IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 3106/07

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

2/2/10 DATE

SIGNATURE

DATE: 5/2/2010

IN THE MATTER BETWEEN

| | |
|---|---|
| CRAWFORD LINDSAY VON ABO | APPLICANT |
| AND | |
| THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA | FIRST RESPONDENT |
| THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA | SECOND RESPONDENT |
| THE MINISTER OF FOREIGN AFFAIRS | THIRD RESPONDENT |
| THE MINISTER OF TRADE AND INDUSTRY | FOURTH RESPONDENT |
| THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT | FIFTH RESPONDENT |

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JUDGMENT

PRINSLOO, J

[1] This judgment concerns a hearing which flowed from certain supervisory relief which I granted in a judgment reported as *Von Abo v Government of the Republic of South Africa & Others* 2009 2 SA 526 (TPD) ("the main judgment").

[2] Before me, Mr Hodes SC assisted by Mr Katz appeared for the applicant and Mr De Jager SC assisted by Mr Mphaga and Ms Sello appeared for the respondents.

The main judgment

[3] Where this judgment is a sequel to the main judgment, it must inevitably be read in conjunction with that judgment. It will be neither necessary nor practicable to embark upon lengthy and unnecessary repetition of the contents of that judgment. Brief references and quotes will suffice.

[4] It is, however, convenient to revisit the order I made in the main judgment as it is reported at 566H-567D:

> "1. It is declared that the failure of the respondents to rationally, appropriately and in good faith consider, decide and deal with the applicant's application for diplomatic protection in respect of the violation of his rights by the Government of Zimbabwe is inconsistent with the Constitution, 1996, and invalid.
>
> 2. It is declared that the applicant has the right to diplomatic protection from the respondents in respect of the violation of his rights by the Government of Zimbabwe.

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

4. The respondents are ordered to forthwith, and in any event within sixty 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 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."

[5] The damages claim, referred to in paragraph 6 of the order, was crafted as follows in the notice of motion which formed the basis of the application which resulted in the main judgment:

> "6. That, in the event of the respondents failing to comply effectively with either the order in terms of prayer 4 or in terms of prayer 5, ordering the respondents jointly and severally (the one paying and the other to be absolved) to pay to the applicant such damages as he may prove that he has suffered as a result of the violation of his rights by the Government of Zimbabwe."

[6] In purported compliance with paragraphs 4 and 5 of the order, *supra*, the respondents indeed reported back to this court by means of an affidavit dated 19 October 2008, the main judgment having been handed down on 29 July 2008.

At that stage the application which came before the constitutional court, to which reference is made hereunder, had not yet been finalised.

[7] When the constitutional court judgment, dated 5 June 2009, was handed down, and in view of the outcome thereof, the parties made arrangements for this further hearing, which inevitably had to flow from the provisions of paragraphs 4 and 5 of my order in the main judgment, to take place.

[8] At a meeting with representatives of both parties in chambers I enquired from both parties whether they felt that I was seized with the matter and, in any event, whether I should preside over the follow-up hearing, particularly in view of some unflattering remarks I had made about the conduct of the respondents during the course of the main judgment.

Counsel from both sides indicated that they felt I should conduct the follow-up hearing and urged me to do so. After due reflection, I obliged.

[9] The essence of the enquiry which came before me in the follow-up hearing was to establish whether or not the respondents had effectively complied with paragraph 4 of my order in the main judgment – at 567A.

A positive finding, from the point of view of the respondents, would signal the end of the matter. A negative finding would result in declaratory relief to the effect that the respondents were liable to compensate the applicant for his damages. A *quantum* trial would then come into play.

The judgment in *Von Abo v President of the Republic of South Africa* 2009 5 SA 345 (CC) ("the Constitutional Court judgment")

[10] During the course of the proceedings before me, which led up to the main judgment, there was agreement between the parties that an adverse finding about the conduct of the State President, who was the second respondent in those

proceedings, would require a certification process by the Constitutional Court as intended by the provisions of section 172(2)(a) of the Constitution – see the main judgment at 566A.

[11] Such an adverse finding is contained in paragraph 1 of the order in the main judgment – at 566H.

[12] It is convenient to quote the text of section 172(2)(a) of the Constitution:

> "The Supreme Court of Appeal, a High Court, or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court." (Emphasis added.)

[13] The applicant duly launched such an application before the Constitutional Court seeking confirmation of the order contained in paragraph 1, *supra*.

[14] In the event, the Constitutional Court found that the application for confirmation was misconceived because the matter does not concern conduct of the President within the meaning of section 172(2)(a) of the Constitution – Constitutional Court judgment at 364I-J.

[15] In the result, the application for confirmation was struck from the roll, but some costs orders were made against the respondents – Constitutional Court judgment at 365E-I.

[16] The Constitutional Court also held that it was necessary to identify the particular government minister responsible for alleged unconstitutional conduct and the Minister for Foreign Affairs, the third respondent, was earmarked in the process. The following is said in the Constitutional Court judgment in this regard:

> "Consequently, any failure to consider the applicant's request for diplomatic protection would have been the failure of the Government of South Africa or indeed of a specific minister, in this case the Minister for Foreign Affairs. As I have concluded earlier, it does not follow that a constitutionally reprehensible failure of a minister or of the government in a generic sense amounts to a failure by the President to fulfill his constitutional obligations." – Constitutional Court judgment at 362C-E.

[17] It was this finding that inspired the applicant to seek relief only against the Government of South Africa (first respondent) and the Minister for Foreign Affairs (third respondent) in the follow-up hearing.

[18] For present purposes, it is convenient to quote paragraphs [51] and [52] of the Constitutional Court judgment reported at 364E-I:

"[51] I also keep in mind that neither the government nor any of the respondents have appealed against the decision of the High Court. If anything, as I have explained earlier, counsel for the government has confirmed with this court that the government has taken steps to comply with the order of the High Court. It was open to the government to appeal the decision of the High Court. It did not do so. It has chosen to abide. It follows that the order made by the High Court is of full force and effect and in substance accords with the relief which Mr Von Abo sought before that court.

[52] The view we take that the order of the High Court in relation to the President is not susceptible to confirmation by this court does not in any way diminish the relief granted and consequently does not harbour any prejudice of any type for Mr Von Abo. Put otherwise, the government's liability towards Mr Von Abo cannot be said to be in any way diminished only by reason of paragraph 1 of the High Court order not having been confirmed by this court. It also follows that, absent any appeal to this court, it is unnecessary to traverse any of the merits. Accordingly, this court expresses no view whatsoever on the correctness or otherwise of the judgment of the High Court. What is clear is that the order of the High Court has not been assailed and it stands unblemished."

[19] In view of these remarks, I am of the opinion that care must be taken not to revisit the merits of the case, for purposes of this follow-up hearing. The horse has bolted. The crisp issue to decide, as explained above, is whether or not the respondents have complied with paragraph 4 of the order in the main judgment. The main source of information on which the aforesaid issue must be decided, is the report submitted by the respondents (for present purposes, read the first and third respondents) in purported compliance with paragraphs 4 and 5 of the order in the main judgment.

The report submitted by the respondents ("the report")

[20] The report consists of an affidavit, running into some twelve pages, with annexures.

[21] The deponent to the affidavit names himself as "Ambassador J N K Mamabolo". He is a Deputy Director-General in the Department of Foreign Affairs. He states that he is duly authorised to depose to the affidavit. This authority flows from the following:

> "A confirmatory affidavit of the Director-General: Department of Foreign Affairs is annexed to this affidavit. As Director-General does not have personal knowledge of the issues raised in this affidavit, he has therefore delegated the authority to depose to this affidavit to me."

[22] There is a confirmatory affidavit by Ayanda Ntsaluba who identifies himself as the Director-General of the Department of Foreign Affairs and says "I have authorised Ambassador J N K Mamabolo, a Deputy Director-General in the Department of Foreign Affairs to depose to the main affidavit." He confirms the contents of Ambassador J N K Mamabolo's affidavit "in so far as it refers to me". In the process he confirms the Ambassador's statement, *supra*, that he has no personal knowledge of the issues raised "in this affidavit".

[23] The Director-General does not say what the source of his authority is to delegate authority to the Ambassador.

[24] In his affidavit, the Ambassador says that, following the main judgment which was handed down on 29 July 2008, (incorrectly stated by the Ambassador to have been 24 July) a meeting was held on 6 August 2008 between officials of the Department of Foreign Affairs, the Department of Trade and Industry, the Presidency and counsel to discuss the way forward. The Ambassador did not attend the meeting but he was "informed" by Advocate Stemmet, senior State Law Advisor also mentioned in the main judgment, who represented the Department of Foreign Affairs at the meeting and who also deposed to a confirmatory affidavit, attached to the report.

[25] According to the Ambassador, counsel, at the meeting, emphasised the importance of "order 4" which is paragraph 4 of the order made in the main judgment, and which description I shall also adopt for the sake of convenience.

Of course, order 4, stripped to its essentials, reads that "the respondents are ordered to forthwith take all necessary steps to have the applicant's violation of his rights by the Government of Zimbabwe remedied".

Order 5 (paragraph 5 of the order in the main judgment), also stripped to essentials, provides that the respondents are directed to report by way of affidavit to this court within sixty days what steps they have taken in respect of order 4 and to provide a copy of such report to the applicant.

[26] Not one of the respondents, let alone the third respondent, who was singled out particularly in the Constitutional Court judgment, as described, "reported by way of affidavit", as instructed in order 5.

There is no direct indication, as far as I can see, that the third respondent (or any other respondent) personally made any effort to comply with orders 4 and 5.

[27] The order in the main judgment was directed at the respondents, not at Ambassador Mamabolo or anybody else.

The abject failure on the part of the respondents, and particularly the third respondent, to demonstrate any visible sign of even taking notice of these orders, amounts, in my view, to contempt of court. Counsel for the applicant put it as follows in their comprehensive heads of argument:

> "It is submitted that the absence and/or failure of the respondents to be involved personally in the discussion of options and possible actions in order to give effect to the Court order is unacceptable and borders on the contemptuous."

With these sentiments I agree.

In the main judgment, at 539I-540B, I already expressed the view that the unexplained failure on the part of any of the respondents to file personal affidavits to deal with the complaints of the applicant amounts to a dereliction of duty and flies in the face of the requirements of section 165(4) of the Constitution which provides that organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

[28] The failure on the part of the respondents to file affidavits, or to even explain the failure to do so or to show any demonstrable interest in the orders, effectively, in my view, amounts to non-compliance with the orders, more particularly orders 4 and 5.

The subject of the inadmissibility for one person to make an affidavit on behalf of another, without the latter filing at least a verifying or supporting affidavit, was extensively dealt with in the main judgment at 540E-543D.

Against this background, it was argued before me during this follow-up hearing on behalf of the applicant that where the respondents had not filed an affidavit confirming the contents of the report, the contents of the report constitutes inadmissible hearsay and I should have no regard thereto. On behalf of the applicant reliance was placed on the well-known authorities already quoted in the main judgment, including *Gerhardt v State President & Others* 1989 2 SA 499 (T) at 504F-H and *Tantoush v Refugee Appeal Board & Others* 2008 1 SA 232 (T) at 256D-F.

Where the respondents (and nobody else) were directed to report by way of affidavit as to the steps they had taken in respect of their duty to have the applicant's violation of his rights by the Government of Zimbabwe remedied, it meant that they were obliged to report on what steps were taken since the grant of the order on 29 July 2008 and not what they had done prior to the grant of the order (as will appear from a further analysis of the report hereunder). Where the respondents failed to file affidavits in compliance with the order, it follows, in my view, that they have not complied with their reporting duty.

On the same subject, it was also argued on behalf of the applicant, correctly in my view, that it was not for the Director-General of the Department of Foreign Affairs, who is not a respondent, to authorise Ambassador Mamabolo to make any affidavit at all. It was for the respondents, and the respondents alone, to authorise someone to make an affidavit in respect of the report, and then only if a confirmatory affidavit by the relevant respondent was filed of record. This is in line with the authorities quoted, *supra*.

The opposing argument offered, in this regard, on behalf of the respondents, was that the Director-General is the most senior official in the Department of the third respondent. By virtue of his office he is intimately involved in and accountable for all conduct of officials of the department, including Ambassadors to foreign states. He is entitled to depose to affidavits on behalf of the Minister, as the accountable officer of that department. This entitlement does not derive from being cited as a respondent but from his position within the department. He is in law empowered to delegate any power or function he may have to other officials, unless he is specifically precluded thereto by legislation. No authority in support of this proposition was submitted to me. The Director-General, in his affidavit, did not even mention the third respondent or indicate that she authorised him to delegate his authority, such as it may be, to the Ambassador. The court order is directed against the third respondent (and other respondents). Her complete silence and failure of involvement in these proceedings remain unexplained. I cannot agree with the argument submitted on behalf of the respondents.

[29] Nevertheless, on the assumption that my conclusion that the report falls to be disregarded for lack of compliance of orders 4 and 5 due to the absence of involvement by the respondents, is wrong, I now turn to a further analysis of the report.

Further analysis of the report

[30] Following the first meeting of 6 August 2008, *supra*, there was another meeting on 27 August 2008 "with a view to discuss options and possible actions to propose to the Department of Foreign Affairs' principals in order to give effect to the court order". It is not stated who the "principals" are. According to the minute of that meeting, the Ambassador was not present. Neither did he apologise for his absence. In fairness, it must be observed that the minute suggests that Advocate De Wet, Chief State Law Advisor, did discuss the main judgment with the Minister. Certain directives, possibly flowing from the meeting with the Minister, who, of course, was not at the meeting, were discussed. These included the following: a diplomatic note had to be sent by the Ambassador in Harare to seek an appointment with "relevant ministers" to meet with them as a matter of urgency; the Zimbabwean Ambassador in Pretoria had to be called in by the Deputy Director-General: Africa "to make representations on behalf of Mr Von Abo"; and a high level delegation had to be composed to travel to Zimbabwe to meet with the relevant Zimbabwean authorities as soon as possible.

I repeat my view that these disclosures are irrelevant for purposes of deciding whether orders 4 and 5 were effectively complied with.

In any event, no BIPPA had been signed by the time this affidavit was deposed to. The controversial article 11 is also alluded to in the affidavit of Mr Williams. There is reference to disagreement between the two governments about the wording of article 11. The last word, evidently, came from Zimbabwe which proposed that article 11 should exclude investments relating to agricultural land made before the entry of the proposed agreement. Of course, this whole debate is irrelevant and academical for present purposes, because the proposed South African wording, *supra*, and the proposed Zimbabwean wording both excluded any hope of diplomatic protection for the applicant. The events covered in the affidavit, such as they are, are irrelevant because they pre-date orders 4 and 5.

This Williams affidavit, in my view, does nothing to enhance the case of the respondents. If anything, given the disclosure of earlier BIPPA's which came to nought, it fortifies conclusions expressed in the main judgment that the government failed to respond appropriately to the plight of its citizens and never showed any real intention to comply with their constitutional obligations in this regard – see for example the remarks in the main judgment at 562C-E.

Conclusionary remarks about the report and related matters

[55] For the reasons I have mentioned, I find that the respondents have failed to comply with orders 4 and 5.

[56] In the first place, such failure flows from the fact that the respondents, and particularly the third respondent, exhibited no interest whatsoever in attempting to comply with the orders of this court. Her conduct borders on the contemptuous. Her conduct corresponds with the lack of interest exhibited by all respondents in the main proceedings. Her conduct also flies in the face of section 165(4) of the Constitution -- see the main judgment at 539I-540A.

[57] Where the respondents, against whom orders 4 and 5 were directed, took no part in the proceedings, and failed to report by affidavit as they were instructed to do, and where no proper basis was laid for the "authority" ultimately passed on to Ambassador Mamabolo to deal with the matter, the report falls to be disregarded for that reason alone, and in view of the relevant authorities as dealt with in the main judgment – at 540F-543D.

[58] In the second place, and on the assumption that my conclusions about the disqualification of the report are wrong, I find that on a proper consideration of the report, such as the one I conducted, orders 4 and 5 were still not complied with:

1. In an Aide Memoire, Ambassador Mamabolo and his team expressed the intention "to adhere to the court order and to provide Mr Von Abo with

diplomatic protection as requested by him". They did absolutely nothing of this sort. The high-water mark of their efforts, at the meeting between the delegations, was that they "requested that the Zimbabwean Government should assist where representations are made by the South African Embassy on behalf of South African farmers who are victims of illegal land occupation". There is no indication that this "request", such as it was, would ever yield any form of protection for the applicant.

2. There are no signs whatsoever of the respondents, through their junior delegation, contemplating the employment of any of the recognised diplomatic measures, which could have brought about diplomatic protection. These measures were mentioned earlier in this judgment and also listed in the main judgment at 545I-J.

There is no explanation for the abject failure to employ these recognised measures, or any other effective measures which may have brought about protection for the applicant.

3. In the celebrated words of the learned chief justice in *Kaunda*, at 262D, this court was entitled to require the government to deal with the matter properly. The respondents failed to do so.

4. In their comprehensive heads of argument, counsel for the respondents made the following submission:

> "In the premises it is submitted that the respondents have fully complied with the supervisory order. As stated in Kaunda (their emphasis) they have exercised such diplomatic measures as they deemed, in their prerogative, were appropriate. The fact that such measures did not yield the desired result, we submit, does not detract from the fact that they discharged their constitutional obligation and consequently fully complied with the court's order."

For the reasons mentioned, I disagree. On this argument offered by the respondents, if I understand it correctly, it would mean that a government, which has the prerogative to decide on the nature of the diplomatic interventions to be made, can opt for the most ineffective and weak measures, which have no prospect of achieving the desired result, and still insist that their feeble efforts pass constitutional muster because they have the prerogative to decide what measures to adopt. To use the present example, the best the Mamabolo delegation did was to "request that the Zimbabwean Government should assist where representations are made by the South African Embassy on behalf of South African farmers who are victims of illegal land occupation". This was a hopeless request with no prospect of inviting any protection for the applicant. The same feeble attitude emerges from the Geerlings telex of 1 September 2008 that "the

best that the South African Government could hope for is that the Zimbabwean Government would give its co-operation in making it easier to convince the judge that indeed enough diplomatic protection was given to Von Abo, but that the Zimbabwean Government did not want to respond to these pleas as it is convinced about the merits of its own Land Reform Process."

To argue that these measures comply with the court order because it is the prerogative of the government to decide what measures to adopt, is untenable. It does not pass the test as expressed in *Kaunda, Mohamed* and *Fose supra*. The task must be performed properly. The remedy afforded to an aggrieved individual whose fundamental rights have been impaired (in this case by his government) must be an effective one. It did not happen in the present case.

5. The "efforts" of the South African delegation, such as they are, are also not in compliance with the declared policy of the South African Government, as repeatedly expressed in assurances to Parliament by the third respondent, from 2002 onwards. For example, in a written reply to Parliament, she said the following in March 2002:

> "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."

- Record volume 6 p522. See also the discussion on the subject in the main judgment at 538D-539E.

6. I am also of the view that the respondents, had they wished to do so, could have taken advantage of the judgment by the Southern African Development Community (SADC) tribunal in Windhoek as fortification for effective diplomatic interventions on behalf of the applicant. The judgment, reported as SADC (T) case no 2/2007, was handed to me for consideration during the follow-up proceedings. It was a case between seventy nine farmers (including farming companies) and the Republic of Zimbabwe as respondent. The court consisted of five members presided over by Mr Justice PILLAY. The members included Justices MTAMBO and MONDLANE and members Dr Kambovo and Dr Tshosa.

Already in October 2007 some of the applicants filed an application with the tribunal challenging the acquisition by the respondent of their agricultural land in Zimbabwe. They also applied for, and were granted, interim relief on 13 December 2007 pending the determination of the main case. In terms of the interim order the Republic of Zimbabwe was restrained from taking any steps or permit any steps to be taken directly or indirectly to evict the applicants from the peaceful residence and beneficial use of their properties. Subsequently, seventy seven other persons applied to intervene in the proceedings. As far as I can make out

some of them are South African citizens. According to the final judgment, the applicants were, in essence, challenging the compulsory acquisition of their agricultural lands by the respondent. The acquisitions were carried out under the Land Reform Program undertaken by the respondent.

Some of the conclusions arrived at by the tribunal are the following:

"(a) by unanimity, the Tribunal has jurisdiction to entertain the application;

(b) by unanimity, the applicants have been denied access to the courts in Zimbabwe;

(c) by a majority of 4 to 1, the applicants have been discriminated against on the ground of race, and

(d) by unanimity, fair compensation is payable to the applicants for their lands compulsorily acquired by the respondent."

The tribunal, by unanimity, then ordered the respondent to take all necessary measures to protect the possession, occupation and ownership of the lands of all the applicants except three of them who had already been evicted from their lands and to take all appropriate measures to ensure that no action is taken to evict these applicants or interfere with their peaceful occupation and use of their farms. In respect of the three that had been evicted the respondent was ordered to pay compensation on or before

30 June 2009, which was long before the follow-up proceedings came before me in October 2009. As I pointed out, it also appears from the minute of the meeting of the two delegations in Harare in September 2008 that these proceedings were taken note of. The copy of the judgment of the tribunal handed to me is undated, but it is clear, for the reasons mentioned, that the final order must have been handed down before June 2009 (the date when compensation had to be paid to those evicted) and well before the matter came before me for purposes of the follow-up proceedings. Although this may be somewhat of a peripheral issue, I am of the view that diligent government ministers, in the position of the respondents facing the task to comply with orders 4 and 5, could also have relied on the judgment of the tribunal to fortify their efforts to employ effective diplomatic interventions on behalf of the applicant. They failed to do so.

[59] In all the circumstances I have come to the conclusion that the respondents have failed to effectively comply with orders 4 and 5, so that the applicant's claim for damages, as contemplated in order 6 (main judgment at 567B-C) must come into play.

Constitutional damages

[60] It was held in the main judgment (more particularly, at 560C-566I) that the respondents had acted unconstitutionally and, in the process, had violated the applicant's right to diplomatic protection as entrenched in the Constitution.

[61] On behalf of the applicant it was argued before me, during the follow-up proceedings, that the applicant is entitled to be compensated for this breach of his constitutional right and that, in the circumstances of this case, payment of damages, as compensation, would be the appropriate relief to be granted.

[62] In my view, a consideration of the following words by the then learned Chief Justice, CENTLIVRES, in *Minister of the Interior & Another v Harris & Others* 1952 4 SA 769 (AD) at 780H-781B would be appropriate:

> "... in other words the individual concerned whose right was guaranteed by the Constitution would be left in the position of possessing a right which would be of no value whatsoever. To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holder of those rights any remedy in law would be to reduce the safeguards enshrined in section 152 to nothing. There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They would never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi ius, ibi remedium* ... In *Dixon v Harrison*,

124 E.R. 958 at p964, it was stated that the greatest absurdity imaginable in law is:

'that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same'."

[63] The translation of *ubi ius, ibi remedium*, offered by Hiemstra and Gonin, *Trilingual Dictionary* 2nd edition p294 is: "Where there is a right, there is a remedy."

[64] In *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA) the following is said at 489G-491B:

"*Fose v Minister of Safety and Security* [1997 (3) SA 786 (CC)] recognised that, in principle, monetary damages are capable of being awarded for a constitutional breach. In that case ACKERMANN, J made the following general, but important, observation in the context of the interim Constitution:

'I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a

country where so few have the means to enforce their rights through the Courts, it is essential that, on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The Courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

Earlier, the learned judge said the following (my note: at paragraph [60] of the report):

'It seems to me that there is no reason in principle why further "appropriate relief" should not include an award of damages where such an award is necessary to protect and enforce chapter 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed.'

[24] Monetary damages for a constitutional breach have since been awarded by this Court, and endorsed by the Constitutional Court in

*Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri South Africa and Legal Resources Centre, amici curiae); President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* [my note: the references are 2004 6 SA 40 (SCA) and 2005 5 SA 3 (CC).] In the decision of this Court HARMS, JA said the following:

'Courts should not be overawed by practical problems. They should "attempt to synchronise the real world with the ideal construct of a constitutional world" and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.' (My note: at paragraph [42]).

[25] In *Fose* the Constitutional Court emphasised that it was 'not required to answer the question ... whether an action for damages in the nature of constitutional damages exists in law, nor whether an order for the payment of damages qualifies as appropriate relief ... in respect of a threat to or infringement of any of the rights in chapter 3' but was concerned only with the much narrower task of deciding whether an award of damages was appropriate in relation to the particular breach that was there in issue. Similarly, in this case, we are not called upon to answer those questions broadly and in the abstract – and I do not do so – but only to decide whether the particular breach that is now in issue is deserving of relief in the form of the monetary damages that are now claimed. Whether

relief in that form is appropriate in a particular case must necessarily be determined casuistically, with due regard to, among other things, the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned." (Emphasis added.)

[65] In *Kate*, an appropriate award of damages was made. In the present case, the nature of the damages sustained by the applicant was illustrated in the main judgment. Through the, as yet unexplained, failure of the respondents to assist him properly, the applicant lost the fruits of the hard work of a lifetime. Had the respondents properly performed their constitutional duty of awarding diplomatic protection to the applicant, when they were first approached to do so almost a decade ago, these damages would not have been sustained.

I cannot see how any relief, other than a damages award, can be "appropriate relief" as explained in *Fose*, *Kate* and other authorities, and as intended by the provisions of the Constitution, notably, perhaps, the provisions of section 38 thereof. I see no alternative relief: this court cannot, for lack of jurisdiction, for example order the reinstatement of the applicant on his properties.

The nature and importance of the rights of the applicant that were infringed and that are in issue, were illustrated in the main judgment. The same applies to the

consequences of the breach on the part of the respondents for the applicant concerned.

A damages award, would, in my view, be in line with the principles laid down by the learned judge of appeal in the above quoted passage to be found in *Kate*, at 490G-491B.

[66] It remains for me to deal with the argument presented on behalf of the respondents in opposing the notion of a damages award. By way of illustration, I quote the following extract from the heads of argument offered by counsel for the respondents:

> "A temporary neglect to assist Mr Von Abo as was found by this honourable court, does not create any causal link between what the Zimbabwean Government did and the fact that Mr Von Abo had yet not received redress in any material form. Diplomacy is an ongoing process and it is for the respondents now to assist Mr Von Abo as far as they can. A finding that the respondents failed to perform their constitutional responsibility in regard to diplomatic assistance to Mr Von Abo, as the court found *in casu*, does not and cannot automatically give rise to damages especially not in the event where it is clear that whatever they may have done in the past up until this moment would not have persuaded the Zimbabwean Government to abandon or reverse their execution of the Land Reform Program."

[67] I cannot agree with these submissions. The internationally recognised forms of diplomatic intervention, *supra*, have been designed to force offending states to tow the line. There is no room for an argument that diplomatic intervention becomes toothless, simply because the offending state exhibits no intention ever to co-operate. It is precisely under those circumstances when the recognised interventions, *supra*, come into play: the strength of the intervention, as illustrated, depends on the level of resistance.

South Africa is the power house of the region. It is common knowledge that Zimbabwe is dependent on South Africa for almost every conceivable form of aid and assistance. I see no reason why the respondents cannot apply the necessary pressure, under these circumstances, to assist their valuable and long suffering citizens, such as the applicant. In breach of their constitutional duties, the respondents have refrained from affording such assistance for almost a decade. To date, they have brought about no meaningful assistance for the applicant whatsoever. This state of affairs may well continue into the future. The time has arrived for this court to afford the applicant appropriate and effective relief as illustrated in *Fose*, *Kate* and other judgments.

The order

[68] I make the following order:

1. It is declared that the first and third respondents, jointly and severally, the one paying the other to be absolved, are liable to pay to the applicant such damages as he may prove that he has suffered as a result of the violation of his rights by the Government of Zimbabwe.
2. The question of the *quantum* of the damages is referred to oral evidence.
3. The usual rules will apply with regard to discovery, expert evidence and the holding of a pre-trial conference.
4. The respondents, jointly and severally, are ordered to pay the applicant's costs arising from this follow-up hearing, including the costs of two counsel.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

3106-2007

HEARD ON: 12 and 13 October 2009
FOR THE APPLICANT: P Hodes SC assisted by A Katz
INSTRUCTED BY: W J Herbst c/o E J V Penzhorn
FOR THE RESPONDENTS: P J J de Jager SC assisted by M Mphaga and M Sello
INSTRUCTED BY: The State Attorney