IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTION HILL

CCT CASE NO: 67/08
TPD CASE NO: 3106/2007

In the matter between:

CRAWFORD LINDSAY VON ABO Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Respondent

In re:

The matter concerning diplomatic protection 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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A. INTRODUCTION

1. This application for confirmation of a declaration of invalidity is made in terms of sections 167(5) and 172(2) of the Constitution read with section 8(1)(a) of the Constitutional Court Complementary Act No 13 of 1995 and Rule 16(4) of this Court's Rules. It concerns the conduct of the Respondent (the then President of the Republic of South Africa).

2. The Applicant seeks orders:

   2.1 confirming paragraph 1 of the order issued on 29 July 2008 by Prinsloo J in the Transvaal Provincial Division of the High Court ("the High Court") in the matter of *Von Abo v Government of the Republic of South Africa and Others,* Case No 3106/2007, to the extent that it refers to the Respondent; and

   2.2 directing the Respondent to pay the Applicant's costs of this confirmation application, such costs to include the costs attendant upon the employment of three counsel.[1]

3. The Applicant, Crawford Lindsay von Abo, is an adult male businessman, a South African citizen by birth, who was the Applicant in the High Court.[2]

4. The Respondent is the former President of the Republic of South Africa, cited in his official capacity as such, care of the State Attorney, Bothongo, 8th Floor, 167 Andries Street, Pretoria.[3]

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[1] Vol 7: 680 – 681.

[2] Vol 1: 8 para 2

5. The Respondent was the Second Respondent in the High Court in an application launched by the Applicant against the government of the Republic of South Africa and Four Others.[4]

6. On 29 July 2008 Prinsloo J gave judgment. The High Court's order consists of seven paragraphs. Only paragraph 1 is of relevance to this application, to the extent that it refers to conduct of the Respondent.[5]

7. Paragraph 1 of the order made by Prinsloo J reads:

> **"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"**.

8. The other paragraphs of the order of the High Court, including paragraph 1, to the extent that it related to persons or entities other than the Respondent, are not subject to confirmation and, it is submitted, are not germane for the purposes of this application.[6]

9. Indeed, section 172(2)(a) of the Constitution provides:

> **"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**

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[3] Vol 7: 685 para 4

[4] Vol 7: 685 – 686.

[5] Vol 8: 783 para 1

[6] See *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC) at para [15]; *Booysen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC) at para [1]; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para [11]; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) at para [2].

Parliament, a provincial Act or <u>any conduct of the President</u>, but an order of constitutional invalidity has no force unless it <u>is confirmed</u> by the Constitutional Court" (emphasis added).

10. Section 167(5) of the Constitution states:

"The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or <u>conduct of the President</u> is constitutional, and must <u>confirm</u> any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force" (emphasis added).

11. Section 8(1)(a) of the Constitutional Court Complementary Act No 13 of 1995, states:

"(1) (a) Whenever the Supreme Court of Appeal, a High Court or a court of similar status declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in section 172 (2) (a) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), that court shall, in accordance with the rules, refer the order of constitutional invalidity to the Court for confirmation.

(b) Whenever any person or organ of state with a sufficient interest appeals or applies directly to the Court to confirm or vary an order of constitutional invalidity by a court, as contemplated in section 172 (2) (d) of the Constitution, the Court shall deal with the matter in accordance with the rules.

(2) If requested by the President of the Court to do so, the Minister shall appoint counsel to present argument to the Court in respect of any matter referred to the Court as contemplated in subsection (1) (a)".

12. Rule 16(4) of this Court's Rules provides:

"Confirmation of an order of constitutional invalidity

(1) The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such order.

(2) A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172 (2) (d) of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.

(3) The appellant shall in such notice of appeal set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against and the order it is contended ought to have been made.

(4) A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.

> **(5) If no notice or application as contemplated in subrules (2) and (4), respectively, has been lodged within the time prescribed, the matter of the confirmation of the order of invalidity shall be disposed of in accordance with directions given by the Chief Justice".**

13. The conduct of the Respondent which the Applicant impugned in the High Court, which was declared to be inconsistent with the Constitution and invalid, is that relating to his response to the Applicant's request to him to provide diplomatic protection in respect of the violation of his (the Applicant's) rights by the government of Zimbabwe.

14. The cause of action was, and is, that set out in the judgment of Chaskalson CJ in *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) (*"Kaunda"*) where at para [144]:5 the learned Chief Justice stated:

> **"South African nationals facing adverse State action in a foreign country are, however, entitled to request the South African government to provide protection against acts which violate accepted norms of international law. <u>The government is obliged to consider such requests and deal with them appropriately</u>"** (emphasis added).

15. Prinsloo J found that the Respondent (and the other respondents in the High Court) had failed to satisfy the constitutional requirement that he consider the Applicant's request for diplomatic protection appropriately.[7]

[7] Vol 8: 784, para [161] 1

16. In the circumstances, the High Court declared, *inter alia*, that the conduct of the Respondent was inconsistent with the Constitution and invalid.

17. That order has no effect until confirmed by this Court, and it requires this Court to consider it.[8]

18. The Applicant accordingly applies for confirmation of the order of invalidity relating to the conduct of the Respondent.[9]

19. In these submissions, two procedural aspects are dealt with followed by a description of the factual background and a conclusion.

20. We do not deal with the basis for, or any other aspect of, the other orders made by the High Court because they are not subject to confirmation as they are not declarations of invalidity of *"an Act of Parliament, a provincial Act or conduct of the President"*. Accordingly, they were valid immediately upon the High Court making them, and do not require confirmation by this Court for their validity. No application for leave to appeal against any of the other orders was lodged by any of the Respondents in the Court *a quo*.

21. The conduct of the Respondent impugned by the Applicant consists of an abject failure to consider, let alone appropriately, the Applicant's cri de coeur for diplomatic protection flowing from the egregious violation of his rights by the government of Zimbabwe.

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[8] See *Kruger v The President of the Republic of South Africa and Others* [2008] ZACC 17, unreported decision of this Court of 2 October 2008 in Case CCT57/07 at para [1].

[9] Vol 7: 680 – 683.

22. That abject failure is to be found in the responses to the requests addressed to him for diplomatic protection.

23. It is not in issue that the government of Zimbabwe expropriated the Applicant's properties in that country without providing him with compensation. Quite apart from the fact that this was done because he is a white farmer in Zimbabwe, it is a violation of the international minimum standard, which triggers the right of South Africa to assert diplomatic protection on the Applicant's behalf given that the Applicant is a South African national.[10]

24. He had a right to request diplomatic protection from the Respondent to vindicate his rights vis a vis Zimbabwe and to have that request considered appropriately.[11]

25. The High Court, correctly it is submitted, accepted that the Respondent had not considered the request in a constitutional manner and made the declaration of invalidity in issue in this application for confirmation.

[10] See *Dugard – International Law – A South African Perspective* (3 ed) 2005 at 299.

[11] Kaunda, para [144]: 5

B. PROCEDURAL ASPECTS

26. It is important to stress two important and inter-related procedural aspects of this matter.

The Respondent's silence

27. The first aspect is that the Respondent has not made an affidavit in this application, as he was entitled to do in terms of this Court's Rule 16 read with Rule 11 (3). The consequence is that this application for confirmation is, in truth, not opposed by the Respondent.

28. This matter demonstrates the woeful response at all material times by the Respondent to the plight of the Applicant and others similarly situated. As demonstrated below, the woefulness of the response extends to the affidavit of Pieter Andreas Stemmet ("Stemmet"),[12] an employee of the Minister of Foreign Affairs, and the deponent to the principal affidavit filed purportedly on behalf of the Respondent, *inter alia*, in the Court below.

29. Furthermore, despite the Respondent's attention being drawn to the difficulty of none of the respondents in the High Court having deposed to an answering affidavit,[13] at no time did the Respondent seek leave to address this difficulty.[14]

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[12] Vol 16: 544 – 575.

[13] See vol 8, pp.616-617, Von Abo reply, paras 5-7.

[14] See *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (TkSC) at 550E-G; *Pretoria Portland Cement and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at para [63]; *Da Mata v Otto NO* 1972 (3) SA 858 (T) at 868G – 869E. See also Ngcobo J (dissenting) in *Thint (Pty) Ltd v National*

30. In relation to requests for diplomatic protection such as those advanced by the Applicant to the Respondent, Chaskalson CJ stated as follows on behalf of the majority of the Court in *Kaunda*:

> **"*… our Constitution contemplates that government will act positively to protect its citizens against human rights abuses. …***
>
> ***The entitlement to request diplomatic protection which is part of the constitutional guarantee given by section 3 has certain consequences. If, as I have held, citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution*."**[15] (emphasis added).

31. The Applicant thus had a right to request diplomatic protection, and the Respondent was under a constitutional duty – at the very least – properly (that is rationally) to apply his mind to the request for diplomatic protection.

32. The Applicant applied to the Respondent for diplomatic protection concerning the violation of his rights in Zimbabwe, which request was simply not acted upon, for reasons which do not stand constitutional scrutiny.[16]

Director of Public Prosecutions and Two Others [2008] ZACC 13, unreported decision of 31 July 2008 (at para [325] and footnote 112).

[15] Paras [66] and [67], *Kaunda*. See also *Van Zyl and Others v The Government of the Republic of South Africa and Others* 2008 (3) 294 (SCA) at para [51].

[16] Vol 1: 13, para 19: and Vol 1: 92, para 187

33. As the record amply demonstrates, since the Applicant, *inter alia*, through his attorneys, first began corresponding with the Respondent regarding the violation of his rights by the Zimbabwean government there is no admissible evidence to show that proper consideration was ever given by the Respondent to the taking of diplomatic steps to respect, protect or fulfill his rights arising out of the unlawful expropriation without compensation of his farms in Zimbabwe and no meaningful explanation for this failure and/or refusal.

34. By the time the application was launched, there had accordingly been nothing but silence – in effect – from the Respondent regarding the Applicant's plight and his requests for diplomatic protection generally.[17]

35. However, once the application was launched, a response of sorts was forthcoming, but only from Stemmet, purportedly on behalf of all the respondents in the Court below.

36. It is striking – but sadly consistent with the approach by the Respondent to the Applicant's claim – that, as mentioned above, he did not see fit to depose to an affidavit before the High Court or to respond to this application.

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[17] See *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C). See also section 237 of the Constitution, which requires all constitutional obligations to be performed diligently and without delay, and *Chonco and 383 Others v The Minister of Constitutional Development and Another* 2008 (4) SA 478 (T) at 487F.

37. And Stemmet, the deponent to an affidavit purportedly on behalf of the Respondent, *inter alia*, attempted – impermissibly – to introduce evidence on the Respondent's behalf to explain the latter's failure to respond effectively to the Applicant's requests for diplomatic protection.

38. This is simply not acceptable. As Murphy J held in *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T):

> **"It was intimated in argument that the denials of the second respondent might be extended to the fifth respondent. That cannot be so. One person cannot make an affidavit on behalf of another. The second respondent can only depose to matters in his own knowledge".**[18]

39. Stemmet, the deponent, is a Senior State Law Adviser (International Law) at the Department of Foreign Affairs.[19] His evidence,[20] unless confirmed by others who were privy to the meetings, documents, advice and/or information on which he comments, is perforce limited to his personal and/or professional involvement therein.[21]

40. The decision of Goldstone J in *Gerhardt v State President and Others*[22] regarding the importance of confirmatory evidence bears repeating:

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[18] At 256 D-E.

[19] Vol 6: 545 para 1

[20] Vol 6: 544 - 575

[21] See also the judgment of Nugent JA in *Director General: Department of Home Affairs v Mavericks Revue CC* 2008 (2) SA 418 (SCA) at para [16] where he stated: *"I do not think a bald denial by a stranger with no apparent knowledge of the facts can carry any weight …"*.

[22] 1989 (2) SA 499 (T) at 504 D- H:

"**That interpretation of the agreement, Mr Doctor points out, has not been answered by the State President who has, for whatever reason, seen fit not to file any affidavit in this matter. He seeks to rely upon the affidavit of the second respondent, ie the Commissioner of Prisons. For that purpose, for what it is worth, he gave an authority to the Commissioner of Prisons which reads that:**

> **'In my hoedanigheid as Staatspresident van die Republiek van Suid-Afrika magtig ek vir Willem Hendrik Willemse, die Kommisaris van Gevangenisse, tweede respondent, om namens en ten behoewe van my 'n antwoordende eedsverklaring af te lê in die bogemelde aansoek.'**

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

41. The decision in *Hurley and Another v Minister of Law and Order and Another*[23] 1985 (4) SA 709 (D) regarding the duty to provide rebutting proof is also of significance.[24]

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[23] 1985 (4) SA 709 (D) where he stated at 504D-H:

[24] Again, to assist this Court, we quote from 725D-J, where Leon J stated:

> "*I return to the question of onus. … Both the Archbishop and Kearney's wife have given detailed reasons for their statements that no reasonable man could have cause to believe that Kearney had committed the offences in question or had withheld the information. That, in my view, is a prima facie case. In reply Colonel Coetzee has declined to furnish the facts upon which his belief is based and with regard to the alleged withholding of information he has not even said when, where, or to whom the information was withheld. He has thus prevented the Court from embarking upon an objective enquiry. At best, for the respondents, Colonel Coetzee's answer, bearing in mind what I have to consider, must be regarded as doubtful or unsatisfactory and, at*

42. Following *Hurley*, the onus in this matter is on the Respondent to rebut irrationality once the Applicant asserted it. To rebut this onus there needs to be more than a bald denial, which does not even exist here.

43. Accordingly, the effect of the failure by the Respondent to adduce evidence before the High Court is that in Stemmet's affidavit regarding what was in the mind of the Respondent, and what steps were or were not taken to afford the Applicant diplomatic protection, is hearsay and inadmissible. Indeed, this Court in *President of the Republic of South Africa v South African Rugby Football Union* accepted that hearsay evidence falls to be disregarded, even in the absence of an objection.[25]

44. It is submitted that it was inappropriate that Stemmet felt himself capable of "*specifically denying*" on the Respondent's behalf "*that the [applicant's] request for diplomatic protection was refused*" on the basis

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worst for the respondents, it is no answer at all. In Ex Parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 466 Stratford JA said this at 479:

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

In my judgment, even assuming that the onus lies on the applicants in this case, I hold that the applicants have discharged that onus. I declare that the detention of Gerald Patrick Kearney is unlawful and of no force and effect. I order that Gerald Patrick Kearney be immediately released from detention." (emphasis added).

See too *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at 256J – 257A; *Eveleth v Minister of Home Affairs and Another* [2004] 3 All SA 322 (T) at paras [7] – [11].

[25] 2000 (1) SA 1 (CC) at para [105]

that he, Stemmet, "*will demonstrate to the Honourable Court the steps taken by the Respondents in this regard*"[26]. This is so given that no confirmatory affidavit was filed by the Respondent. No confirmatory affidavits were filed by any of the other respondents in the High Court.

45. There was thus no admissible evidence to substantiate any possible defence by the Respondent. For that reason alone, we contend this application must succeed.

46. That is because there is no evidence against which this Court might test the rationality, reasonableness or *bona fides* of the decision-maker's refusal or failure to consider his application for diplomatic protection and indeed to provide him with diplomatic protection.

47. More particularly, there is nothing to gainsay the allegation made in the Applicant's founding affidavit (in paras 184-187)[27] that he applied to the Respondent for diplomatic protection concerning the violation of his rights in Zimbabwe, which request has simply not been properly considered.[28]

[26] Vol. 7, p 545, Stemmet, para 5.

[27] Vol 1, pp 91-92, Von Abo.

[28] See Stemmet's response at Vol 6: 573, para 99 and *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paras [12]- [16]

The failure to respond to the averments in the replying affidavit that called for a response

48. The second procedural aspect is that in relation to the contents of replying affidavits and the inferences that may be drawn by a failure on the part of a respondent to rebut that contained in a replying affidavit. Despite the Respondent's attention being drawn to the difficulty of his not deposing to an answering (or even confirmatory) affidavit,[29] he did not seek to address this difficulty.[30]

[29] See Vol 8, pp 616 – 617, Von Abo reply, paras 5 – 7.

[30] See *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (TkSC) at 550E-G; *Pretoria Portland Cement and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at para [63]; *Da Mata v Otto NO* 1972 (3) SA 858(A) at 868G – 869B.

See Ngcobo J (dissenting) in *Thint (Pty) Ltd v National Director of Public Prosecutions and Two Others* [2008] ZACC 13, unreported decision of 31 July 2008 at para [325] at footnote 112.

C. THE INAPPROPRIATENESS OF STEMMET's RESPONSE

Introduction

49. *Kaunda* is the South African authority on diplomatic protection and the State's duty under the Constitution towards its nationals who claim protection from injuries suffered abroad at the hands of a foreign government.

50. It is submitted that *Kaunda* holds that a South African national has two entitlements in respect of diplomatic protection:

50.1 *First*: a national has an entitlement to request diplomatic protection as a constitutional right; and

50.2 S*econdly*: because the request is premised on a constitutional right, a national has an entitlement to expect the President to consider such request and to deal with it appropriately; that is, that the President must consider a request properly (rationally) and ought to provide appropriate protection (in line with the government's foreign policy commitments) unless there are compelling reasons not to do so.

51. In *Kaunda*, the majority, per Chaskalson CJ, stressed that "*the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such*"

and, therefore, that claimaints, such as the Applicant, "*cannot base their claims on customary international law*".[31]

52. The Applicant does not base his claim for relief on customary international law. The Applicant's claim is premised on the Constitution, inasmuch as he had a right, being a South African citizen, to have his request (constitutionally) rationally and appropriately considered by the Respondent.

53. The Respondent did not do so and his conduct falls to be declared invalid for that reason. In this regard we refer to the dicta of Chaskalson CJ quoted above.

54. The Respondent failed to act appropriately in accordance with his duty to respond to the Applicant's request for diplomatic protection in the face of acts by Zimbabwe which violated accepted norms of international law.

55. Inasmuch it is not in issue that the government of Zimbabwe has been guilty of gross human rights abuses with regard to the Applicant, the following dicta of Chaskalson CJ in Kaunda are particularly apt:

> **"When the request is directed to a material infringement of a human right that forms part of customary international law, one would not expect our government to be passive."**[32]

[31] Kaunda *ibid* at para [29].

> **"…our Constitution contemplates that government <u>will act positively to protect its citizens against human rights abuses</u>."**[33] (emphasis added)

> **"If, as I have held, citizens have a right to request government to provide them with diplomatic protection, then government must have a <u>corresponding obligation to consider the request and deal with it consistently with the Constitution</u>."**[34] (emphasis added)

> **"There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. <u>A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse</u>."**[35] (emphasis added)

56. In light of these extracts, we deal next with the Respondent's failure to deal *appropriately* with the Applicant's requests for diplomatic protection. In *Kaunda* Chaskalson CJ held that:

> **"<u>[i]f 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</u>. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review decisions. There may**

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[32] *Kaunda* at para [64].

[33] *Kaunda* at para [66].

[34] *Kaunda* at para [67].

[35] *Kaunda* at para [69].

possibly be other grounds as well and these illustrations should not be understood as a closed list."[36]

If it were admissible the justification offered by Stemmet is in any event irrational

57. The grounds advanced by Stemmet, to the extent that they are comprehensible, for the Respondent's refusal to provide the Applicant with diplomatic protection, are in any event irrational.[37]

58. In relation to the Applicant's general requests for diplomatic assistance, the Respondent provided no response at all, other than to unconstitutionally "pass the buck" to various Ministers of State.

59. Stemmet states that "There was no failure to consider the request to grant diplomatic protection", and that "All necessary and appropriate steps were taken". He then states that diplomatic protection was granted.[38]

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[36] Paras [79] and [80], *Kaunda* (emphasis added).

[37] It appears that Stemmet generally suggests that the Applicant is not entitled to diplomatic protection on the one hand and on the other that "the respondents have taken such diplomatic steps as they saw fit in the circumstances" (Vol: 6: 561, para 31); and "Applicant requested diplomatic protection. Respondents took such steps as were appropriate to respond to the request" (Vol 6: 562, para 35); and "There may not have been a response to applicant but diplomatic steps were taken to assist applicant" (Vol 6: 562, para 37); and "The respondent took all appropriate steps to provide diplomatic protection." (Vol 6: 571, para 82); and "The respondents granted such diplomatic protection as was appropriate in these circumstances." (Vol 6: 573, para 97).

[38] Vol 6: 574, para 101.

60. Prinsloo J gave an accurate and detailed summary of the communications between the Applicant and the Respondent and various Ministers of his Cabinet.[39] To submit that the Respondent's responses to the Applicant's request detailed in the letters sent by him or his attorneys leaves a lot to be desired is putting it mildly.[40] As part of the attempt to resolve the disputes with Zimbabwe, the Applicant's legal advisers also requested a meeting with the Respondent.[41]

61. That meeting was never held. The blame for this must be laid at the door of the Respondent.[42]

62. The Respondent, as suggested by Stemmet, never responded to the request by the Applicant's legal representatives for a meeting, because, as Stemmet puts it: "*any meeting would have been an exercise in futility*".[43]

63. In relation to a proposed bilateral investment treaty ("BIT") between the government of Zimbabwe and South Africa, the High Court was not told of developments in relation thereto: e.g. what was the content of the

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[39] See Vol 8: 744 – 766, judgment, paragraphs [99] – [132] for a description of these communications. It would be an exercise in supererogation to repeat these submissions, which in our submission have been summarised aptly by Prinsloo J.

[40] The Applicant or his attorneys wrote to the Respondent on numerous occasions without receiving any meaningful response.

[41] Vol 5: 495, CVA 143(h).

[42] The only response was that "Your request for a meeting will be discussed with Adv Vilakazi": see Vol 6: 499, CVA 143(l).

[43] Vol. 6, p 552 - 523, Stemmet, para 18. Cf. *John v Rees* [1870] Ch 345 at 402, quoted with approval in *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (2) SA (A) at 37C-F.

BIT exactly; how far along were the negotiations?; what was the expected date for the BIT's finalisation?; would the BIT be retrospective in application to cover cases of land expropriation prior to the BIT coming into force between the two States?[44]

64. Instead of clarity and forthrightness, Stemmet simply iterates the obvious: "*that there are various considerations which the Republic has to take into account in deciding whether or not to accede to an international agreement*";[45] and then trumpets the predicted: "*matters relating to the formulation of policy in respect of foreign relations are the prerogative of the national executive*",[46] and the Courts (and the Applicant, a citizen of South Africa), is/are not "*entitled to know the reasons the Republic is not a party thereto (ICSID) and whether or when it intends to become a party*".[47] But, what Stemmet states is in any event inadmissible hearsay, as discussed above.

65. It is submitted that this is not a response. The best that can be said for the Respondent is that he did not in fact have a reason. This appears from what Stemmet states is the basis for the inexcusable failure by the Respondent to respond to the Applicant's request for a meeting with the Respondents in respect of ICSID, namely, that "*Respondents have*

[44] The Applicant's attorneys requested copies of any international agreement between South Africa and Zimbabwe relating to investment disputes, but access was refused – Vol 5: 473, CVA 130.

[45] Vol. 7, p 548, Stemmet, para 15.1.

[46] Vol. 7, p 549- 550, Stemmet, para 15.4.

[47] Vol. 7, p 558- 559, Stemmet, para 25.

been considering the question whether to adopt ICSID and have up to now not reached a conclusion".[48] Surely a meeting with the Applicant's representatives might well have assisted the Respondent in coming to a conclusion.

66. Stemmet then argues that there is "*no ground on which applicant can approach this Honourable Court to compel the Republic to subject itself to an agreement which is not binding on the Republic*"[49] since, so Stemmet informs the Court, the national executive negotiates international agreements like ICSID and "*such a negotiated agreement of the nature of ICSID can only bind the Republic after it has been approved by a resolution of both the National Assembly and the National Council of Provinces*".[50] In his view, the Court cannot "*entertain a claim based on a convention which is neither binding to [sic] the Republic nor law in this country. The attempt to force the accession to a convention lacks averments necessary to sustain a cause of action and is unconstitutional*".[51]

67. This missed the point. It demonstrates the continuing willingness of the Respondent to avoid engaging with the Applicant's request for diplomatic protection in a candid and rights-committed manner.

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[48] Vol. 7, p 552-553, Stemmet, para 18.

[49] Vol. 7, p 549, Stemmet, para 15.3.

[50] Vol. 7, p 549, Stemmet, para 15.2.

[51] Vol. 7, p 556, Stemmet, para 21.2.

68. It is submitted that this evasive "pleading" by Stemmet further confirms that the Applicant's request for diplomatic protection was not dealt with rationally by the Respondent in accordance with his duty, as explained in *Kaunda*.

69. If Stemmet's response is of any value, it is in that it demonstrates that the Applicant's only means of securing diplomatic protection is through the intervention of the Courts. This, it is submitted, is so because Stemmet's acceptance that the "*efforts*" made by the Respondent to respond to the Applicant's so-called "*general request for diplomatic protection*" have "*not met with great success, if any at all*".[52]

70. It is submitted that the attitude of the Respondent towards the Applicant's request for diplomatic protection, and Stemmet's feeble attempt at justifying the resistance to the Applicant's request, demonstrate the irrational response by the Respondent to the Applicant's claim for diplomatic protection.

71. It is submitted that without this Court's assistance the Applicant quite literally stands no hope of a rational, objective and constitutionally-required response from the President of the Republic of South Africa to his request for diplomatic protection.

[52] Vol. 7, p 554, Stemmet, para 20.3.

The Respondent's conduct was inconsistent with the government's own policy commitment to its nationals

72. In any event, by failing to accord diplomatic protection to the Applicant the Respondent's conduct is in conflict with the South African government's stated policy commitments regarding the provision of diplomatic protection.

73. That stated policy commitment came to light before this Court in *Kaunda*. In order to advance their claim for diplomatic protection, the applicants in Kaunda relied on various policy commitments of the South African government in the field of foreign relations.

74. The evidence regarding the government's policy on diplomatic protection which was placed before this Court by the Kaunda applicants, without objection by the Respondent, is referred to by Chaskalson CJ as "*principles and the priorities of the Ministry of Foreign Affairs*" which include, *inter alia,*

> **"a commitment to justice and international law in the conduct of relations between nations, a commitment to interact with African partners as equals, and a commitment to the promotion of the New African Partnership for Africa's Developments".**[53]

[53] Para [125], *Kaunda*.

75. That evidence of policy was placed before the High Court, and is now before this Court. See the copies of **Annexures CVA 145(a)** and **145(b)** and **146(a)**, **(b)** and **(c)** annexed to the founding affidavit of the Applicant:

- **Annexure CVA 145(a) and CVA 145(b):** Question no.103 submitted on 16 February 2002 by Mr A J Botha MP DP [internal question paper no.2 of 2002] submitted for written reply on 27 March 2002 in the National Assembly by the Minister of Foreign Affairs, Dr N Zuma.[54]

- **Annexure CVA 146(a), (b) and (c):** Question no. 127 submitted on 4 June 2004 by Mr D H M Gibson MP DP [internal question paper no.3 of 2004] submitted for written reply on 24 June 2004 in the National Assembly by the Minister of Foreign Affairs, Dr N Zuma.[55]

The government's stated foreign policy as set out in these annexures was confirmed in Parliament by the Minister of Foreign Affairs during March 2002[56]. The manner in which the government gave effect to the stated policy in respect of South African farmers' land disputes with the government of Zimbabwe, as stated by the Minister of Foreign Affairs in Parliament during June 2004, is set out in **Annexures CVA 147(a)** and **CVA 147(b)[57]**.

In short: government had committed itself to a policy to *"ensure the safety and security of all its citizens, their property as well as South African owned companies operating in foreign countries*."

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[54] Vol. 6, p 521- 522.

[55] Vol. 6, p 523- 525.

[56] Vol 6: 521 - 522

[57] Vol 6: 526 - 527

76. It is submitted that the policy commitments of the South African government reflected in these annexures entitled the Applicant to expect that the Respondent would take action to intervene diplomatically on his behalf in his land disputes with the government of Zimbabwe, and if not, to provide justifiable reasons for that failure.

77. *Kaunda* made it clear that when it comes to the provision of or refusal to provide diplomatic protection, the government (and thus the Respondent) is not at liberty to ignore its own stated foreign policy. As stated by Chaskalson CJ:

> **"The government's policy on this issue is that it makes representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen. … The applicants are entitled to the benefit of this policy, and if capital punishment were to be imposed on them, then consistently with its policy, government <u>would have</u> to make representations on their behalf."**[58] (emphasis added)

78. One of the reasons this Court declined to order the government to provide diplomatic protection in *Kaunda* was because it accepted that the government would act in accordance with its policy at the appropriate time. According to Ngcobo J:

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[58] Para [99], *Kaunda*.

> **"The policy of the government is to grant such protection [to intervene and make representations once the death penalty is imposed]. The government says the appropriate time to consider whether to grant such protection is when the applicants are extradited to Equatorial Guinea. In all the circumstances of this case I have no reason to believe that the government will not do what it says it will do. I therefore consider it unnecessary to issue a declarator."**[59]

79. It is submitted that, unlike in *Kaunda*, the Respondent manifestly did not act in terms of the government's stated foreign policy regarding the protection of nationals' property rights abroad and has provided no rational explanation for this failure.

80. The Respondent, through his consistent and irrational failure to consider properly furnishing diplomatic protection to the Applicant, has failed to act consistently with government's stated policy to *"ensure the safety and security of all its citizens, their property as well as South African owned companies operating in foreign countries*."

81. The Applicant was and remains entitled to the benefit of this policy, and where his property rights have been expropriated unlawfully in terms of international law then, consistent with its policy, the Respondent was

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[59] See para [210], *Kaunda*. See too the statement by Chaskalson CJ in *Kaunda*:

> "*Should that risk [of being sentenced to death] become a reality <u>the government would be obliged to respond positively</u>. Given its stated foreign policy, there is no reason to believe that this will not be done*." (emphasis added) (At para [127]).

and is constitutionally obliged to provide him with diplomatic protection or else to explain rationally why he will not do so.

82. The Respondent was not at liberty to ignore his government's own policy pronouncements. The South African government is bound by its own policies. As Ngcobo J stated in *Bato Star Fisheries (Pty) Ltd v The Minister of Environmental Affairs & Tourism & Others* 2004 (4) SA 490 (CC):

> "**It is true that the Minister has discretion in the granting of fishing rights under the Act. But how is the Minister to exercise that discretion? In particular, the question is does the Act read as a whole and in the context of our commitment to equality, indicate any policy which the Minister is to follow? <u>If there is such a policy, then the Minister must exercise his discretion in accordance with such policy</u>. The Minister has a duty to give effect to that policy. Here, the main foundational policy of the Act is to redress the imbalance of the past. The Minister is bound to give effect to that policy in the exercise of the discretion**."[60]
>
> (emphasis added)

And see too Ngcobo J in *Kaunda*:

> **"I conclude therefore that diplomatic protection is a benefit within the meaning of section 3(2)(a). It follows therefore that sections 3(2)(a) and 7(2) must be read together as imposing a constitutional duty on the government to ensure that all South African nationals abroad enjoy the benefit of diplomatic protection. The proposition that the government**

[60] Para [100]. The decision of *Bato Star* was referred to by this Court in *Kaunda*. See the judgment of Ncobo J at para [156], fn 6; see also the judgment of O'Regan J at para [219].

> **has no constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the government's own declared policy and acknowledged constitutional duty."**[61]

83. It is submitted that, in the circumstances, the failure by the Respondent to provide diplomatic protection, when in fact it was the government's stated policy to do so, suggests not only irrational and impermissible behaviour, but also bad faith.

84. No admissible, let alone cogent, reasons have been proffered by the Respondent to justify the departure from this policy commitment. Insofar as the Respondent has failed to act consistently with government policy, such failure is irrational and the refusal to respond to the Applicant's request for the exercise of diplomatic protection consistent with the aforesaid policy falls to be declared unconstitutional.

[61] Para [188], *Kaunda*.

The Respondent failed to act in a constitutionally appropriate manner

85. It is submitted that the aforegoing makes it clear that the Respondent has failed to act in a constitutionally appropriate manner in failing to accede to the Applicant's requests for diplomatic protection, or at least failing to consider the request properly and rationally.

86. The Respondent failed to deal appropriately with the Applicant's requests to provide diplomatic protection. The inappropriateness of this conduct is evidenced by:

86.1 the failure to place any admissible evidence before the Court to justify his conduct;

86.2 the irrational reasons advanced by Stemmet in his affidavit; and

86.3 the failure by the Respondent to act consistently with government's own stated policy.

87. It is accordingly contended that the Court is thus required to intervene. In this regard Chaskalson CJ held as follows:

> **"The exercise of all public power is subject to constitutional control. Thus even decisions of the President to grant a pardon or to appoint a commission of inquiry are justiciable. This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection. …**
>
> **If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the**

> **matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list."**[62]

88. This Court in *Kaunda* affirmed that it has the power, and indeed the obligation, to decide on the lawfulness of the provision of or failure to provide diplomatic protection in any specific case.

[62] Paras [79] and [80], *Kaunda*.

D. CONCLUSION AND REMEDY

89. The evidence before this Court shows that the Respondent was faced with timeous, various, and substantiated requests by the Applicant for diplomatic protection prior to the application being launched in the High Court.

90. As part of his requests for diplomatic protection the Applicant offered for his legal representatives to meet with the Respondent to explain not only what international law wrong had been perpetrated against him by Zimbabwe, but also to elaborate on the content of diplomatic protection under the South African Constitution as read with customary international law.[63]

91. The Applicant's documents, supporting evidence, pleas for assistance and patience fell on deaf ears. He was constrained to approach the High Court.

92. This context, we submit, is important. The Respondent was not surprised with a demand for diplomatic protection or forced to respond to a court application at short notice.

93. By contrast, in *Kaunda*, this Court was critical of the manner in which the applicants in that case had demanded diplomatic protection and had drafted their application papers.

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[63] Vol 2: 102; CVA 3(a) and Vol 2: 105 CVA 3(d).

93.1 Chaskalson CJ criticised the way in which the Kaunda applicants had "*turned peremptorily to the South African government and demanded that it secure relief for them"*.[64]

93.2 The learned Chief Justice also criticised the fact that "*[n]o specific allegations are made in the founding affidavit that the applicants requested assistance from the South African High Commission to address their complaints, and that this was refused*"[65] and pointed out that *"[t]here is moreover nothing to show that the government has not provided assistance to the applicants in Zimbabwe when it was requested to do so".*[66]

94. By contrast, the care and time taken and cost incurred by the Applicant to prepare his requests for diplomatic protection have ensured that the Respondent was furnished with clear evidence of the international wrong that the Applicant has suffered at the hands of the Zimbabwean government and with timeous requests for assistance.

95. The failure by the Respondent to consider appropriately these timeous and substantiated requests for diplomatic protection is remarkable. As mentioned above, Chaskalson CJ pointed out that "*[a] request to the government for assistance in such circumstances where the evidence*

[64] Para [139], *Kaunda*.

[65] Para [140] *Kaunda*.

[66] Para [143], *Kaunda*.

is clear would be difficult, and in extreme cases possibly impossible to refuse."[67] This was an extreme case.

96. The clear evidence regarding the Applicant's timeous and substantiated requests for diplomatic protection and of the Respondent's unconstitutional failure to consider his requests properly or at all and to provide diplomatic protection paints a clear picture that the Applicant is entitled to a declaratory order that the Respondent's conduct was inconsistent with the Constitution.

97. It is now trite that a Court under section 172(1)(a) of the Constitution is obliged, once it has concluded that law or conduct is unconstitutional, to declare the offending law or provision to be invalid to the extent of its inconsistency with the Constitution.[68]

98. Because the conduct of the Respondent in refusing to consider properly the Applicant's request for diplomatic protection is inconsistent with the Constitution and invalid, the Applicant is entitled to a declaratory order to that effect.

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[67] Para [69], *Kaunda*.

[68] *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para [59] and *Matatiele Municipality and Others v President of the Republic of South Africa and Others (No 2)* 2007 (6) SA 477 (CC) at paras 87-91.

99. On the basis of these submissions, it is submitted that the application for confirmation ought to succeed and that the Respondent should be ordered to pay the costs of three counsel.[69]

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3 October 2008

[69] It is submitted that the matter is an exceptional one, which justifies the employment of three counsel. See *South African Railway and Harbours v Illovo Sugar Estates Ltd and Another* 1954 (4) SA 425 (N) at 427A; *Van Zyl and Others v Government of the Republic of South Africa and Others* 2008 (3) 294 (SCA) at para [93] and *Van Zyl and Others v Government of the Republic of South Africa and Others* 2005 (11) BCLR 1106 (T) at para [125], where Patel J stated: "The services of three counsel were certainly not extravagant having regard to the novelty, complexity and magnitude of the matter as well as numerous issues of international law and constitutional law and the importance of the matter to both sides." *Van Zyl* similarly dealt with issues relating to diplomatic protection.