IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN

Case No: 1934/2019

In the matter between:

NICOLAAS VAN DEN BERGH Plaintiff

and

THE GOVERNMENT OF THE FRENCH REPUBLIC Defendant

Reportable / Not reportable

Coram: Anderssen AJ

Heard: 16 March 2026

Delivered: Electronically on 17 March 2026

Summary: Claim in contract – special plea of immunity – Foreign States Immunity Act – onus on plaintiff to plead and prove exception in terms of Act

Absolution from the instance – *prima facie* case not established

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ORDER

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1. The application for absolution from the instance is granted and the special plea of immunity is upheld.

2. The plaintiff is ordered to pay the defendant's costs, such costs to include

the costs of two counsel on scales C and B respectively.

JUDGMENT

INTRODUCTION

[1] The defendant brought an application for absolution from the instance with respect to its special plea in abatement. In its plea, the defendant denied that this Court is capable of adjudicating the dispute between the plaintiff and the French government as the defendant is a foreign state, in terms of section 1(2) of the Foreign States Immunities Act ("*the Act*"), which enjoys immunity from the jurisdiction of the courts of South Africa in terms of section 2(1) of this Act. The plea raised the defence that the disputed contract, as pleaded, is not a contract as envisaged by either section 4(1)(a) or (b) of the Act.

[2] In terms of the plaintiff's particulars of claim, he, acting personally, concluded an oral agreement with Mr Jean-Claude Le Duc ("*Le Duc*") who, at the time, was the duly authorized representative of the defendant, during November 2011 and in Cape Town. The agreement was one for the supply of chemical breathalysers and was conditional upon Decree No. 2012-284 being enacted in France and the defendant confirming the numbers of breathalysers to be provided annually. The defendant, later confirming that 40 million NF chemical breathalysers must be supplied annually – for an indefinite period – undertook to ensure the proper implementation of legislation. In turn the plaintiff agreed to allow the defendant to conduct an

annual audit of the manufacturing plant and premises where the NF chemical breathalysers were manufactured to ensure that the breathalysers were safe and could carry the NF stamp.

BACKGROUND

[3] The background facts, as pleaded by the plaintiff in his particulars of claim, were not challenged by the defendant as it raised a special plea for reasons elaborated on below. These facts were confirmed under oath by the plaintiff during his evidence in chief and were mostly not challenged in his cross-examination. The dispute before the court was a narrow one and centred on whether the plaintiff could establish that the transaction giving rise to his claim is a 'commercial transaction' within the meaning of section 4(1) of the Act, alternatively, whether the defendant had waived its right to claim immunity in terms of section 3 of the Act. For purposes of this judgment I briefly summarise the facts as pleaded by the plaintiff, and expanded upon by him during his evidence.

[4] One of the main causes of road deaths in France was drivers driving under the influence of alcohol ("*drink-driving*"). The defendant had, as a result, enacted stringent laws to combat drink-driving, had ongoing campaigns to reduce drink-driving, and had imposed a blood-alcohol limit of 0,5 milligrams of alcohol per millilitre of blood on drivers. On 28 February 2012, as part of this ongoing campaign, the defendant enacted Decree no 2012-284 ("*Decree 284*"). This decree made it mandatory for every vehicle in France (subject to a few limited exceptions) to possess a portable testing device capable of determining the driver's blood alcohol level from a breath sample (breathalyser). The breathalyser had to be government-

approved (‘*norme française*’ or “*NF*”) and unused.

[5] Decree 284 applied to local and foreign drivers travelling in France and any driver that failed to comply was liable to a spot fine. The practical effect of this was two-fold: (a) each vehicle needed two unused breathalysers in case one was used, and (b) each vehicle had to replace the breathalysers on an on-going basis – at least bi-annually – due to its limited lifespan. As the number of vehicles on France’s roads exceed 50 million each year, this meant that at least 100 million breathalysers would be needed in the first year and, thereafter, 70 million per year. Random checks would be carried out by the police to ensure compliance with the law. As a result, there was an immediate (and substantial) increase in demand for breathalysers in France and its surrounding countries.

[6] The defendant, during late 2011 and early 2012, through various officials, orally represented to the plaintiff the urgent requirement for NF certified breathalysers to be supplied into France and that it would endorse and support persons capable of producing NF breathalysers. A South African company, Redline Products (Pty) Ltd (“*Redline*”), had the capacity, from November 2012, to produce 120 million breathalysers per annum and was rightfully anticipating significant increases in sales. The plaintiff was a director of Redline and held 45% of the shares in this company. His co-director was Hugh Butler (the developer of the product) who also held 45% of the issued shares. The other 10% issued shares were held by two further individuals in equal blocks. Redline was one of only two producers in the world (at the time) that could produce NF chemical breathalysers.

[7] The plaintiff – as a result of the agreement reached with Le Duc and

telephonically confirmed by a senior official from the French Department of Transport – took steps to have Redline produce NF chemical breathalysers on his behalf in Cape Town and to have these delivered, again on his behalf, to the French public and foreign drivers in France. The defendant, the French population and foreign drivers accepted the NF chemical breathalysers from the plaintiff and paid a market-related price for them into the bank account designated by the plaintiff. Delivery was made to distributors as the defendant was unable to receive, store and distribute the breathalysers. On 15 February 2013, however, the Prime Minister of France announced the indefinite postponement of the fine imposed for contravention of Decree 284 and, on 28 February 2013, the defendant enacted Decree no 2013-180 ("*Decree 180*"), which postponed the fine – for not having an unused breathalyser in a vehicle – indefinitely. (This was the allegation made in the particulars of claim but it appeared from cross-examination that Decree 180 may have abolished the fine). As a result of Decree 180, the demand for, and sales of, breathalysers in France collapsed.

[8] As a further result, Redline was unable to pay its liabilities arising from its borrowings for outlay to increase the manufacture of breathalysers to meet the plaintiff's contractual obligation. Redline went into business rescue, the plaintiff lost his shares in Redline after the company was restructured, and was called upon, in terms of the sureties he had signed, to pay the company's liabilities (the latter resulted in the forced sale of several properties owned by the plaintiff). The plaintiff seeks damages for the losses he suffered, being the loss of his shares in Redline, his loss of substantial annual dividends, payments made in respect of the suretyship

he signed and the replacement cost for several properties he lost through forced sales.

THE STATUTORY FRAMEWORK

[9] The Foreign States Immunities Act[1] commenced on 20 November 1981 and its stated purpose is to determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic, and to provide for matters connected therewith. It is common cause that the defendant is a foreign state. In terms of section 2(1) of the Act a foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder. This section therefore confers general immunity on a foreign state, subject to the limited exceptions listed in the Act. Section 2(2) imposes an obligation on this court to give effect to the immunity conferred by subsection (1) even though the foreign state does not appear in the proceedings in question. The Act followed the development of case law in South Africa – from the position where foreign states enjoyed absolute immunity to the position where the exercise of sovereign authority by a foreign state was not susceptible to determination in our courts, but acts flowing from ordinary commercial transactions, undertaken by a foreign state, were.[2]

[10] The plaintiff avers that the defendant does not have immunity from the jurisdiction of this Court by virtue of the transaction between the plaintiff

[1] Act 87 of 1981.
[2] See for example ***Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Moçambique*** 1980 (2) SA 111 (T), which is the landmark case that applied the restrictive approach to sovereign immunity. It established that foreign states are not immune from legal action regarding commercial transactions (*acta jure gestionis*), as distinct from public acts (*acta jure imperii*). See also ***Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia*** 1980 (2) SA 709 (E).

and the defendant (a) being a contract for the supply of goods, which makes it a commercial transaction within the provisions of section 4(1)(a) of the Act; and (b) imposing on the defendant an obligation to perform annual audits in Cape Town, which means that the contract fell to be partly performed in South Africa in accordance with section 4(1)(b) of the Act. Furthermore, he avers that an official letter, from the defendant to the plaintiff, dated 26 November 2018, constitutes a deemed waiver of its immunity. The plaintiff thus relies on two exceptions to the defendant's general immunity. The relevant sections of the Act are the following:

3. Waiver of immunity

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings in respect of which the foreign state has expressly waived its immunity or is in terms of subsection (3) deemed to have waived its immunity.

(2) Waiver of immunity may be effected after the dispute which gave rise to the proceedings has arisen or by prior written agreement, but a provision in an agreement that it is to be governed by the law of the Republic shall not be regarded as a waiver.

(3) A foreign state shall be deemed to have waived its immunity—

(a) if it has instituted the proceedings; or

(b) subject to the provisions of subsection (4), if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) shall not apply to intervention or any step taken for the purpose only of—

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the foreign state would have been entitled to immunity if the proceedings had been brought against it.

4. Commercial transactions

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to—

(a) a commercial transaction entered into by the foreign state; or

(b) an obligation of the foreign state which by virtue of a contract

(whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.

*(3) In subsection (1) '**commercial transaction**' means –*

(a) any contract for the supply of services or goods;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and

(c) any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does not include a contract of employment between a foreign state and an individual.

[11] The defendant, mindful of the provision of section 3(3)(b), has not taken any step in the proceedings. It did not even object to the various amendments effected to the plaintiff's particulars of claim over the years but confined itself to raising exceptions and filing a plea in which it affirmed its immunity and denied that the pleaded contract constituted a commercial transaction. By doing so the defendant cannot be said to have waived its immunity because it was, and is, merely asserting its immunity.

THE BURDEN OF PROOF

[12] The plaintiff has referred me to the *locus classicus* on the incidence of the burden of proof and has, based on ***Pillay v Khrishna***,[3] submitted that the defendant has raised a substantive special plea relating to jurisdiction and therefore it is asserting a positive case that facts exist, which defeat the plaintiff's right to invoke this court's jurisdiction. As such, the argument is, that the onus rests with the defendant to prove that case and it cannot content itself with a denial of the plaintiff's allegations or with cross-examination of the plaintiff. The *exceptio declinatoria fori,* on which the plaintiff avers the defendant is relying, is a Roman-Dutch legal plea, often

[3] ***Pillay v Krishna and Another*** 1946 AD 946.

referred to as a plea to jurisdiction. It is used by a defendant to argue that a particular court lacks the authority to hear a case, often questioning the court's jurisdiction over the subject matter or the person involved.

[13] The terms 'burden of proof' and 'onus of proof' refer to the duty that is cast upon a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that the claim or the defence, as the case may be, should succeed. It never shifts. In ***Pillay v Krishna*** it was described as follows:

> *The only correct use of the word 'onus' is that which I believe to be its true and original sense (cf D 31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be…*

[14] The burden of proof in an action will not necessarily fall on one party alone, but each of the parties may bear a burden of proof in relation to different issues. In ***Pillay v Krishna*** the general approach was explained as follows:

> *If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: Where the person against whom the claim is made is not content with a mere denial of the claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it … But there is a third rule, which Voet states … as follows: 'He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is fact that is denied and that the denial is absolute'. The onus is on the person who alleges something and not on his opponent who merely denies it.*

[15] Where there are a number of distinct issues, for instance a claim and a special plea, then there are several and distinct burdens of proof. During the course of the trial the evidential burden (as opposed to the burden of proof) may shift. In ***South Cape Corporation (Pty) Ltd v Engineering***

Management Services (Pty) Ltd[4] Corbett JA (as he then was) explained the distinction between the burden of proof and the evidential burden as follows:

As was pointed out by Davis AJA in Pillay v Krishna and Another 1946 AD at 952-3, the word onus has often been used to denote, inter alia two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In Brand v Minister of Justice and Another 1959 (4) SA 712 (A) at 715 Ogilvie-Thompson JA called it 'the overall onus'. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other.

[16] Rules 39(5) and (9) of the Uniform Rules of Court, read together, provide that the party who bears the burden of proof has the right to adduce evidence first. Rule 39(13) provides as follows:

Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him.

[17] The 'onus to adduce evidence' as it is used in Rules 39(11) and (13) is no more than the duty to adduce evidence and has no bearing upon the evaluation of the evidence. It is merely a procedural duty that is imposed upon one or other of the parties to enable the trial to be conducted effectively. In general, and as a matter of logic, the party who bears the burden of proof will have a duty to adduce evidence first on those issues upon which he or she bears that burden, but the pleadings may alter the position.

[4] 1977 (3) SA 534 (A) at 548.

[18] The defendant has referred me to the ***Mohunram***-case[5] as authority for its argument that the plaintiff bears the onus and that the defendant bears no onus in respect of its special plea in abatement. My attention was drawn to paragraph [75]. The Constitutional Court, with reference to the extract from ***South Cape Corporation***, quoted above, held the following:

> *… The onus of establishing that all the requirements for a forfeiture order in terms of section 50 of POCA – including that of proportionality – have been met, rests on the NDPP throughout. However, as some of the factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned, the owner who is faced with a prima facie case established by the NDPP would in the usual course be well-advised to place this material before the court. This does not, however, shift the onus of proof to the owner in question; it merely places on the owner an evidentiary burden or, as it is sometimes called, a burden of adducing evidence in rebuttal*.

[19] The question of onus must be determined with reference to the pleadings. In paragraph 52 of the particulars of claim, the plaintiff avers that the defendant does not have immunity from the jurisdiction of this Court in these proceedings by virtue of the transaction between the parties, which he expands on in subparagraphs 52.1 and 52.2. In essence he relies on the exceptions to the default position of immunity as formulated in section 4(1)(a) and (b) of the Act. In paragraph 53 of the particulars of claim the plaintiff also pleads a deemed waiver and therefore also relies on the exception formulated in section 3(1) of the Act.

[20] It is necessary for the plaintiff to plead and prove one of the exceptions listed in the Act in light of the provision of section 2(1) of the Act – the default position is that a foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided for in the Act. The

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[5] ***Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)*** (CCT19/06) [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC); 2007 (2) SACR 145 (CC) (26 March 2007).

question of what must be pleaded by the plaintiff was an issue that came before this court already by way of exception in this matter and was determined by Francis J on 9 December 2024.

[21] The hearing before Francis J related to the adjudication of a second exception lodged by the defendant against the plaintiff's (amended) particulars of claim dated 12 June 2024. The defendant averred that the particulars of claim did not disclose a cause of action as the plaintiff had failed to plead the facts which would demonstrate, if proved, that the defendant does not enjoy immunity from the court's jurisdiction. I quote from this judgment[6] the passages that made it clear that the plaintiff was obliged to set out the facts on which he relies to establish one of the exceptions to the defendant's general immunity:

> *[16] ... Plaintiff has not expressly categorized the type of commercial transaction that he seeks to enforce but, in my view, even if what he has set out in his particulars of claim could be construed as some sort of supply and/or distribution agreement, the transaction as pleaded by plaintiff is substantially, and predominantly, political or governmental in character. It is not a 'commercial transaction' even though it may incorporate, or possibly incorporate, some elements of commercial activity.*
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> *[17] In my view, the principal difficulty with plaintiff's submission is that the enactment of legislation, or the amendment, or repeal thereof, is primarily political in nature and involves the exercise of sovereign authority. From what is stated in the particulars of claim, it is apparent that the Decree was meant to apply to all drivers in France and was designed to achieve a public objective. Certainly, it appears that the purpose of the Decree was not to enact a law in order that plaintiff may profit therefrom in perpetuity.*
>
> *[18] Indeed, if the purported agreement between plaintiff and defendant is 'commercial', then the agreement as pleaded by plaintiff is extremely vague and runs counter to what one would expect of such an agreement: obligations in commercial agreements are generally expressed in definite, quantifiable terms. Having regard to the alleged agreement as a whole, with reference to the context in which it was apparently made, the transaction has insufficient character of commerciality. The Decree, in my view, was a political or governmental act that fell outside the ambit of the definition of 'commercial transaction' under the Act.*

[6] ***Van Der Bergh v Government of the French Republic*** [2024] ZAWCHC 414; 2025 (4) SA 307 (WCC) (9 December 2024).

[19] In the result, I am satisfied that the exception should succeed as the particulars of claim do not disclose a cause of action. Defendant has immunity in terms of the Act and this Court does not have jurisdiction to entertain plaintiff's claim against it.

[22] It was only after this decision that the plaintiff introduced paragraphs 52 and 53 to his particulars of claim. The special plea of abatement filed by the defendant merely reasserts the defendant's immunity – i.e. pleads the default statutory position – and denies that the contract, as pleaded by the plaintiff, is a contract in terms of section 4(1) of the Act. The defendant is not asserting a positive case. It is a denial of an averment in the particulars of claim. My analysis of the pleadings – against the background of the statutory framework and the views expressed by Francis J – leads me to the conclusion that the first principle and the third rule referred to in ***Pillay v Krishna*** find application in this matter: The plaintiff has asserted, as he was obliged to do, that the exceptions raised by sections 3(1) and 4(1) of the Act finds application in this matter. He must prove this. If he does not, the defendant's general immunity from jurisdiction remains. The onus is on the plaintiff in this regard and it cannot shift. The defendant has denied that the contract is a contract in respect of which the exception raised under section 4(1) applies – which effectively incorporates a denial in respect of the exception raised under section 3(1) – and this denial cannot draw to it an onus in its true and original sense. The defendant did not raise the *exceptio declinatoria fori* in the ordinary sense.

[23] Should the plaintiff establish a *prima facie* case after close of his case, then this would place on the defendant an evidentiary burden – a burden of adducing evidence in rebuttal. This application for absolution from the instance is before me precisely because the plaintiff has closed its case

and the defendant avers that the plaintiff has not made out a *prima facie* case. I do not agree with the submission by Mr Papier that ***The Akademik Fyodorov***-case[7] is authority for the proposition that the onus is on a foreign state to prove that it must be afforded immunity. He relied on the following passage at 443A/B:

It is clear from the provisions of s 2(1) read with s 3-s 12, which set out the exceptions to the general immunity of foreign States from the jurisdiction of South African courts, that a foreign State does not enjoy such immunity if any one of the statutory exceptions applies to it or to the proceedings in which the question of immunity arises. The foreign State must, so to speak, run the gamut of the statutory exceptions under s 3-s 12 and only if it emerges unscathed must it be afforded immunity from the adjudicative jurisdiction of the courts.

In this matter the respondent company obtained an order for the arrest of the ship, Akademik Fyodorov, as security for its claim in arbitration proceedings pending in London. The Russian government launched an application seeking the release of the ship. As such, it was deemed to have waived its immunity in terms of section 3(3)(a) by instituting the proceedings.

[24] The plaintiff has also relied on ***Minister of Correctional Services and Others v Ongom***[8] for his submission that the party asserting a special plea bears the onus of establishing it. The special plea that was raised in this matter by the appellants, was one of prescription. The full court held that the onus in respect of the special plea rested on the appellants. In doing so, the court relied on ***Macleod v Kweyiya***[9] where the Supreme Court of Appeal held:

[7] ***The Akademik Fyodorov: Government of the Russian Federation and Another v Marine Expeditions Inc*** 1996 (4) SA 422 (C).
[8] An unreported full court decision by Fortuin J (case no 2912/21 in the WCHC), which does not appear on Saflii.
[9] ***Macleod v Kweyiya*** (365/12) [2013] ZASCA 28; 2013 (6) SA 1 (SCA) (27 March 2013) at para [10].

> *This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case.*

[25] This full court judgment is therefore not authority for the general proposition that the onus is always on the party raising a special plea. The nature of the plea raised by the defendant must be determined. It was described to be a 'special plea in abatement.' The import of the term 'plea in abatement' is, however, not clear in South African jurisprudence. It is taken from the English procedural lexicon.[10] The purpose of a special plea is to prevent unnecessary time and resources on a matter that proceeds to trial where the trial should not have started from the beginning. The functioning of a plea *in abatement* simply determines the legal position prior to the matter proceeding to trial. The plea raised by the defendant is not a dilatory plea, which seeks to delay the plaintiff's claim on the merits until some defect is remedied or some temporary bar to the claim is removed. It is a plea that strikes at the heart of the plaintiff's case. A party denying an essential element of a plaintiff's case can never be said to draw the onus of disproving an element in respect of which that plaintiff bears the burden of proof. It is clear that the burden of proving the exceptions to general immunity raised by the plaintiff falls on him.

[26] I also do not agree with the submission by Mr Papier, relying on rule 39(6), that the defendant's special plea must be dismissed and judgment should be granted in favour of the plaintiff. This submission, and the claim that this court declares that the plaintiff is entitled to proceed to trial on his claim, is based on the incorrect submission that the burden of proof is on the

[10] See AC Cilliers et al, *Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa* (Juta) 5th edition at p 599.

defendant and furthermore conflates the application for absolution from the instance with the defendant closing its case. At this stage only the plaintiff has closed his case. Should I refuse the application for absolution from the instance, this equates to a finding that the plaintiff has established a *prima facie* case and would then cast the duty upon the defendant to adduce evidence in order to combat the *prima facie* case made by the plaintiff. Once he has done so, and has closed his case, this court must determine the narrow issue – has the plaintiff discharged its burden of proving, on a balance of probabilities, on one or more of the exceptions to the general immunity of the defendant.

ABSOLUTION FROM THE INSTANCE

The test for absolution

[27] When absolution from the instance is sought at the close of a plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.[11] Counsel for the parties were at least *ad idem* as to this test. Mr Papier formulated the test slightly differently in accordance with what was set out in ***Gascoyne***:[12] the test is whether there is evidence upon which a court, applying its mind reasonably, could find for the plaintiff.

[28] As pointed out in ***Van Wyk v Venter N.O.***,[13] although the constitutionality

[11] ***Claude Neon Lights (SA) Ltd v Daniel*** 1976 (4) SA 403 (A) at 409E.
[12] ***Gascoyne v Paul and Hunter*** 1917 TPD 170 at 173.
[13] ***Van Wyk v Venter N.O and Others*** (21072/2019) [2025] ZAWCHC 197; [2025] 3 All SA 572 (WCC) (12 May 2025)

of granting absolution has been questioned in the past, it remains a rule of practice engrained in Rule 39(6). This old rule of litigation practice may pre-date our constitutional era but it serves an important constitutional purpose. It allows bad cases to be weeded out, thus protecting scarce judicial resources from being spent on cases which do not merit further judicial attention. In this way, absolution serves the interests of justice and promotes the more efficient and effective administration of justice. Absolution from the instance implies that, at the end of a plaintiff's case, there is an insufficiency of cogent evidence, or the absence of adequate testimony, so that no order ought to be made in a plaintiff's favour in respect of a claim.

'…a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff. As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one. ... The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'[14]

[29] I am also mindful thereof that, in deciding whether absolution should be granted, it must be assumed that, in the absence of special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true.[15] Questions of credibility should not normally be investigated at this stage of the proceedings.[16]

<u>The first narrow issue before the court</u>

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[14] ***Gordon Lloyd Page & Associates v Rivera and Another*** 2001 (1) SA 88 (SCA), 92G-93A. Internal citations removed.
[15] ***Atlantic Continental Assurance Co of SA v Vermaak*** 1973 (2) SA 525 (E) at 527C-D.
[16] ***South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd*** 2012 (3) SA 431 (KZP) at 439D-E.

[30] The first question is whether the plaintiff has established that a 'commercial transaction' was concluded between the defendant and him – either in terms of section 4(1)(a) or (b). In that regard, Mr Manca SC made two broad submissions:

[30.1] If the Court does not regard itself as bound by the finding of Francis J, it should make the same finding, for the same reasons, that what is pleaded is not a 'commercial transaction;' and

[30.2] Even if what is pleaded is a 'commercial transaction,' the plaintiff has not, by a long mark, proven the conclusion of such an agreement. He has not even tendered evidence with respect to all elements of the claim.

[31] As to the first ground, Mr Manca SC argued that the formulation of the contractual claim in the fourth set of particulars is not materially different to the formulation of the contractual claim in the third set of particulars, which served before Francis J when the second exception was taken. In this regard he referred me to paragraph [16] of that judgment (as quoted above), in which it was held that the agreement pleaded by the plaintiff is not a 'commercial transaction'. As the amendment of the particulars by the plaintiff did not change the fundamental nature of the contractual claim contended for, he submitted that the plaintiff is estopped from now contending that the contract has a different character to what the court already found.[17]

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[17] I was referred to ***Democratic Alliance v Brummer*** (A184/2020) [2021] ZAWCHC 62; [2021] 2 All SA 818 (WCC); 2021 (6) SA 144 (WCC) (12 April 2021).

[32] Mr Papier has, with reference to the ***Brummer***-judgment,[18] argued that even if both requirements for issue estoppel are met (i.e. (a) the same parties, and (b) the same issue to have been finally determined), the court retains a discretion to refuse the plea on the grounds of fairness and equity. He argued that the *eadem quaestio* for determination before this court differs as the question before Francis J was whether the particulars of claim disclosed a cause of action – a pleading test on paper – whilst the question before this court is an evidentiary determination on facts. Furthermore, the plaintiff amended his particulars of claim, but the defendant did not plead estoppel, electing instead to participate in the trial and cross-examine the plaintiff extensively. I find these arguments persuasive.

[33] It is, however, not necessary for me to decide this issue, which would require an analysis of the third and fourth sets of particulars of claim. The issue can be determined with regards to the contract as pleaded in the fourth set of particulars, and the plaintiff's evidence. The plaintiff's evidence was as follows:

[33.1] Le Duc came to South Africa for two reasons: one was to enter into a contract with the plaintiff "*for a commercial contract to enable the drivers in France to comply with decree 2012-284 for two breathalysers in their vehicle*" and secondly to do an audit so that the product would have the NF mark.

[33.2] The terms of the contract were "*we, through the conduit, the factory would manufacture the product. It would have an NF. I*

[18] *Supra.*

undertook to deliver, at that time, 55 million breathalysers ... The contract was ongoing. The prices were set, market-related prices, and the French government undertook to implement the Sarkozy decree of 2012-284 was their responsibility. Without that, I would not have committed myself and taken the contract without that certainty."

[34] The doctrine of sovereign immunity applicable in this country is that of restrictive immunity as opposed to absolute immunity. A foreign state would enjoy immunity from our courts where the relevant act, which forms the basis of the claim, is an act *iure imperii* (a sovereign or public act). On the other hand, the foreign state would not enjoy immunity if the act which forms the basis of the claim is an act *iure gestionis* – an act of a private law character such as a private citizen might have entered into.

[35] What the plaintiff is asking the court to believe is that he contracted with a foreign state to exercise its sovereign authority and to pass Decree 284 so that the plaintiff could benefit from that sovereign act personally. The enactment of legislation (such as Decree 284), or the amendment thereof (such as Decree 180), is political in nature and involves the exercise of sovereign authority. This was never disputed by the plaintiff.[19] From what is stated in the particulars of claim, it is apparent that Decree 284 was meant to apply to all drivers in France and was designed to achieve a public objective. This was expressly pleaded by the plaintiff (it was part of the defendant's campaign to reduce road deaths by policing drink-driving).

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[19] In fact the plaintiff, relying on *Planmount Ltd v Republic of Zaire* [1981] 1 All ER 1110 at 1114F and *Victory Transport Inc v Comisaria General de Abestecimientos y Transportes* (1964) 336 F 2d 354 (2nd Cir) at 360, argued that sovereign acts are confined to internal administration, <u>legislation</u>, armed forces, diplomatic activity and public loans

Certainly, the purpose of Decree 284 could never have been to enact a law so that the plaintiff may profit therefrom in perpetuity. I agree with Francis J that Decree 284 was a political or governmental act that fell outside the ambit of the definition of 'commercial transaction' under the Act.

[36] In ***The Akademik Fyodorov***-case the court considered the definition of 'commercial transaction' in section 4(3) of the Act and held that this "*poses an objective criterion based upon the nature or character of a particular transaction, contract or activity without reference to the purpose with which it was concluded or engaged in*."[20] I agree. But despite what Mr Papier has argued, this does not save the plaintiff. The problem for the plaintiff is that he alleges that the defendant contracted with him (one man) to enact legislation (Decree 284) – affecting 50 million drivers in France – and, concomitantly, not to repeal or amend the legislation as the contract / commercial transaction had no end date. This is inherently improbable.

[37] This brings me to the second broad submission from Mr Manca SC. The plaintiff had pleaded that Le Duc was the duly authorised representative of the defendant at the time of the conclusion of the pleaded contract. He testified that Le Duc came to Cape Town *inter alia* with the express intention of concluding a contract with him. The defendant expressly placed the authority of Le Duc in dispute, yet the plaintiff gave no evidence on how it came about that Le Duc (who was employed as the chairman of the NF Certification Committee at Laboratire National d'Essais or "*LNE*") had the authority to bind the French state to issue Decree 284 and, furthermore, to bind the state not to change this law thereafter. As Mr

[20] At 447F-H.

Manca SC submitted, this is an extraordinary claim, requiring extraordinary evidence. The plaintiff admitted in cross-examination that the LNE is responsible for carrying out all studies, research, consultations, expert assessments, testing and control work, as well as all technical assistance services useful for consumer protection and information or for improving product quality. Its mission is to ensure consumer protection and information – to protect the NF mark. No evidence was led as to why Le Duc, against this background, would have the authority to bind the defendant.

[38] The plaintiff's riposte was that, if LNE is not an arm of the French government but distinct from the executive organs and capable of being sued in their own name, then section 15(1) of the Act would in any event find operation. This does not address the point regarding the inherent probabilities that a chairperson of a Certification Committee could bind the French government to issue a law and not to recall or amend same. Put differently, the plaintiff must put up the evidence that would persuade the court that Le Duc met with the plaintiff not only in his capacity as an employee of LNE tasked with annual NF quality audits but also as a representative of the defendant. No factual evidence was led that would support such a conclusion – testifying to the conclusion as fact is not sufficient.

[39] The further difficulty is that no evidence was tendered regarding what had passed between the plaintiff and Le Duc at this meeting. There was no evidence placed before this court as to an offer or an acceptance, that would indicate consensus between the parties. Thus no evidence was led

regarding the conclusion of a contract. The plaintiff had to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff. In my view, he did not.

<u>The second narrow issue before the court</u>

[40] Section 3(1) of the Act removes immunity where a foreign state has expressly waived immunity or is deemed to have done so. The plaintiff argues that a contractual waiver entered into before proceedings is sufficient[21] and that the letter from the Prime Minister of France operates precisely in this way. On 10 October 2018, the plaintiff had written to the Prime Minister requesting him to intervene and take personal control of the plaintiff's financial claim against the government. On 26 November 2018 the Prime Minister sent a reply to him, in French, on his official letterhead. The letter was translated and reads as follows:

> *Dear Sir*
>
> *In your letter of 10 October 2018, you engaged the Prime Minister about a discretionary remedy.*
>
> *I have the honour to inform you that requests to the French administration must be written in French.*
>
> *Yours truly*
>
> *Thierry-Xavier GIRARDOT*

[41] The argument is that a head of government's personal response to a financial claim, on official letterhead, constitutes conduct wholly inconsistent with any assertion of immunity. The ***Balkan Energy***-case, on which the plaintiff relies, does not support the argument. The dispute has

[21] Relying on ***Ex parte Balkan Energy Limited and Another; In re Balkan Energy Limited and Another v Government of the Republic of Ghana*** 2017 (5) SA 428 (GJ).

its origins in an agreement called 'the Power Purchase Agreement'. In terms of this agreement the respondent contracted the second applicant in Ghana to operate a dual fired diesel and gas power barge on its behalf for the purposes of generating and supplying electricity. The written agreement contained a clause relating to jurisdiction and expressly provided "… *GoG agrees not to claim and irrevocably waives immunity to the full extent permitted by the laws of such jurisdiction."* This was clearly an express waiver.

[42] The plaintiff faces an additional difficulty. He claimed a deemed waiver, as opposed to an express waiver. In terms of section 3(3) a foreign state shall be deemed to have waived its immunity only on two grounds: firstly, if it has instituted the proceedings (which is clearly not the case *in casu*); or, secondly, if it has intervened or taken any step in the proceedings (with a step taken purely to claim immunity being expressly excluded). The letter from the Prime Minister does not fall within either of these categories. It also does not incorporate an express waiver. It is trite that a waiver must be clear and unequivocal. In this regard the Constitutional Court has held[22] as follows:

Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to

[22] ***Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*** (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (20 March 2009) at [80].

establish.

[43] The plaintiff's evidence was in accordance with what he had pleaded in the fourth particulars of claim. This evidence is not sufficient to make out a *prima facie* case for either a deemed, or an express, waiver, and in this respect also the plaintiff cannot survive absolution because no court could find for the plaintiff on the evidence as led.

<u>THE PROBABITIVE VALUE OF PLAINTIFF'S EVIDENCE</u>

[44] Finally I wish to remark on the probative value of the plaintiff's evidence. His evidence in chief was little more than having his particulars of claim read to him. Mr Manca SC recorded early on that the defendant was not objecting on the narrow basis that he was being led through a document that he himself had signed, and that on that basis he was entitled to tell the court that that is indeed what he had pleaded. Despite the fact that the plaintiff was warned that the defendant would argue that this evidence had no probative value as a result, the leading questions continued.

[45] As Mr Papier rightly submitted, the rule against leading questions in examination in chief is to ensure that the reliability of the witness' evidence is not compromised – the rule relates not to admissibility but to the weight to be attached to the evidence. He submitted that the plaintiff's evidence was corroborated by objective documents and that this gave the evidence weight despite the leading questions. I cannot agree with him. The documents do the opposite. They demonstrate that the plaintiff never acted in his personal capacity at any time. He always acted as the director and shareholder of Redline. The only agreement for '*goods sold and delivered'*

was between Redline and its distributors as is clear from the invoices discovered by the plaintiff. There was no evidence that the French Government purchased anything from the plaintiff or made any payment to him. All payments were made by the distributors to Redline.

[46] Furthermore, if the plaintiff has not established that any contract was entered into, then he has not established that any part of the agreement fell to be performed in this country. The evidence was clear that the annual NF audit was being performed in the years prior to the alleged contract being concluded. Furthermore, it was an audit of Redline's factory to ensure that the product may continue to carry the NF mark. Every document, from Redline's audited annual financial statements to the invoices, and the Le Duc's emails (always addressed to the directors of Redline) as well as the concessions made by the plaintiff in cross-examination, point to one inescapable conclusion. Whatever agreement came into being, it was never between the plaintiff in his personal capacity and a third party. At every point in time he met with officials from various departments as the director of Redline. It was Redline that manufactured the breathalysers, made delivery to distributors, invoiced distributors, received payment and declared profits on the sales. It was not the plaintiff.

[47] The effect of the order, which I intend to make, is to leave the parties in the same position as if the case had never been brought, for a judgment of absolution from the instance does not amount to *res iudicata* and the plaintiff is entitled to proceed afresh. I would, however, caution the plaintiff against this course of action. The court in this division has now, on two separate occasions held that the contract, as pleaded by him, was not a

commercial transaction.

[48] I agree with Mr Manca SC that the plaintiff's case was properly set out in the first set of particulars. It was a claim in delict. It did not rely on any contract of any kind. It was preceded by a string of emails from him to the defendant in which he sought to convince the defendant to compensate him for his alleged loss. Those attempts came to nought. The notion of a 'contract' only arose after the defendant alerted him to the general immunity it enjoys in terms of the Act. After the first exception before Desai J was upheld, the plaintiff amended his pleadings to introduce one of the exceptions provided for in the Act. This is the first time a contract was pleaded. As he still failed to establish a cause of action, the second exception followed and he, then, for the fourth time, amended his particulars of claim and also introduced the waiver claim.

[49] The plaintiff's version as regards the conclusion of the contract has gone from him accepting the terms of Decree 284 to concluding the contract on the telephone whilst in a taxi in France with an unnamed French official (which was the version placed before Desai J and deposed to in an affidavit), which was then amended to being a contract concluded with unknown officials (in the second particulars of claim) before, in the third particulars of claim, being a contract concluded with Le Duc as duly authorised representative. It is clear that the plaintiff's evidence has not, and cannot, establish any basis on which to assert that the defendant does not enjoy immunity from this Court's jurisdiction.

COSTS

[50] The ordinarily rule is that the successful party is entitled to its costs. The matter is of sufficient complexity to warrant the employment of two counsel and for taxation of counsel's fees on Scales C and B respectively.

[51] The order is recorded above.

ANDERSSEN J S

Acting Judge of the High Court

Appearances:

For the applicant: Adv G R Papier with Adv Carla Hing
Instructed by: Tobin Attorneys Inc

For the defendant: Adv B J Manca SC with Adv Adam Brink
Instructed by: Bisset Boehmke McBlain