign states and international organisations with international legal personality'.[53] As a result it would still have to be the state that must take up the right as its own and in accordance with its broader national interest. Obviously, national interests might not necessarily be the same, and indeed they often clash with those of the individual. Further, a decision whether protection should be given is and must remain *an act of state* which is essentially the function of the executive. Although courts enjoy the power to review the decisions of the executive, they are not competent to substitute their own views or opinions on whether diplomatic protection should be given or not. The duty of the court is to ensure that whatever decision is arrived at by the executive, must be in accordance with mandated constitutional procedures.

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52 *Id* at par 23.

53 *Van Zyl* n 16 above at par 27.

The right of citizens to request diplomatic protection from his own state and to have the request properly considered

This right is clearly available to every citizen under domestic law, such as South African constitutional law. An individual is entitled to submit a request to his own government and the government has an obligation properly to consider such request, failure of which amounts to a breach of a constitutional duty by government. In *Kaunda*, Chaskalson CJ emphatically pointed out that '[i]f citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution'.[54] Ngcobo J also accepted a limited right when he said:'a citizen has the right under section 3(2)(a) to request the government to provide him or her with rights, privileges and benefits of citizenship, such as diplomatic protection, and that the obligation of the government is to consider rationally such request and decide whether to grant it in relation to that citizen'.[55] In *Von Abo*, the High Court recognised that 'the government was under a constitutional duty at the very least to properly apply its mind to the request for diplomatic protection'.[56]

What emerges from the above is that, while the government might have an obligation to consider a request for diplomatic protection, the actual outcome of such deliberations is something that a private citizen, or even the courts, cannot change. In *Kaunda*, Chaskalson CJ had this principle in mind when he pointed out that 'courts would not substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection'.[57] The government in principle fulfils its duty by simply considering the application in good faith or rationally and then arrive at whatever outcome it deems fit.

A proper examination of the nature of the relief sought by Von Abo shows that the above is not the context within which his application for diplomatic protection was premised. Had it been, his action would simply have been limited to assailing the manner in which the government handled his request for diplomatic protection as improper or irrational. And even if he had succeeded in such action, the only available remedy for him would have been an order of court directing the government properly to reconsider his request and give him a proper response. The government could still refuse to give him the required diplomatic protection by properly communicating its decision to him. And if it refused to give him such protection, that would have been the end of the matter, because South African jurisprudence is clear

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54 *Kaunda* n 20 above par 67.
55 *Id* at par 178.
56 N 11 above par 141.
57 N 20 above par 79.

that courts would not substitute their opinion for that of the government, or order the government to respond in a particular fashion.[58] In this regard it would be relevant to consider the South African legal framework within which a citizen may request the government for diplomatic protection.

South African legal framework for diplomatic protection

Two crucial constitutional provisions have been put forward in advancing the argument that the right to diplomatic protection exist under South African constitutional law. Reliance is placed on section 3(2)(a) of the Constitution, which provides that all citizens are equally entitled to the rights, privileges and benefits of citizenship. Reliance is also placed on section 7(2) of the Constitution, which provides that the state must respect, protect, promote and fulfill the rights in the Bill of Rights.

In *Kaunda*, Ngcobo J remarked that while section 3(2)(a) is the source of the rights, privileges and benefits of citizenship to which South African citizens are entitled under our Constitution, section 7(2) on the other hand, binds the state to respect, protect, promote and fulfill the rights in the Bill of Rights.[59] Whether the rights, privileges and benefits to which citizens are entitled under section 3(2)(a) include the citizen's right to actual or effective diplomatic protection, is a matter of construction.

In his judgment, Ngcobo J found that sections 3(2)(a) and 7(2) 'must be read as imposing a constitutional duty on the government to ensure that all South African nationals abroad enjoy the benefits of public protection and the proposition that the government has no constitutional duty in this regard must be rejected'.[60] The potential implications of this expansive and unrestrained application of the provisions of section 7(2) of the South African Constitution beyond our borders was recognised by Chaskalson CJ, when he suggested that the relevance of section 7(2) is *not to give our Constitution extraterritorial effect*, but to show that our Constitution contemplates that government will act positively to protect its citizens against human rights abuses.[61] The actions of the South African government to protect its citizens under section 7(2) must in principle be limited to South Africa. Any action of the South African government to protect its citizen beyond its borders, such as diplomatic protection, will have to comply with international law. International law declares that the right to diplomatic protection is a state right and a right which a state cannot be forced to exercise.

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58 *Ibid*.
59 *Id* at paras 175–176.
60 *Id* at par 188.
61 *Id* at par 66.

In *Kaunda*, O'Regean J only accepted a qualified obligation of the state to provide diplomatic protection 'in circumstances where citizens are threatened with or have experienced the egregious violation of International human rights norms'.[62] Chaskalson CJ went along with this proposition, holding that 'when the basis of a request is a *material infringement of a human right* that forms part of customary international law, it cannot be doubted that in substance the true beneficiary of the right to diplomatic protection is the individual'.[63] Elsewhere he also remarked that, 'a request for government assistance in such circumstances would be difficult and in extreme cases possibly impossible to refuse, but if it were to be refused the decision would be justiciable, and the court could order the government to take appropriate action'.[64] These findings require further analysis.

In cases involving a citizen's claim for diplomatic protection from their own governments, does a material infringement of human rights norms justify a court ordering the state to take positive diplomatic steps to protect its citizens? In my view, such an order would not be necessary or effective given the nature of diplomatic protection. Dinstein probably had the same considerations in mind when he remarked that 'the right to diplomatic protection, as a state right, must not be confused with human rights, as human rights do not afford protection to an ordinary individual to the same extent as diplomatic protection.'[65] An order directing the state to take diplomatic measures to protect a citizen, even in cases of a material infringement of human rights norms, would be useless as courts would not substitute their opinion for that of the government or order the Government to provide a particular form of diplomatic protection.[66] However, this does not mean that a citizen is without a remedy. Developments in international human rights law should allow individuals (in certain circumstances) to take a claim in their own name to an international tribunal without necessarily involving their state of nationality. Therefore, in appropriate circumstances, an individual whose rights have been infringed by another state has the option to institute action in his own name before an international tribunal. Alternately, he can request his own state of nationality to provide him with diplomatic protection.

Where a citizen decides to settle his dispute with another state through seeking diplomatic protection from his state of nationality, the rules applicable to diplomatic protection apply and the rights and remedies available to him must be properly understood. Writing for the majority in

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62 *Id* at par 242.
63 *Id* at par 64.
64 *Id* at par 69.
65 Dinstein n 45 above.
66 *Kaunda*, n 20 above, at par 79.

Kaunda, Chaskalson CJ accepted a limited right of citizens to an entitlement to request the government to provide them with diplomatic protection, and the limited duty of government to consider the request and deal with it consistently with the Constitution[67] – that is rationally or properly. In the same judgment, Ngcobo J also accepted the logic of a limited right when he said 'a citizen has the right under section 3(2)(a) to require the government to provide him or her with rights, privileges and benefits of citizenship, (such as diplomatic protection) and that the obligation of the government is to consider rationally such request and decide whether to grant such request in relation to that citizen'.[68]

In *Von Abo*, the North Gauteng High Court also took note of the above views and conceded that Mr Von Abo had a right to *apply for diplomatic protection,* and the respondents, as a minimum, were under a constitutional duty to *properly (that is rationally) apply their minds to the request for diplomatic protection*.[69] Although the Constitutional Court did not decide the *Von Abo* matter on the merits, it was clearly an indication of the court's preferred position when it stated that 'the provision of diplomatic protection at the request of a citizen whose rights are violated in and by a foreign state is a matter which forms part of the executive function of government and that it is up to the government to decide whether protection should be given, and if so, what form the diplomatic intervention should take'.[70] Referring to its previous decision, the Constitutional Court held further that 'if government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly'.[71] The above approach, confirmed by the Supreme Court of Appeal in its *Von Abo* decision,[72] is undoubtedly the correct approach when dealing with claims to diplomatic protection under South African constitutional law.

Conclusion

Any normal person would obviously be sympathetic to Mr Von Abo and others who find themselves in similar situations. Diplomatic protection as of right is, however, not a suitable remedy to be employed by an individual seeking to protect private interests in a foreign country. Other remedies available in law may need to be considered. The problem following the North Gauteng High Court decision in *Von Abo*, was that it was likely to create new confusion and uncertainty on the issue of the existence of the right to diplomatic protection under the South African Constitution. This

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67 *Id* at par 67.
68 *Id* at par 178.
69 Von Abo, n 13 above, par 141 (own emphasis).
70 *Von Abo v President of the Republic of South Africa* n 14 above par 45.
71 *Ibid*.
72 Note 15 above.

uncertainty, in part perpetuated by views of some of Constitutional Court justices, expressing views which were wrongly interpreted in a manner implying that the right to diplomatic protection existed and could be relied upon by litigants in subsequent cases,[73] had to be addressed.

[73] *Von Abo* n 11 above par 135.