South African judicial decisions

Constitutional and international law at a crossroads: diplomatic protection in the light of the *Von Abo* judgment

Von Abo v Government of the Republic of South Africa 2009 2 SA 526 (T)
Government of the Republic of South Africa v Von Abo 2011 3 All SA 261 (SCA)

Introduction

The application of the law of diplomatic protection has been relatively settled for some time. The individual, not a traditional subject of international law, has been reliant on his state of nationality to use diplomatic protection to protect his interests where a foreign state has violated his international human rights. South African courts have, in the past, followed international precedent when confronted with citizens seeking the state's exercise of diplomatic protection. Following the so-called land grabs in Zimbabwe, Von Abo, a South African , with farming interests in that country, approached the South African government and requested that it protect his property interests in Zimbabwe through the exercise of its right to diplomatic protection. When he obtained no relief, he approached the High Court.

This case note deals with the resultant judgment, which, it is submitted, deviates from the traditional understanding and application of the law of diplomatic protection under international, foreign and South African law. The judgment is controversial for the following reasons:

- it ascribes to the individual more rights than the law permits;
- it may result in the judiciary usurping the policy formulation powers of the executive;
- it dealt with factors not relevant to the issues before it; and
- it indicates scant regard for the precedent setting judgments of the

Supreme Court of Appeal[1] and the Constitutional Court,[2] by which the High Court is legally bound.

In addressing these issues, this note will include commentary on the Supreme Court of Appeal's judgment in *Government of the Republic of South Africa v Von Abo*[3] which, it is submitted, restored the international law position on diplomatic protection.

Von Abo v Government of the Republic of South Africa[4] (*Von Abo* HC)

In *Von Abo* (HC)[5] the High Court of South Africa had to determine whether an individual has a right to diplomatic protection and whether it could direct government action with respect to foreign policy issues.

Von Abo, a South African citizen, had obtained farming interests in Zimbabwe in 1954 and 1955. His ownership was via various commercial vehicles such as private companies. The Von Abo Trust was created for a similar purpose. All decisions pertaining to the private companies and the trust were made by Von Abo alone. Through the trust, his farming interests expanded to the point where he became the 'beneficial owner of a considerable farming empire'.[6]

As a result of Zimbabwe's nationalisation programme that involved so-called 'land grabs', the Zimbabwean government expropriated a significant portion of his empire without compensation. Von Abo unsuccessfully attempted to protect his rights in Zimbabwe as well as the rights of the companies and the trust. Consequently, he requested the South African government to exercise its right of diplomatic protection over him in respect of the loss he had suffered at the hands of the Zimbabwean government. From this point forward, Von Abo became increasingly frustrated with the South African government's failure to respond to his plight. After several unsuccessful attempts at persuading the government to assist him, he made an application to the High Court that would, *inter alia*, force the government to: a) exercise diplomatic protection in order to protect his farming interests; b) ratify the ICSID treaty; and c) compensate him for the loss he suffered at the hands of the Zimbabwean government.

The court held that:

1 It is declared that the failure of the respondents to rationally, appropriately and

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[1] *Van Zyl v Government of the Republic of South Africa* 2008 1 All SA 102 (SCA) *(Van Zyl).*
[2] *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC).
[3] *Government of the Republic of South Africa v Von Abo* 2011 3 All SA 261 (SCA).
[4] *Von Abo v Government of the Republic of South Africa* 2009 2 SA 526 (T).
[5] *Ibid*.
[6] Paragraph 6.

in good faith consider, decide and deal with the applicant's application for diplomatic protection in respect of the violation of his rights by the Government of Zimbabwe is inconsistent with the Constitution, 1996 and invalid;

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

3 It is declared that the respondents have a Constitutional obligation to provide diplomatic protection to the applicant in respect of the violation of his rights by the Government of Zimbabwe.

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

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

6 The applicant's claim for damages against the respondents, subject to effective compliance with paragraphs 4 and 5 above, and as formulated in the notice of motion, is postponed *sine die*. Leave is granted to all parties to supplement their papers prior to the hearing of this claim for damages, if appropriate.

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

The reasons why this order was controversial[7] will now be dealt with individually.

The rights of the individual

Diplomatic protection is rooted in the minimum standard of treatment that should be accorded to aliens. It is accepted that before a state may exercise a right of diplomatic protection over one of its own nationals, three jurisdictional facts must be established, namely that: the injured person is its national; all local remedies have been exhausted; and the conduct of the defendant state violates the rules of international law relating to the treatment of aliens.[8]

In *Von Abo* HC, the court stated that 'the rule [that the applicant must first exhaust all available remedies] has now been codified in article 10 of the

[7]As stated in the introduction.

[8]'Draft Articles on Diplomatic Protection 2006'. See further *Mavrommatis Palestinian Concessions* case PCIJ Series A No 2 1924 at 12 and the *Interhandel* case (*Switzerland v United States of America*) Preliminary objections ICJ Rep 1959 6 at 27.

International Law Commission's Rules on Exhaustion of Local Remedies'.[9] The court's pronouncement is factually incorrect. In this regard, Tladi correctly asserts that 'the ILC has never worked on the topic of exhaustion of local remedies and certainly never produced any "rules" on it'.[10] Furthermore, codification of law is not the job of the ILC 'at least not in the sense that the product can be regarded as binding law'.[11]

The establishment of these jurisdictional facts alone does not empower an individual to force government to exercise its right of diplomatic protection which remains discretionary in nature and is an aspect of state responsibility. While the state's right to diplomatic protection,[12] like an individual's right to leave the Republic,[13] exists in law, no obligation to exercise the right can be said to exist. The state, like the individual, has a discretion to exercise, or to refrain from exercising, the right in question. The existence of the discretion is based on the understanding that the executive is responsible for foreign policy commitments. To expect a state to act contrary to its own foreign policy would be ludicrous.

The state is vested with a discretion to exercise the right of diplomatic protection which means that the High Court's order that the 'applicant has the right to diplomatic protection from the [state]...'[14] and that 'the [state] has a Constitutional obligation to provide diplomatic protection to [Von Abo]...'[15] are wrong in law.

If the High Court was correct in so ordering, one would arrive at the absurd conclusion that the right of diplomatic protection is the right of individuals and not of states. The Constitutional obligation to which the court refers cannot be correct simply because the Bill of Rights has no external application in this case. The Constitutional obligation is in fact limited to section 3 of the Constitution which is relevant to diplomatic protection only in so far as it discussed in *Van Zyl v The Government of the Republic of South Africa.*[16] A discussion of this judgment appears below. The executive's hand cannot be forced because of the illegal actions of Zimbabwe.

In the English case of *Abassi v Secretary of State for Foreign and*

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[9]Paragraph 85.
[10]Tladi 'The *Von Abo* decision, and one big can of worms: Eroding the clarity of *Kaunda'* (2009) 1 *Stell LR* 14 at 23.
[11]*Ibid*.
[12]'Draft Articles on Diplomatic Protection 2006' art 2.
[13]Section 21(2) of the Constitution of the Republic of South Africa 1996.
[14]Paragraph 2 of the order.
[15]Paragraph 3 of the order.
[16]Note 1 above.

Commonwealth Affairs,[17] the court held that 'the citizen's legitimate expectation is that his request will be "considered", and that in that consideration all relevant factors will be thrown into the balance'.[18] This decision makes it clear that the rights of the citizen in this context are limited to: requesting the exercise of the right to diplomatic protection; and just administrative action on the part of the state. Nothing more is promised to the individual. No greater entitlement on his part exists.

In the notable case of *Van Zyl* the appellants sought to rely partly on national law and partly on international law to substantiate a right to diplomatic protection to which they claimed they were entitled. The Supreme Court of Appeal described the position as follows:

> They recognise that their application is based on South African municipal law because international law does not recognise a right of a national to diplomatic protection ... Although customary international law is part of our law, it is conceptually difficult to understand how an international law rule dealing with one relationship (state: state) can be transformed into a local rule regulating another relationship (citizen: state).One example suffices. The right to ask for diplomatic protection derives from section 3 of the Constitution as an aspect of citizenship and nothing else.[19]

Von Abo SCA noted that *Von Abo* HC contained 'no reference to *Van Zyl* in which the applicable legal principles were clearly re-stated and helpfully explained'.[20] The court ultimately concluded that paragraphs 2 and 3, discussed above, of *Von* Abo HC were 'contrary to law'.[21]

Judicial intervention

A crucial issue arising out of *Von Abo* HC is whether the judiciary is empowered to intervene in executive decisions pertaining to diplomatic protection.

The concept of democracy is, by its nature, rooted in the doctrine of separation of powers which has been described as being 'fundamental to the organisation of a State – and to the concept of constitutionalism – in so far as it prescribes the appropriate allocation of powers, and the limits of those powers, to differing institutions'.[22] The executive, legislature and judiciary, should function relatively independently of each other 'in order that none should have excessive power and that there should be in place a system of checks and

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[17](2003) 42 *ILM* 358.
[18]At par 99.
[19]At par 60 61.
[20]At par 23.
[21]Note 3 above at par 24.
[22]Barnett *Constitutional and administrative law* (1996) at 117.

balances between the institutions'.[23] This explains why the conduct of the executive towards an individual over whom the state has jurisdiction may be constitutionally tested by the judiciary.

Understanding the limits of such judicial oversight is imperative when deciding whether the judiciary is empowered to test the legitimacy of executive decisions in the context of diplomatic protection. Simply put, can there be judicial supremacy over the executive? It has been written[24] that

> judicial review ... presents a constitutional paradox, representing on the one hand a check on the executive arguably infringing the doctrine and on the other hand keeping the executive within its legal powers, thus buttressing the sovereignty of Parliament and the rule of law.

The Constitutional Court, in *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa*,[25] explained the limits of such judicial oversight in terms of rationality, stating that

> Rationality ... is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.

In *Kaunda v President of the Republic of South Africa,* which is the foremost of South African cases[26] on diplomatic protection, the Constitutional Court held that

> 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.[27]

While the court felt that an irrational decision on the part of the executive

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[23] *Ibid*.
[24] *Id* at 143.
[25] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC); 2000 3 BCLR 241 (CC) at par 90.
[26] Note 2 above.
[27] *Id* at par 77.

could invite judicial intervention,[28] it was quick to point out that this did 'not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection'.[29]

On the question of foreign relations, the court concluded[30] that

> 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.

Furthermore, if a court's

> mandatory order directing the government to give consideration to the request (for diplomatic protection) ... amounts to an intrusion into the conduct of foreign policy, it is an intrusion mandated by the Constitution itself.[31]

Of course, this is not to say that the court must substitute the government's decision not to grant diplomatic protection with a ruling that it should afford such protection. What it means is that the court may direct the government to apply its mind to a request for diplomatic protection rather than refusing to consider it altogether. The government may, thereafter, still refuse the request, but the difference is that by applying its mind to the request, the government has more than likely engaged in just administrative action which is essentially the duty that the court in *Kaunda* sought to reinforce. The *Kaunda* decision is consistent with comparable foreign decisions.[32]

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[28] *Id* at par 78.
[29] *Id* at par 79.
[30] *Id* at par 172.
[31] *Id* at 190.
[32] In *Abassi*, the court found that '... in apparent contravention of fundamental principles recognised by both jurisdictions [United States and England and Wales] and by international law, Mr Abbasi is at present arbitrarily detained in a "legal black hole"'. Importantly, despite this acknowledgment of illegality, the court defined its own role in relation to diplomatic protection as follows: 'The extreme case where judicial review would lie in relation to diplomatic protection would be if the Foreign and Commonwealth Office were, contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated. In such, unlikely, circumstances we consider that it would be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant's case.'

Given the well considered judgment in *Kaunda*, *Von Abo* SCA held that, in prescribing to the executive 'the result their diplomatic protection should achieve for the respondent (and) the time frame within which to do so',[33] paragraphs 4 and 5 of the High Court order 'violated the legal principles laid down in *Kaunda*'.[34] It held further that the judgment of the HC reflected a 'violation of the separation of powers ... as it prescribes to the Executive which functionary is required to act'.[35]

There is, then, a generally clear acceptance of where judicial intervention is neither welcome nor permitted. It would seem that the HC in *Von Abo* acted *ultra vires* in dictating to the executive how it ought to conduct itself in Von Abo's case.

Factors not relevant to the issues before the court

Unfortunately, the High Court in *Von Abo* sought to drag irrelevant factors into consideration in order to arrive at its decision. The applicant had raised the question of why South Africa was not a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States that established the International Centre for Settlement of Investment Disputes (ICSID). However, he later abandoned that portion of the order sought which prayed that South Africa become a party to ICSID or consent, *ad hoc,* to the applicant's dispute with the government of Zimbabwe (in respect of his claim that such Government has violated his rights), being submitted to the ICSID.

The judgment considers ICSID in great detail to the extent that it seems to constitute part of the *ratio* for the decision. This, it is submitted, was incorrect. The abandonment of this aspect of the order sought means that the court ought not to have considered ICSID in its decision making process. Yet, a significant portion of the judgment deals with just that. It creates the impression that the spectre of ICSID was raised to draw the court's attention to its possible relevance, but was then dropped only after 'the state convincingly argued that such an order, if granted, may turn out to be a *brutum fulmen*, because Zimbabwe would have to consent to take part in such dispute resolution proceedings. It was argued that there was no guarantee that such consent would be forthcoming'.[36]

This is not an issue that *Von Abo* SCA appears to consider. The fact that the South African government was involved as a mediator in delicate negotiations

[33]See n 3 above at par 29.
[34]*Ibid*.
[35]*Id* at par 38.
[36]See n 4 above at par 16.

in the Zimbabwe crisis meant that it had to have a degree of impartiality. Its intervention on behalf of a national (or the intervention by a South African national acting through ICSID) would not have facilitated the broader negotiation process. It would have created a certain level of unease about South Africa acting as mediator.

Scant regard for precedent setting judgments: *Kaunda* – O'Regan's minority judgment

Von Abo HC places greater emphasis on O'Regan J's minority judgment in *Kaunda* than on the majority judgment of the highest Court in the land, by whose decisions it is bound. In this regard, Tladi observes that 'the decision in *Von Abo* ... goes beyond what was provided for in *Kaunda*'.[37]

O'Regan's dissenting judgment found that the government had an obligation 'to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights law norms'.[38]

No reasons are given for *Von Abo* HC's heavy reliance on the dissenting judgment rather than the majority judgment. This was not a case of different provincial divisions of the High Court arriving at different conclusions. It was, in essence, a failure, or perhaps refusal, by the High Court to follow the precedent set by the Constitutional Court in *Kaunda*. *Von Abo* SCA criticised the fact that despite having made 'extensive reference to the judgment in *Kaunda*', (the HC still) arrived at 'an incorrect conclusion'.[39]

It appeared that Ngcobo J's 'less precise views ... in the concurring minority judgment ... resulted in the incorrect approach'.[40] The fact that the HC judgment makes no reference to *Van Zyl* was also of concern to the SCA.[41]

The right to property

Tladi asserts that 'expropriation without compensation is, without doubt, a violation of international law. However, this does not necessarily mean that the right to property is a *human* right under customary international law.'[42] Whereas *Kaunda* had everything to do with human rights, *Von Abo* did not: it dealt with property. Dugard's view[43] is that there is no consensus on expropriation of alien property, that is to say what rules should govern such

[37] See n 10 above at 18.
[38] See n 2 above at par 238.
[39] See n 3 above at par 23.
[40] *Ibid*.
[41] *Ibid*.
[42] See n 10 above at 23.
[43] Dugard *International law: A South African perspective* (2005) (3 ed) at 299.

a process. If anything, 'this area of law remains unsettled ...(and is) probably the most disputed issue in international law between developing and developed states'.[44] Tladi's view is that if a claim is made that the right to property is indeed a human right , this cannot be accepted on the face of it but must 'be substantiated by proving the elements of customary international law'.[45] How or why *Von Abo* HC sought to make the right to property something it was not remains elusive.

Conclusion

This note has attempted to point out some of the highlights of *Von Abo* HC and SCA. The High Court judgment was disappointing and, in various respects, wrong in both domestic and international law. Fortunately, the SCA judgment struck down the inadequacies of the High Court's ill-considered judgment and, in so doing, restored the wisdom of the *Kaunda* decision and re-affirmed the state's rights. The SCA judgment has prevented the extension of the state's obligations beyond the recommended practice for states when requests for diplomatic protection are received.[46]

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