CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 67/08
[2009] ZACC 15

CRAWFORD LINDSAY VON ABO Applicant

versus

PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA Respondent

Heard on : 26 February 2009

Decided on : 5 June 2009

JUDGMENT

MOSENEKE DCJ:

Introduction

[1] Before us are confirmatory proceedings in terms of section 172(2)(a)[1] of the Constitution read with Rule 16 of the Constitutional Court Rules.[2] The applicant, Mr

[1] Section 172(2)(a) states:

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

[2] Rule 16 provides as follows:

> "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

Von Abo, seeks confirmation of an order of the North Gauteng High Court, Pretoria (High Court) made by Prinsloo J against the President of the Republic of South Africa. In that Court, the President was cited, along with four other Cabinet Ministers and the government, as a respondent. The court order consists of declaratory and mandatory relief. However, only paragraph 1 of the declaratory orders has been brought to this Court for confirmation and only the President has been cited as respondent. The essence of the order sought to be confirmed is that the failure of the President, as one of several government respondents, to consider and decide properly the request of Mr Von Abo for diplomatic protection against the violation of his property rights by the government of Zimbabwe, was inconsistent with the Constitution and invalid.[3]

[2] Mr Von Abo is a South African citizen and businessman who held various properties and farming interests in Zimbabwe. His complaint against the government

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making of such an 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 the 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 or 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."

[3] *Von Abo v Government of the Republic of South Africa* 2009 (2) SA 526 (T) at para 161.

of South Africa flows from its alleged failure to afford him diplomatic protection against his proprietary interests being "violated" by the government of Zimbabwe.

[3] In the High Court the applicant cited as the first respondent the government of South Africa, together with the President as second respondent and the Minister for Foreign Affairs, the Minister for Trade and Industry and the Minister for Justice and Constitutional Development as third, fourth and fifth respondents respectively. However, in this Court, the applicant has cited only the President as respondent. This the applicant has done because, in his view, the failure by the President to afford him diplomatic protection constitutes "any conduct" of the President referred to in section 172(2)(a) of the Constitution and therefore an order of the High Court relating to the conduct of the President is binding only if it is confirmed by this Court. Implicit in the stance the applicant has adopted is that the order of the High Court relating to the Cabinet Ministers, who were respondents before it, is not susceptible to confirmation by this Court and that, if not reversed on appeal, is without more binding and final.

[4] Before I identify the crisp issue for decision it is necessary to sketch the background facts and course of the litigation.

Background facts and litigation

[5] As managing director of certain companies and sole trustee of the Von Abo Trust, Mr Von Abo established substantial financial and farming interests in Zimbabwe. This he did over the course of the last 50 years. Initially, he financed the

farming activities by applying his own resources drawn from his South African reserves. In time however, he funded the farming interests using finances available to him in Zimbabwe. He set about re-investing profits and capital gains in his Zimbabwean interests. In this manner he became the beneficial owner of a "considerable farming empire" in that country.

[6] From about 1997, the government of Zimbabwe devised a legislative scheme to confiscate land owned by white farmers. This led to wide-scale expropriation of land and farming businesses without compensation. Many white-owned farms were taken over by the government or invaded by people who claimed to be repossessing farms under government authority. Owners of the farms, their workers and other occupants were forcibly evicted without due process of the law. The farming operations stalled and many farms were destroyed in the process. The same fate befell Mr Von Abo's farming interests.

[7] Mr Von Abo was aggrieved that his farming operations had been ruined and, what is more, that the government of Zimbabwe had not paid him compensation for the expropriation or damages he had suffered. Having exhausted all remedies available to him in Zimbabwe, he approached the South African government for diplomatic protection related to his invaded land and now-compromised commercial interests. In March 2002 he wrote to the President requesting diplomatic protection concerning the "violation of his rights" in Zimbabwe. Mr Von Abo also requested that the President and the Minister for Trade and Industry accede on behalf of South

Africa to the International Convention on the Settlement of Investment Disputes (ICSID), in order that he might, as a citizen of a party to this Convention, pursue a claim for compensation against the Zimbabwean government under ICSID.[4] This would have been feasible because Zimbabwe had acceded to ICSID and could thus be held liable under its terms. To this end, he requested a meeting with the President in order to discuss the importance of the government becoming a party to ICSID.

[8] Dissatisfied with the response of the government and what he termed its failure to "take diplomatic steps . . . to protect or fulfil [his] rights" and without "meaningful explanation for this failure and/or refusal," he decided to put it on terms, and threatened legal action. No response was forthcoming from the government. In January 2007 and nearly five years after his initial request to the government for diplomatic protection, Mr Von Abo approached the High Court. He sought an order declaring, amongst other prayers, that the failure of the government to consider and decide his application for diplomatic protection in respect of the violation of his rights by the government of Zimbabwe was inconsistent with the Constitution and invalid.

[9] The government and the cabinet ministers cited opposed the relief sought. They contended that they had seriously considered the request for diplomatic protection and that they had taken reasonable steps to provide the protection sought. They added that the government of South Africa had made several diplomatic

[4] ICSID was entered into force on 14 October 1966. Zimbabwe deposited its ratification of ICSID on 20 May 1994.

representations on Mr Von Abo's plight to the government of Zimbabwe without success but had no means to coerce that government to heed the representations.

[10] These averments were deposed to by an official in the Department of Foreign Affairs. None of the government respondents filed an affidavit to confirm the correctness of the answering affidavit put up on behalf of government. This the applicant took issue with in his replying affidavit. In its judgment, the High Court found the omission to be a material defect in the defence raised by the government and other respondents. It accordingly approached the facts on the basis that the government and other respondents had put up no credible facts to controvert Mr Von Abo's version.

The High Court

[11] The High Court found that the requirements necessary for a state to assert a claim for diplomatic protection on behalf of its citizen were present. It found that the requirements are that the claimant must be a national of the country from which diplomatic protection is sought; that there had been a violation of an international minimum standard; and that the claimant had previously exhausted all available internal remedies. The High Court found that the long drawn out responses of the government to the applicant's numerous letters and requests had amounted to merely "stringing the applicant along" and that the respondents "never had any serious intention to afford him proper protection." As a result, the Court held that the applicant did indeed have a right to diplomatic protection, and that the respondents

had failed to take the necessary steps to afford Mr Von Abo diplomatic protection. The High Court concluded that the applicant had made out a proper case for declaratory and mandatory relief and granted the order sought against all respondents including the President.

[12] For the sake of completeness, I reproduce the order of the High Court in full:

> "1. It is declared that the failure of the respondents to rationally, appropriately and in good faith consider, decide and deal with the applicant's application for diplomatic protection in respect of the violation of his rights by the Government of Zimbabwe is inconsistent with the Constitution, 1996 and invalid.
> 2. It is declared that the applicant has the right to diplomatic protection from the respondents in respect of the violation of his rights by the Government of Zimbabwe.
> 3. It is declared that the respondents have a Constitutional obligation to provide diplomatic protection to the applicant in respect of the violation of his rights by the Government of Zimbabwe.
> 4. The respondents are ordered to forthwith, and in any event within 60 days of the date of this order, take all necessary steps to have the applicant's violation of his rights by the Government of Zimbabwe remedied.
> 5. The respondents are directed to report by way of affidavit to this court within 60 (sixty) days of this order, what steps they have taken in respect of paragraph 4 above, and to provide a copy of such report to the applicant.
> 6. The applicant's claim for damages against the respondents, subject to effective compliance with paragraphs 4 and 5 above, and as formulated in the notice of motion, is postponed *sine die*. Leave is granted to all parties to supplement their papers prior to the hearing of this claim for damages, if appropriate.
> 7. The respondents are ordered, jointly and severally, to pay the costs of the applicant, which will include the costs flowing from the employment of two counsel."

[13] Neither the government nor any of the other respondents has assailed the correctness of the judgment or the validity of the order of the High Court by way of an appeal. The order was made nearly ten months ago and the time within which the respondents in that Court may have sought leave to appeal has long elapsed. A party to confirmation proceedings in this Court has an automatic right of appeal against the order sought to be confirmed. None of the government respondents has availed itself of this right of appeal. If anything, during the hearing in this Court, counsel for the respondent sought to tender new evidence to show that the government respondents were taking active steps to comply with the order of the High Court. From the bar counsel for the respondent assured this Court that neither the government nor any of the other respondents is minded to do anything other than comply with the order of the High Court.

Proceedings in this Court

[14] I have explained earlier that Mr Von Abo has approached this Court for an order confirming the order of the High Court but only insofar as it relates to the conduct of the President and only in relation to paragraph 1 of the order. He says that the order will be a limping one unless it is confirmed by this Court in terms of section 172(2)(a) of the Constitution. The applicant's conviction that the order of the High Court is susceptible to confirmation appears to have been emboldened by the stance of the High Court. In its judgment, the High Court too is of the view that its order should be referred to this Court for confirmation. The respondent does not agree with this characterisation and on this basis opposes the confirmation. He contends that the

order in issue does not relate to his conduct as President as envisaged in section 172(2)(a) of the Constitution and thus it is not susceptible to confirmation.

New evidence

[15] Before I formulate the crisp issue to be determined, regrettably, I must stray to mention a matter that unduly obscured, if not side-tracked the determination of the core question. The matter relates to the abortive attempts on behalf of the respondent to introduce new evidence to the confirmatory proceedings in this Court. This occurred in the following manner. Prior to the hearing of 11 November 2008 the respondent attached an annexure to his written argument. The contents of the annexure related to diplomatic exchanges between the governments of South Africa and Zimbabwe as part of an effort by our government to comply with the order of the High Court in favour of Mr Von Abo. The respondent's attorney served the annexure on the applicant's attorney and filed it with the Registrar of this Court. The annexure contained a claim on behalf of the respondent that the evidence of the diplomatic exchanges was confidential and deserved to be protected from public disclosure by means of a court order. This Court issued an interim ruling to protect the claimed confidentiality until the date of hearing when the parties would be heard on the confidentiality claim.[5]

[5] A similar ruling was adopted in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC).

[16] However, on the day of the hearing, the respondent had still not brought a formal application for the admission of the new evidence contained in the annexure. The applicant's attitude was that it would not take the point that no formal application for admission of the evidence had been made but would oppose its admission on grounds of relevance. It was argued that the evidence was irrelevant as it had no bearing on the possible outcome of the confirmatory proceedings. The new evidence related to the conduct of the respondents after and in compliance with the order of the High Court.

[17] Confronted by this difficulty, counsel for the President nonetheless requested a postponement of the confirmation hearing in order to bring a formal application to tender the new evidence. The hearing was postponed to 26 February 2009 and the respondent was ordered to pay the wasted costs occasioned by the postponement of the hearing and to file the requisite application no later than 28 November 2008. The deadline came and went and no application to tender new evidence was made. On 20 January 2009 the Court issued directions requiring the parties to make representations on why this Court should not withdraw its concession to keep the "confidential" documents away from public viewing.

[18] It was only on 11 February 2009 that the respondent filed a belated application to tender new evidence, along with a request for condonation for his non-compliance with the Court's directions of 11 November 2008. Mr Von Abo opposed the application for condonation and for leave to tender new evidence. He submitted that

the new evidence was irrelevant to the confirmation proceedings. As matters turned out, at the hearing of 26 February 2009, this Court did not reach the application to admit new evidence. This was so because by direction of this Court the parties were enjoined to argue only the narrow question whether the High Court order was susceptible to confirmation under section 172(2)(a) of the Constitution.

[19] However, the wasted costs relating to the two interlocutory applications remain undetermined. It is thus now necessary to dispose of the costs of the two applications. In my view, both applications were destined to be dismissed. During the hearing counsel for the respondent conceded that the respondent should be ordered to pay all the wasted costs related to the aborted application to introduce new evidence as well as the related application for condonation. That concession was properly made.

[20] In *Van Wyk v Unitas Hospital* this Court warned that in an application for condonation the explanation of the delay must be full and frank and must demonstrate that the case of the applicant bears some prospect of success.[6] The application for condonation was bad on both counts. It lacked an adequate explanation for the failure of the respondent to bring an application for admission of fresh evidence within the time-frames stipulated by the directions of this Court. What is more, the substantive application to introduce new evidence at this late stage bore no prospects of success because, as the applicants correctly submitted, the new evidence in issue bore no relevance to the confirmation proceedings. Instead it related to events that occurred

[6] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at paras 20 and 22.

after the High Court had made the order which is now the subject of the present confirmation proceedings. The new matter was not directed at challenging the order of the High Court but rather at displaying the steps the government had taken to satisfy the order. I propose to make an adverse order as to wasted costs relating to the two interlocutory applications against the respondent. I have said the respondent does not resist the adverse cost order being made. I will make the costs order at an appropriate stage of this judgment.

[21] This of course means that the new testimony which was said to be confidential was not admitted as part of the papers in this matter. It must follow without more that any interim order intended to protect that confidentiality should fall away. Again, I will revert to this matter when I fashion an appropriate order.

Issues

[22] This Court's directions of 25 February 2009 required the parties to argue only the following issues:

> "a) whether the order of the High Court that the conduct of the President is inconsistent with the Constitution and invalid, is subject to confirmation by this Court in terms of section 172(2)(a) of the Constitution.
>
> b) if this Court were to find that the order of the High Court is not subject to confirmation what order should this Court make in relation to costs.
>
> c) if this Court were to find that the order of the High Court is not subject to confirmation what order should this Court make regarding its own order made on 4 November 2008 regarding the confidentiality of certain documents claimed on behalf of the respondents."

[23] At the hearing, the sole question of substance that came up for debate was whether the failure to provide diplomatic protection by the President constitutes "conduct" as envisaged in section 172(2)(a) of the Constitution. If it does, this Court is obliged to consider and determine the merits of the decision of the court *a quo* in order to decide whether the order of the High Court should be confirmed. However, if the President's failure does not constitute the envisaged conduct, that finding would be dispositive of the matter and the application for confirmation would be struck off the roll.

Contentions of the parties

[24] Before I briefly describe the submissions of the parties, it is expedient to set out the wording of section 172(2)(a) in full:

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

[25] The applicant has asked this Court to confirm the order of the High Court because it relates to the conduct of the President. He contended that the words "any conduct of the President" in section 172(2)(a) must be accorded a generous meaning. Read widely, the provision renders a court order relating to "any conduct" of the President susceptible to confirmation. He submitted that "any conduct" so envisaged in the section certainly includes the conduct of the President in relation to Mr Von Abo's request for diplomatic protection. In another submission the applicant says that

the mere fact that the order of the High Court has declared the conduct of the President unconstitutional is sufficient to render it "conduct" for the purposes of section 172(2)(a). The declaration of invalidity compels confirmation of the order by this Court so as to dispel any uncertainty.

[26] In addition, the applicant submitted that the line between the concurrent jurisdiction provided for by section 172(2)(a) read with section 167(5) of the Constitution, and the exclusive jurisdiction conferred by section 167(4)(e) of the Constitution must be drawn in the light of *Doctors for Life*.[7] There, this Court held that the nature of the conduct envisaged in section 167(4)(e) is that which involves decisions relating to crucial political questions, and necessarily implicates separation of powers issues.[8] Those decisions may only be made by this Court.[9] However, presidential conduct in terms of sections 172(2)(a) and 167(5) does not necessarily involve crucial political questions but must still be confirmed by this Court. Although, so the argument goes, sections 172(2)(a) and 167(5) cannot include each and every action of the President, a determination on whether conduct of the President is "conduct" for the purposes of these sections, should be made on a case-by-case basis. It requires a context-sensitive enquiry.

[27] The respondent has urged us to refuse the application for confirmation. Stated pithily, the respondent's attitude is that the failure to provide proper diplomatic

[7] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[8] Id at paras 21 and 24.

[9] Id.

intervention in issue does not amount to the "conduct of the President" as envisaged in section 172(2)(a). The failure to act found by the High Court, in truth, is not that of the President but of the government including certain of its ministers. The duty to consider properly whether to furnish diplomatic protection rests on the government acting through the national executive which is headed by the President. However, the respondent exercises executive authority together with other members of the Cabinet. For this contention the respondent advanced several reasons in law and fact which, given the conclusion I reach, I need not now re-state.

Constitutional jurisdiction

[28] This Court, like other courts in our land, is a progeny of our democratic Constitution and so too is its jurisdiction. However, unlike other courts it occupies a special place in our new constitutional order. It is the highest court on all constitutional matters and is clothed with both exclusive and concurrent jurisdiction. It enjoys exclusive jurisdiction in regard to specified constitutional matters and makes the final decision on other constitutional issues that are also within the jurisdictions of other superior courts and in particular, the Supreme Court of Appeal and the High Court. The exclusive and supervisory jurisdictions of this Court may be properly gathered from three constitutional provisions. They are sections 172(2)(a) and 167(5) of the Constitution, which regulate concurrent jurisdiction with the High Court and the Supreme Court of Appeal, and section 167(4) which carves out jurisdictional exclusivity for this Court. I look at the remit of each of the provisions with reference to our jurisprudence.

[29] It is plain from the wording of section 172(2)(a) that an order of the Supreme Court of Appeal or of the High Court concerning the constitutional validity of "any conduct of the President" has no force unless this Court confirms it. In reviewing the meaning of the phrase "any conduct" this Court in *Pharmaceutical Manufacturers* held that it must be accorded a generous and wide meaning.[10] The Court explained that the purpose of the section is to ensure that the highest court in constitutional matters should supervise declarations of constitutional invalidity against the conduct of the President who as Head of State and head of the national executive is the highest organ of the state. The Court warned that this purpose would be defeated if the constitutional validity of the conduct of the President in that case could be characterised as not falling within the bounds of section 172(2)(a).[11]

[30] I must instantly add that in that case this Court was called upon to decide whether to confirm an order of the High Court that had declared invalid a proclamation by the President to bring into force an Act of Parliament. The Act concerned had provided that it would come into operation on a date to be determined by the President. The national legislation concerned required the President to take the positive step of issuing a proclamation. Clearly, only the President could exercise the power specially conferred on him by legislation. In other words, the President did not exercise executive authority together with other members of the Cabinet. It is that

[10] *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 56.

[11] Id.

conduct which the Court considered to be susceptible to confirmation. It must be said that whilst *Pharmaceutical Manufacturers* considered the conduct of the President to be a proper subject for confirmation in that case, it does not furnish the answer to the crisp question of which conduct of the President, if any, is not susceptible to confirmation under section 172(2)(a).

[31] Another provision of the Constitution that regulates confirmation by this Court of orders relating to "conduct of the President" is section 167(5). It provides that:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a Provincial Act or conduct of the President is constitutional, and must confirm 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." (My emphasis.)

[32] In substance the provisions of sections 172(2)(a) and 167(5) serve separate but complementary purposes. Both sections map out the respective areas of jurisdiction of the Supreme Court of Appeal and the High Court, on the one hand, and of this Court, on the other. They may be said to be two sides of the same coin. Put differently, section 172(2)(a) forms part of a collection of provisions that confer constitutional jurisdiction on the Supreme Court of Appeal and High Courts subject to the express oversight of this Court in relation to orders on the constitutional validity of national and provincial legislation and conduct of the President. On the other hand, section 167(5) delineates the power of this Court in relation to the same class of orders of constitutional invalidity made by the Supreme Court of Appeal and the High Court. This suggests that the "conduct of the President" envisaged in the two provisions

ordinarily bear the same meaning. In other words, if particular conduct of the President is liable to be confirmed under the one provision, ordinarily it should also be so under the other provision. Both provisions serve the vital purpose of ensuring that orders of invalidity directed at the appropriate class of the President's conduct have no force unless confirmed by this Court. This complementary relationship between these two provisions was recognised by this Court in *Doctors for Life*.[12] In that case we held that through sections 167(5) and 172(2)(a), the Constitution contemplates that disputes on whether provincial or national legislation or conduct of the President is constitutional will be considered in the first instance by the High Courts, which are given the power to declare such laws or conduct invalid, subject to confirmation by this Court.[13]

[33] This does not however mean that every dispute about the conduct of the President falls within the jurisdiction of the High Court or the Supreme Court of Appeal. The first prominent exclusion is found in the provisions of section 167(4)(e), which expressly confers exclusive jurisdiction by providing that, only this Court may—

> "decide that Parliament or the President has failed to fulfil a constitutional obligation". (My emphasis.)

[12] Above n 7.

[13] Id at para 23.

[34] The Constitution distinguishes disputes related to the "conduct of the President" from those where he has "failed to fulfil a constitutional obligation". In *SARFU*[14] this Court pointed out that the words "fulfil a constitutional obligation" must be given a narrow meaning in order to avoid any conflict with the power given to the High Court and the Supreme Court of Appeal on all questions concerning the constitutional validity of conduct of the President. There the Court recognised that it would be difficult to determine what that narrow meaning should be in each case. This Court in *Doctors for Life*,[15] and previously the Supreme Court of Appeal in *King v Attorneys' Fidelity Fund*,[16] resorted to a narrow construction of section 167(4)(e) in order not to constrict the powers of lower courts to test legislation and the conduct of the President for constitutional compliance.

[35] It seems plain to me that where the conduct of the President does not pass muster as a "constitutional obligation" envisaged in section 167(4)(e), ordinarily it would be susceptible to the jurisdiction of the Supreme Court of Appeal or the High Court. That jurisdiction is conferred by the Constitution through the provisions of section 167(5) read with section 172(2)(a) and must be given full effect.

[36] In *Doctors for Life*, Ngcobo J, writing for the Court, observed that the word "obligation" connotes a duty specifically imposed by the Constitution on parliament to

[14] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) at para 25.

[15] Above n 7 at para 19.

[16] *King and Others v Attorneys' Fidelity Fund Board of Control and Another* 2006 (1) SA 474 (SCA); 2006 (4) BCLR 462 (SCA) at para 23.

perform specified conduct.[17] It seems to me that by parity of reasoning the same consideration applies to an "obligation" relating to the President. The main thrust of these decisions seems to be that section 167(4)(e) which provides for the exclusive jurisdiction of the Constitutional Court should be construed restrictively in order to give full recognition to the power of the Supreme Court of Appeal and the High Court to determine whether conduct of the President is constitutionally valid. On the other hand, the Constitution does contemplate that certain duties are pointedly reserved for the President. This class of obligations is derived from the Constitution itself or from legislation. It includes specified duties that the President as Head of State and head of the national executive must fulfil.[18]

[37] It however remains a complex question whether a specific power exercised by the President under the Constitution or other law amounts to a "constitutional obligation" which only this Court may decide. It is neither prudent nor pressing to describe what amounts to a constitutional obligation under section 167(4)(e) any more so than I have done. Even so, ready examples of constitutional obligations specifically entrusted to the President may be found in section 84(2) of the Constitution.[19] Many of the powers and obligations in section 84(2) vest in the

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[17] Above n 7 at paras 25-6.

[18] See section 84(1) of the Constitution which provides that:

> "The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive."

[19] Section 84(2) of the Constitution provides as follows:

> "The President is responsible for—
>
> (a) assenting to and signing Bills;
>
> (b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;

President as Head of State and head of the national executive. These duties may correctly be described as functions the Constitution requires him or her to perform. Ordinarily they would be matters that have important political consequences and which call for a measure of comity between the judicial and executive branches of the state. Some of the obligations do relate to decisions on crucial political questions, referred to in *Doctors for Life*[20] and necessarily implicate separation of powers issues. Moreover, the decisions to be tested for constitutional compliance are those of the highest office of the Head of State and the head of the national executive. And for that reason the Constitution provides that disputes of that order must be decided by this Court only.

[38] I need say nothing more about exclusive jurisdiction of this Court because none of the parties in this case contended that this is a matter which falls within the exclusive power of this Court under section 167(4)(e). Both accepted that the High Court had jurisdiction to deal with the matter in terms of section 172(2)(a) and section

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(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;

(d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;

(e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;

(f) appointing commissions of enquiry;

(g) calling a national referendum in terms of an Act of Parliament;

(h) receiving and recognising foreign diplomatic and consular representatives;

(i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;

(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and

(k) conferring honours."

[20] Above n 7 at para 24.

167(5). That approach to this matter is the correct one. That simply means that the residual question is whether the dispute over the alleged failure to deal with the applicant's requests for diplomatic protection against the violation of his property rights by the Zimbabwean government can properly be characterised as relating to conduct of the President under section 172(2)(a).

[39] In order to answer this question, it is expedient to describe briefly the nature of the executive authority envisaged by the Constitution. It vests in the President the executive authority which he or she must exercise together with other members of the Cabinet.[21] These powers include implementing national legislation, developing and implementing national policy, co-ordinating functions of state departments, and preparing and initiating legislation. And more significantly for the present case, section 85(2)(e)[22] requires the President, acting together with Cabinet, to perform any other executive function provided for in the Constitution or in national legislation. In my view, the exercise of all of these powers under section 85 does not necessarily constitute an "obligation" as used in section 167(4)(e).

[40] There may be appropriate instances where conduct of the President constitutes "conduct" that is susceptible to the jurisdiction of the High Court and the Supreme Court of Appeal under sections 172(2)(a) and 167(5). However, it is important to

[21] Section 85 of the Constitution provides that:

> "(1) The executive authority of the Republic is vested in the President.
> (2) The President exercises the executive authority together with the other members of the Cabinet."

[22] Section 85(2)(e) provides that "the President exercises the executive authority, together with the other members of the Cabinet by performing any other executive function provided for in the Constitution or in national legislation."

keep in mind the provisions of sections 91(1) and (2)[23] and 92(1) and (2).[24] In terms of these provisions the Cabinet is made up of the President, the Deputy President and Ministers who are all appointed by the President. He assigns to them their powers and functions. Once the powers and functions have been assigned, the Deputy President and Ministers are responsible for the executive powers and functions assigned to them. These provisions make plain that members of the Cabinet are accountable independently and collectively to Parliament for the exercise of their powers and performance of their functions. For good measure, section 92(3) of the Constitution restates the obvious which is that, when they exercise the powers assigned to them, members of the Cabinet must act in accordance with the Constitution.[25] This is significant because once Cabinet ministers are assigned powers and functions by the President they are not mere vassals of the President. They bear the duty and the responsibility to fulfil the duties and functions so assigned which in practice take the form of political and executive leadership of specified state departments. The Constitution makes the point that besides the duty to account to the head of the

[23] These provisions state the following:

> "(1) The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.
> (2) The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them."

[24] These provisions state the following:

> "(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.
> (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions."

[25] Section 92(3) provides:

> "Members of the Cabinet must—
>
> (a) act in accordance with the Constitution; and
> (b) provide Parliament with full and regular reports concerning matters under their control."

national executive, cabinet ministers bear the responsibility to report and account to Parliament on how they execute their executive duties.

[41] Relevant here, in my opinion, is the collaborative nature of the national executive function, on the one hand, and the individual accountability of every Minister in the Cabinet, on the other. The President is head of Cabinet. Thus, where a national executive function is impugned or where the conduct of a Minister is challenged, it may be said, loosely speaking, that the conduct of the President as head of the national executive is in issue. However, to categorise all national executive functions at cabinet level as "conduct of the President" for the purposes of sections 167(5) and 172(2)(a), by mere virtue of the fact that the President is head of the national executive, is to misconstrue the true nature of the national executive function envisaged by Chapter 5 of the Constitution. It may well be that the President has some residual authority as head of the national executive, but the primary responsibility lies with the government, and with the Ministers to whom a specific task has been assigned in accordance with sections 91 and 92 of the Constitution.

[42] It seems to me, therefore, that it is impermissible to hold that when the conduct of the government as represented by the national executive or of one or more members of the Cabinet, is impugned on the ground that it is inconsistent with the Constitution and thus invalid, that dispute relates to the conduct of the President and therefore that the ensuing order of constitutional invalidity must be confirmed by this Court on the ground that it relates to the conduct of the President. If that were so, it would mean

that in theory every order against the government or a member of the Cabinet must be confirmed before it has any force or effect. As I have demonstrated earlier, that would defeat the scheme of Chapter 5 of the Constitution; it would blur the careful jurisdictional lines between this Court and other superior courts drawn by Chapter 8 of the Constitution; and would lead to an unwarranted increase of confirmation proceedings in this Court.

[43] It is now convenient to return to the context of the present case. It is clear that the government of South Africa was the first and main respondent in the High Court proceedings, and that diplomatic protection could have been considered by any of the Ministers empowered by the President to do so under section 92 of the Constitution. This being a matter which relates to the foreign relations of the Republic, it is clear from the papers that the Department of Foreign Affairs was seized with the matter and that each time correspondence was sent to the President, it was forwarded to that Department for its attention. Consequently, any failure to consider the applicant's request for diplomatic protection would have been the failure of the government of South Africa or indeed of a specific Minister, in this case the Minister for Foreign Affairs. As I have concluded earlier, it does not follow that a constitutionally reprehensible failure of a Minister or of the government in a generic sense amounts to a failure by the President to fulfil his constitutional obligations.

[44] In addition, on a reading of the correspondence between the applicant and the Office of the Presidency, it is clear that the latter's response indicated that Mr Von

Abo's concerns had been forwarded to the Ministry for Foreign Affairs. Moreover, much of the remaining correspondence brought before this Court as evidence of the applicant's attempts to secure diplomatic protection was directed by Mr Von Abo to certain executive officials, namely the South African High Commissioner in Zimbabwe and the Minister for Foreign Affairs. Moreover, the responses to his various requests were authored by these executive officials.

[45] In *Kaunda*[26] the majority held that the provision of diplomatic protection at the request of a citizen whose rights are violated in and by a foreign state is a matter which forms part of the executive function of government. Thus, it is up to the government to decide whether protection should be given, and if so, what form the diplomatic intervention should take. This Court stated that "if government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly."[27] This duty and function to give proper consideration to a legitimate request for diplomatic intervention by government is one carried out in terms of section 85(2) read together with section 92(1) of the Constitution which makes it clear that the Minister concerned bears the constitutional responsibility to execute the assigned powers and functions. Thus, any failure of the national executive or one of its members to discharge its obligations must be remedied accordingly and a court is entitled to require the government or the Minister concerned to fulfil its constitutional responsibilities. It would, however, be

[26] *Kaunda and Others v President of the Republic of South Africa and Others* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).

[27] Id at para 80.

inappropriate to attribute the conduct of the government or of a member of the Cabinet to the President, for no reason other than that he or she is the head of the national executive. The primary responsibility rests upon the appropriate member of the cabinet, and although the President may bear residual responsibility, it cannot be said that where the primary obligation is not fulfilled by the cabinet member, that that failure constitutes "conduct of the President" within the meaning of section 172(2)(a).

[46] There is an additional consideration. In *Liebenberg*[28] this Court foreshadowed the difficulties associated with imprecise and open-ended citing of the President in litigation. It observed that when declaring conduct of the President unconstitutional it is necessary to indicate precisely which conduct is attributable to the President, and falls foul of the Constitution.[29] This requirement is important for at least two reasons. One important reason is that a concisely worded order would disclose the character of the conduct of the President in issue and thereby indicate whether the court concerned was properly clothed with jurisdiction to resolve the dispute. Also the President, as respondent is entitled to know which conduct has offended in order to decide whether to appeal or to correct the constitutionally recalcitrant conduct in issue.

[47] The High Court, in its judgment, regrettably does not specify the conduct of the President it found to be inconsistent with his constitutional obligations. We will do well to keep in mind the actual finding of the High Court that it was in fact confronted

[28] *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168.

[29] Id at para 15.

with conduct of the government and not of the President. The passage below is one of several that consistently decry the conduct of the government:

> "In my view, and for all the reasons mentioned, the Government, in the present instance, failed to respond appropriately and dealt with the matter in bad faith and irrationally. For six years or more, and in the face of the stream of urgent requests from many sources, they did absolutely nothing to bring about relief for the applicant and hundreds of other white commercial farmers in the same position. Their 'assistance' such as it is, was limited to empty promises."[30]

[48] This and other findings against the government are followed through in the order the High Court made. Its order does not single out the offending conduct on the part of the President in particular. The order we are called upon to confirm does not even refer to the President. It does no more than make a declaration that "the failure of the respondents" is inconsistent with the Constitution. It must be added that the President is one of five respondents, the others being the government and three other cabinet ministers.

[49] In light of the above, I find that the applicant has approached this Court erroneously. The portion of the order of the High Court that declares the conduct of the respondents to be invalid does not concern the conduct of the President within the meaning of section 172(2)(a) of the Constitution and is therefore not subject to confirmation, despite the fact that he was cited as a party to the proceedings. At this stage, it is in order to restate the importance of claimants in litigation identifying the exact entity, state organ or Minister whose conduct is being impugned. Increasingly

[30] Above n 3 at para 143.

practitioners and litigants cite and sue the President and the government in litigation as generic representatives of a state organ, or Minister or other state functionary. This practice is unhelpful and often leads not only to imprecise pleading, but also to difficulties in identifying appropriate state officials to respond to the claims made.

[50] The Constitution carefully apportions powers, duties and obligations to organs of state and its functionaries. It imposes a duty on all who exercise public power to be responsive and accountable and to act in accordance with the law. This implies that a claimant, who seeks to vindicate a constitutional right by impugning the conduct of a state functionary, must identify the functionary and its impugned conduct with reasonable precision. Courts too, in making orders, have to formulate orders with appropriate precision.

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

[52] The view we take that the order of the High Court in relation to the President is not susceptible to confirmation by this Court does not in any way diminish the relief

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

[53] I have made it clear that in this matter we do not reach the merits of the dispute which was before the High Court. The import of the conclusions that we reach is that the application for confirmation is misconceived because it does not concern conduct of the President within the meaning of section 172(2)(a) of the Constitution. In the circumstances, the order of the High Court does not need to be confirmed by this Court. It embodies no competent claim and should therefore not have come to this Court in the first instance. In the event, the application for the confirmation of the order of the High Court stands to be struck off the roll.

Costs

[54] The applicant came to this Court in the honest belief that he was required by the provisions of section 172(2)(a) of the Constitution to submit the order of the High Court for confirmation. As I have intimated earlier, the High Court held the same belief. I have found that the application for confirmation must fail. The application

has raised matters of considerable constitutional importance. Mr Von Abo came to this Court only because he thought that the step was necessary before he could properly vindicate the final order of the High Court in his favour. In any event, this was constitutional litigation against the government and ordinarily an order of costs against the applicant would be plainly inappropriate. This Court has consistently eschewed burdening with costs unsuccessful litigants who honestly sought to vindicate their constitutional rights against the government. The proper course to adopt here is to make no order as to costs.

[55] In relation to the two interlocutory applications the respondent properly conceded that he is liable to pay all the wasted costs which must include the cost of two counsel.

Order

[56] The following order is made:

(a) The application by the applicant in terms of section 172(2)(a) of the Constitution and Rule 16 of the Rules of this Court for confirmation of paragraph 1 of the order issued by the North Gauteng High Court, Pretoria, under case number 3106/2007, on 29 July 2008, to the extent that it refers to the President, is struck off the roll.

(b) No order as to costs is made in relation to the application for confirmation.

(c) The respondent is ordered to pay the costs of the applicant occasioned by the applications for leave to adduce new evidence and for condonation of the late filing of the application to adduce new evidence.

(d) The interim order of this Court that annexures to the respondent's written submission shall not be made accessible to the public is set aside.

(e) The respondent is also ordered to pay all costs occasioned by the application to declare certain evidentiary material confidential and inaccessible to the public.

(f) The costs orders in paragraph (c) and (e) above shall include costs consequent upon the employment of two counsel.

Langa CJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Moseneke DCJ.

Counsel for the Applicant:	Advocate P Hodes SC, Advocate A Katz and Advocate M Du Plessis instructed by Hill, McHardy and Herbst.
Counsel for the Respondent:	Advocate PJJ De Jager SC, Advocate P Mphaga and Advocate M Sello instructed by the State Attorney, Pretoria.