THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 170/06

In the matter between:

Josias van Zyl	**First Appellant**
Josias van Zyl and Gail van Zyl NNO (cited in their capacities as Trustees for the time being of The Burmilla Trust NO TMP 4027)	**Second Appellant**
Josias van Zyl and Gail van Zyl NNO (cited in their capacities as Trustees for the time being of The Josias van Zyl FamilyTrust NO TMP 4028)	**Third Appellant**
Swissbourgh Diamond Mines (Pty) Ltd	**Fourth Appellant**
Patiseng Diamonds (Pty) Ltd	**Fifth Appellant**
Motete Diamonds (Pty) Ltd	**Sixth Appellant**
Rampai Diamonds (Pty) Ltd	**Seventh Appellant**
Matsoku Diamonds (Pty) Ltd	**Eighth Appellant**
Orange Diamonds (Pty) Ltd	**Ninth Appellant**
and	
The Government of the Republic of South Africa	**First Respondent**
The President of the Republic of South Africa	**Second Respondent**
The Minister of Foreign Affairs of the Republic of South Africa	**Third Respondent**
The Deputy Minister of Foreign Affairs of the Republic of South Africa	**Fourth Respondent**

Coram : Harms ADP, Heher, Cachalia JJA, Hurt and Mhlantla AJJA
Heard : 21 and 22 August 2007
Delivered : 20 September 2007
Summary: Public international law – diplomatic protection

Neutral Citation: This judgment may be referred to as *Van Zyl v Government of RSA* [2007] SCA 109 (RSA)

HARMS ADP

INTRODUCTION

[1] This appeal relates to a claim for diplomatic protection, i.e., action by one state against another state in respect of an injury to the person or property of a national of the former state that has been caused by an international delict that is attributable to the latter state. Diplomatic protection includes, in a broad sense, consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, a retort, severance of diplomatic relations, and economic pressures.[1]

[2] The appellants requested the Government of the RSA to provide them with diplomatic protection against the Government of Lesotho. The international delict on which they relied was the cancellation and revocation of five mineral leases that had been granted by the Government of Lesotho.

[3] The President of the RSA was advised that the Government was under no obligation to afford diplomatic protection to the appellants; that any decision to intervene would involve a policy and not a legal decision; that the decision is the sole prerogative of the Government; that the disputes between the appellants and the Government of Lesotho had been decided by the Lesotho courts; that mediation or intervention by the Government would imply a lack of faith in the judicial system of a sovereign state; and that diplomatic intervention would set an unhealthy precedent. The President in the result refused to accede to the appellants' request and they were informed that they were not, in the circumstances of the case, entitled to diplomatic protection.

[4] Dissatisfied with this ruling, the appellants sought to review the Government's decision. They also applied for a mandamus directing the Government 'to take all steps necessary to vindicate the rights of the

[1] *Kaunda v President of the RSA* 2004 (10) BCLR 1009 (CC), 2005 (4) SA 235 (CC) para 26-27.

applicants, including but not limited to providing diplomatic protection.' The application was heard by Patel J in the Pretoria High Court. He dismissed the application but granted leave to appeal to this Court.

[5] Courts should act with restraint when dealing with allegations of unlawful conduct ascribed to sovereign states.[2] Unfortunately, in order to decide this case it is necessary to deal with the allegations made by the appellants to determine whether or not Patel J was correct in dismissing their application.

[6] This judgment holds that the appellants have no right under South African law to diplomatic protection, especially not in respect of protection of a particular kind. Nationals have a right to request Government to consider diplomatic protection and Government has a duty to consider it rationally. Government received the request, considered the matter properly and decided to decline to act on rational grounds. This judgment further holds that the Government is not entitled under international law to afford the appellants diplomatic protection under the particular circumstances of the case. Accordingly, the appeal stands to be dismissed.

THE PARTIES

[7] There are nine appellants but the driving force behind the litigation is the first appellant, Mr Josias van Zyl. He and his wife are in their capacity as trustees of two trusts, the Burmilla Trust and the Josias van Zyl Family Trust, the second and third appellants respectively. Both trusts are registered in South Africa. Mr and Mrs van Zyl are South African citizens.

[8] There are six corporate appellants, all companies incorporated and registered in Lesotho. The important one is Swissbourgh Diamond Mines (Pty) Ltd. The issued shares in Swissbourgh belong to Mr van Zyl (5%), Burmilla

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[2] *Swissbourgh Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) at 330D and follows. Cf.*Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 3 All ER 209 (HL) para 24-26.

Trust (90%) and the family trust (5%). Swissbourgh holds 99% of the shares in the other companies and the family trust holds the remaining 1%. The mineral leases were all held by Swissbourgh and the other appellant companies derived their interests from Swissbourgh by means of tributary agreements (effectively sub-leases). Because of this it will not be necessary to distinguish between the appellant companies and references to Swissbourgh will usually be in a generic sense to include a reference to all or most of the appellants. All the directors are also South African citizens.

[9] The respondents are, respectively, the Government of the RSA, the President, the Minister of Foreign Affairs and, last, the Deputy Minister. It is for purposes of the judgment not important to distinguish between them and I shall refer to them (unless the context requires otherwise) as the Government. I also do not intend to distinguish between the State and the Government and will use the terms interchangeably.

THE HISTORY

[10] This case has a long and convoluted history. The appellants displayed an obsessive attention to peripheral facts and factoids and their affidavits raise speculation to the level of fact and thereafter raise argument based on the speculation.[3] And as in the *Kaunda* case, this case has been complicated by the appellants' excessive demands and the form in which the notice of motion was framed.[4] In what follows I intend to limit myself to the salient facts. They are briefly related at this juncture to set the stage for a more detailed discussion where and when required.

[11] The RSA and the Kingdom of Lesotho concluded a treaty concerning the Lesotho Highlands Project on 24 October 1986. The main purpose of the project was to supply water to the Witwatersrand from a dam that had to be built in Lesotho. Joffe J in previous proceedings between the appellants and

[3] As happened in *Swissbourgh Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) at 315E-F per Joffe J.
[4] *Kaunda v President of the RSA* 2004 (10) BCLR 1009 (CC), 2005 (4) SA 235 (CC) at para 128.

the Government dealt with the detail of the treaty and what he said need not be repeated.[5] During June 1988, construction operations by the Lesotho Highlands Development Authority, a Lesotho statutory body established pursuant to the treaty, began in the Rampai area.

[12] Shortly thereafter, on 4 August 1988, the Government of Lesotho and Swissbourgh entered into five mining leases. One of these leases covered the Rampai area in the basin of the proposed dam. The terms of the Rampai lease are typical. The lease was entered into in Lesotho in terms of s 6 and 15 of the Lesotho Mining Rights Act, 1967. The Commissioner of Mines represented the Basotho Nation and Mr van Zyl represented Swissbourgh. Swissbourgh obtained the sole right to prospect for and mine and dispose of precious stones within the Rampai area for a period of ten years with a right of renewal for a further five years. Swissbourgh had to pay the Government of Lesotho a yearly rental of R13 600 (R100 per square kilometre) and a royalty of 14% on the value of the stones recovered. The agreement contained an arbitration clause. The lease had to be registered in terms of the Mining Rights Act, which happened soon thereafter. (For purposes of the rest of the judgment a distinction will be drawn between the Rampai lease and the other four because of subsequent events.)

[13] The Authority proceeded with its work on the dam project until July 1991 when Swissbourgh obtained an interim interdict against the Authority preventing it from performing any work within the Rampai area. The rule was subsequently discharged by agreement but the final determination of the application was kept in abeyance pending settlement negotiations.

[14] Faced with the consequences of a grant of competing rights to Swissbourgh and the Authority as well as a breach of its treaty obligations, the Government of Lesotho took a number of steps which the Lesotho courts in

[5] In particular, he found (at 327C and follows) that the appellants did not derive any rights from the treaty.

due course found were unlawful.[6] These acts form the crux of the appellants' complaints against the Government of Lesotho.

[15] The first step was the cancellation by the Commissioner of Mines of all the mining leases. This enabled the Authority to rely on the cancellation of the Rampai lease as a defence to the interdict application. (The other leases did not affect the construction activities.) However, on 20 November 1991, the court, at the behest of Swissbourgh, on an interim basis set aside the cancellation of the mining leases by the Commissioner. It also issued an interim interdict preventing the Authority from proceeding with its dam construction activities within the Rampai area. One may assume that this order must have had a devastating effect on the construction activities of the Authority.

[16] In another attempt to undo the mining leases the governing Military Council issued the 'Revocation of Specified Mining Leases Order' of 20 March 1992. This executive order revoked the five mining leases of Swissbourgh; provided that no person would be entitled to compensation for loss or damage as a result of the cancellation; and prohibited the institution of any legal proceedings, including arbitration proceedings, resulting from or in connection with the order or the cancellation of the leases.

[17] Another application to court followed immediately, this time for an order setting aside the revocation order and for another interim interdict.[7] Swissbourgh was successful and Cullinan CJ in his judgment of September 1994 had some harsh words about the actions of the Government of Lesotho, especially for the disrespect for the Constitution and the negation of the rule of law.

[18] The subsequent appeal was not successful. During January 1995 the Court of Appeal held that the revocation order was in conflict with the

[6] How it came about that the Government of Lesotho granted conflicting rights at that stage has been the subject of much speculation in Lesotho but has never been explained.
[7] The terms of the order are quoted at *Swissbourgh Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) 297E-I.

provisions of the Lesotho Human Rights Act and consequently void.[8] The appeal against the interim interdict, however, succeeded on the ground that Cullinan CJ had not exercised a proper discretion. The balance of convenience, the court found, did not favour Swissbourgh and that an award of damages would compensate Swissbourgh adequately. Swissbourgh was given time to do exploratory work in the Rampai area to quantify its damages.[9]

[19] During March 1995, the Government of Lesotho and the Authority conceded that the cancellation of the mining leases by the Commissioner had been invalid. The Authority nevertheless lodged a counter-application for a declaration that the Rampai lease had been void ab initio because the required formalities had not been followed. The court consequently set the cancellation aside and referred the validity issue for oral evidence. This led to a 58-day trial before the Chief Justice, Mr Justice Kheola.

[20] Kheola CJ found against Swissbourgh on 28 April 1999, holding that the Rampai lease was void ab initio. Swissbourgh appealed to the Court of Appeal but the appeal was dismissed on 6 October 2000.[10] The reasons are fairly basic. According to Lesotho customary law all land belongs to the Basotho Nation; this principle is entrenched in the Lesotho Constitution; any grant of rights in relation to land required the consent of the relevant Chiefs; since its promulgation the Lesotho Mining Rights Act, 1967 (under which the mineral leases were granted) required the Chiefs' consent for the grant of mineral rights; and the evidence established that no consent had been sought or granted.[11] The Rampai lease was accordingly void.

[21] Less than three weeks later the appellants made the initial request for diplomatic protection, which led to these proceedings.

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[8] *Attorney-General of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* 1997 (8) BCLR 1122 (L AC). The terms of the order are quoted in *Swissbourgh Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) 298A-D.
[9] *Attorney General v Swissbourgh* Diamond Mines (Pty) Ltd 1995-1996 Lesotho LR 173.
[10] *Swissbourgh Diamond Mines (Pty) Ltd v LHDA* 2000 Lesotho LR 432 (CA).
[11] This explains why the lease purported to have been entered into by the Basotho Nation and not by the Government of Lesotho.

[22] It is convenient to mention two intervening matters. The first relates to the other four leases that were not involved in the Rampai appeal. Faced with the revocation order, which denied it access to court, Swissbourgh decided to regard the Government of Lesotho's denial of the validity of these leases as a repudiation of contract and to accept the repudiation, thereby bringing to an end any contractual relationship between the parties. (Notably, probably for tactical reasons, Swissbourgh did not cancel the Rampai lease.) On 25 October 1993, Swissbourgh instituted action claiming R 930m damages. There was an additional claim of R 15m in respect of physical damage to plant and equipment.

[23] On 16 September 1994, Swissbourgh ceded its rights in respect of the pending action and the contractual and delictual damages claims to Burmilla Trust. Although the rights were valued at R2 637m, the consideration was a mere R1 000. Burmilla Trust has not yet been substituted as plaintiff and the action has not been pursued. Another action relating to the same or similar causes of action was instituted during May 1996 by Swissbourgh. This action is also in limbo.

[24] Two years later Swissbourgh entered into another cession agreement with Burmilla Trust in amplification of the first one. It ceded all Swissbourgh's claims against the Government of Lesotho in the event of a declaration that any of the mining leases were invalid.

[25] The second set of intervening facts concerns the adoption of legislation by the Government of Lesotho to place matters on a proper legal footing and to comply with its national and, coincidentally, its international obligations especially in relation to the treaty with the RSA. The Lesotho Act 5 of 1995, which came into effect on 16 August 1995, provided for the expropriation by the Authority of mineral rights for purposes of the water project. Thus far the Authority had been entitled to take 'land' and pay compensation but the initial legislation did not deal with mineral rights and did not have adequate compensation provisions. This Act, however, provided for full compensation, properly determined, in respect of any such expropriation to a person in

whose favour a 'duly granted and executed mineral right' was registered. Pursuant to this Act, the Authority purported to expropriate the Rampai lease on 17 August 1995 but in the light of the Rampai judgment expropriation was unnecessary because there was nothing to expropriate.

[26] On the same day another piece of legislation was promulgated, namely Lesotho Act 6 of 1995. It validated certain dam construction activities of the Authority 'subject to any accrued or vested right to damages'. Again, as a result of the Rampai judgment Swissbourgh had no accrued or vested rights, at least not in relation to the Rampai lease.

THE REQUEST FOR DIPLOMATIC PROTECTION

[27] The first request for diplomatic protection was made per letter of 25 October 2000 to the Department of Foreign Affairs. It relied on the unlawful revocation of the mineral leases during 1992 and the destruction and confiscation of assets by the Government of Lesotho.[12] The appellants also complained about corruption 'at the highest level' in the Government of Lesotho. In addition they alleged that Swissbourgh had suffered a miscarriage of justice at the hand of the Lesotho courts. The appellants further said that they had 'no faith in the independence and impartiality' of the Lesotho courts[13] and they 'rejected' the Rampai judgment because the judges were 'specially appointed' and their analysis of the evidence and their findings were 'one-sided and manifested bias.'

[28] The next letter of consequence was dated 8 December 2000. Before dealing with its terms it is necessary to contextualise it. During 1993, Swissbourgh instituted action against the Government of the RSA for damages suffered as a result of the loss of their leases. The particulars of this action (and a related action against a local statutory body) need not be mentioned – they are to be found in the judgment of Joffe J. In summary,

[12] In a letter of 10 April 2001 it is referred to as a confiscation through the cancellation of the mineral leases.
[13] The letter of 19 December 2000 repeated the statement.

Swissbourgh alleged that the Government of the RSA interfered unlawfully with its mining rights, which caused it to suffer damages of R 945m. Swissbourgh, in addition, claimed R 507,8m from the statutory body on similar grounds. The unlawful interference, according to the particulars of claim, was done with the improper motive of obtaining an unlawful advantage for the joint water supply venture. The defendants in that case allegedly 'procured' (followed by ten alternatives) the unlawful interference with Swissbourgh's rights by the Government of Lesotho.

[29] The conspiracy issue also formed part of the case before Kheola CJ and was the main reason for the length of the trial. He found that the allegations were without any merit and made a special costs order against Swissbourgh. The Court of Appeal did not consider the merits of the issue because it became irrelevant in the light of the finding that the Rampai lease was invalid.

[30] During 1995, Mr van Zyl approached the RSA Government with settlement proposals. This elicited a letter from the State Attorney written on the instructions of the Minister of Water Affairs (under whose jurisdiction the dam project fell), dated 15 May 1995. It is necessary to quote from the letter: 3/136

- 'The Minister is in principle not averse to endeavours aimed at settling legitimate claims against the Government.'

- 'The manner in which you have conducted the pursuit of your interests as you perceive them, has, however, created the firm impression that you set out to coerce the Republic of South Africa to meet a claim which you may or may not have against the Government of the Kingdom of Lesotho and the Lesotho Highlands Development Authority. This you set out to do *inter alia* by calling upon the international community to take up your perceived cause against the Government of the Republic of South Africa, by widely publicizing allegations of immoral collusion and improper conduct on the part of the Government and by making similar allegations in respect of the present Government in your recent correspondence to the Minister.'

- ‘You have indeed succeeded in creating a situation where you have offended the dignity of the Republic of South Africa, not only under the previous Government, but also under the present one. The dispute is thus no longer a simple commercial dispute. Settlement of the actions with you may amount to an acknowledgement of the veracity of your allegations and may compromise the credibility of the present Government, not only in its international relations with the Kingdom of Lesotho, but also with the other states and international institutions whose assistance you sought to muster.’

- ‘As long as you persist in your allegations of improper collusion between the Government of the Republic of South Africa and the independent and sovereign Kingdom of Lesotho, no advances of settlement can be entertained.’

- ‘Should you withdraw the actions as well as the offensive allegations against the Government of the Republic of South Africa unreservedly and publicly, my Government may find itself in a position where it may consider attempts to facilitate mediation of the various disputes between yourself and the Government of the Kingdom of Lesotho and the Lesotho Highlands Development Authority.’

- ‘As matters presently stand this is, however, impossible without prejudicing the dignity of the Government of the Republic of South Africa and its credibility in the international community.’

[31] The appellants rejected the suggestion that they withdraw the allegations; instead, as mentioned, they proceeded to conduct a lengthy trial in order to prove the allegations of collusion and they harassed the Government in the local litigation as appears from the judgment of Joffe J. During July 1999 (shortly after the judgment of Kheola CJ), Mr van Zyl went yet further: he submitted a voluminous request for an inspection by the World Bank (a financier of the scheme) alleging that the Bank, the RSA Government, the Government of Lesotho and the Authority were involved in the ‘patently unlawful acts’ surrounding the water project and the leases.

[32] Having lost the Rampai appeal the appellants in the mentioned letter of 8 December 2001, rather cynically relied on the promises contained in the State Attorney’s letter; they withdrew the South African actions and the

allegations ‘in respect of the ANC government’s involvement’ in an unlawful conspiracy; and they released a press statement apologising to Government.

[33] The next letter of importance, dated 15 December 2000, argued the existence of a ‘right to diplomatic protection’ under the Constitution at length (an assertion repeated in later correspondence) and submitted that ‘the State is under a constitutional obligation to provide diplomatic protection to its citizens’. The letter also requested the Government to ‘act in terms of its undertaking’ contained in the letter of the State Attorney.

[34] The appellants insisted that Government should provide them with diplomatic protection by mediating the dispute and convincing the Government of Lesotho to pay a ‘settlement’ amount of R 85,4m with interest within a given period. Otherwise Government had to institute legal proceedings against the Government of Lesotho in an international court or arbitration tribunal for payment of some R1 812,5m with interest on the appellants’ behalf.

[35] In spite of its refusal to grant the request, the Government sent a Note Verbale to the Government of Lesotho, informing that government of the complaint. The Government of Lesotho did not respond but its view appears forcefully from a letter dated 19 November 2001, by its attorneys to Swissbourgh in response to a parallel paper campaign against the Government of Lesotho. It rejected the allegations in no uncertain terms, stating that a number of premises of the arguments put forward were, to the knowledge of the claimants, fundamentally flawed; that the attacks on the judiciary were scurrilous; and that there was no prospect of any settlement. (A copy of the letter is annexed to this judgment.) This six page letter drew a reply of 138 pages from Mr van Zyl. The Government of Lesotho responded by reiterating that it would not submit to any form of arbitration, international or otherwise.

THE COURT APPLICATION

[36] Review applications, in the ordinary course of events, have to be brought under Uniform rule 53 (unless covered by the Promotion of Administrative Justice Act 3 of 2000 – PAJA). This one was not, and the failure to follow the rule caused much aggravation.

[37] The founding affidavit of Mr van Zyl set out the nature of the application under a separate heading. He relied on a violation of the appellants' rights by the cancellation of the mining leases without payment of compensation (and nothing more). This, he said, constituted an expropriation that did not comply with minimum international standards. The Government of Lesotho was accordingly obliged to pay the appellants some R 3 089m damages.

[38] Mr van Zyl proceeded to say, as foreshadowed in the correspondence, that the appellants have 'a constitutional right to diplomatic protection' and that the Government has 'a corresponding obligation to provide such protection'; the issue (he said) was the failure of Government to exercise its power in a constitutionally permissible manner; the decision was irrational because it was based on a wrong understanding of its legal obligation; and that the merits of the disputes with the Government of Lesotho were not directly in issue.

[39] Then followed 70 pages of 'history and background' interspersed with legal argument. Two aspects need to be noted. The first concerns the Lesotho courts. After alleging that the appellants had exhausted their local remedies, Mr van Zyl proceeded to state (contrary to the line taken in the preceding correspondence) that the application was not 'a reflection on the integrity of any of the judges in the Courts of Lesotho' or on those courts. The second is a one-liner based on the State Attorney's letter of 15 May 1995: this letter allegedly gave the appellants a legitimate expectation that the Government

would afford them diplomatic protection should they withdraw their South African litigation, something they had now done.[14]

[40] Attached to the founding affidavit are about 850 pages of exhibits. The allegations contained in these annexures were not confirmed in the founding affidavit and are therefore not evidence. Mr van Zyl and his legal advisers knew that it is not open to a party merely to annex documentation to an affidavit and during argument use its contents to establish a new case. A party is obliged to identify those parts on which it intends to rely and must give an indication of the case it seeks to make out on the strength thereof.[15] The fact that the appellants again have ignored the procedural rules dealt with by Joffe J is probably due to Mr van Zyl's belief, as he said during argument, that fifty per cent of all court rules are unconstitutional and can be ignored.

[41] The main affidavit in answer was by the Deputy Minister, Mr Aziz Pahad. It dealt in 91 pages with the appellants' right to diplomatic protection and with the decision of Government in response to the request. He added that Mr van Zyl had failed to disclose five material facts. These facts, according to the deponent, went to the heart of the application.

[42] This elicited a replying affidavit of about 550 pages and annexures of some 1700 pages. The main 'justification' proffered was that Mr van Zyl indeed had disclosed the five material facts in the founding affidavit. In other words, this mass of material was required to underpin five common cause facts. One illustration should suffice. Mr Pahad alleged that the cession of Swissbourgh's claims to Burmilla Trust was material and had not been stated in the founding affidavit. Mr van Zyl took Mr Pahad to task because, he pointed out, the fact of the cession appeared from a note on two of the annexures to the founding affidavit. Instead of admitting the cession and giving the reference, Mr van Zyl now sought to traverse new ground. In

[14] I do not propose to deal with the legitimate expectation argument separately because the facts are destructive of any such argument. The expectation was not legitimate or reasonable. There is also something schizophrenic about the argument because, as will appear later, the replying affidavit resurrected the abandoned conspiracy argument.
[15] *Swissbourgh Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) 323F-325C.

addition, Mr van Zyl resurrected the conspiracy case in the reply because, he said, of the Government's allegations concerning his failure to disclose material facts. He also attacked the Government's decision on new grounds.

[43] The Government applied for the striking out of major parts of the reply as either new matter or as otherwise objectionable, namely being scandalous, vexatious, irrelevant or inadmissible.

THE PROCEEDINGS IN THE TPD

[44] During the hearing before Patel J, the appellants were represented by three counsel. Patel J granted the Government's striking out application and dismissed the appellants' application. His judgment dealt in great detail with all the legal issues raised. As will appear in the course of this judgment, I agree in general terms with his reasoning but I do not find it necessary to decide all the issues he did.

[45] It is convenient to deal at this stage with the application to strike out. Both sides filed lengthy heads dealing with each and every finding made by Patel J. The learned judge, it should be noted, took great pains to analyse the complaint. I do not think that a court of appeal could reasonably be asked to redo an exercise concerning an interlocutory matter, especially in the circumstances of this case. Schutz JA once made these pointed remarks:[16]

'There is one other matter that I am compelled to mention – replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.'

[16] *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* [2003] 2 All SA 616 (SCA), 2003 (6) SA 407 (SCA) at para 80.

[46] A reply in this form is an abuse of the court process and instead of wasting judicial time in analysing it sentence by sentence and paragraph by paragraph such affidavits should not only give rise to adverse costs orders but should be struck out as a whole. Since I am of the view that Patel J should have taken that route *mero motu*, I am not going to deal with those few instances where he quoted a wrong paragraph number (one of the grounds, as I understood from what Mr van Zyl volunteered during argument, that led to a complaint to the Judicial Services Commission against the late judge) or erred. I shall nevertheless have regard to the reply to the extent that it contains relevant and admissible material that impacts on the merits of the case.[17]

THE HEARING IN THE SCA

[47] It is unfortunately necessary to say something (but not all) about the appeal hearing. Mr Redelinghuys, an attorney with the right of appearance, appeared for all appellants excepting Mr van Zyl. Mr Redelinghuys knows the case because he was Swissbourgh's attorney in Lesotho. Mr van Zyl argued in person but chose to follow Mr Redelinghuys.

[48] The heads of argument filed by the appellants ran to 530 pages. A few days before the hearing, without explanation, another set of 325 pages was filed.[18] After a short and well prepared introductory argument, Mr Redelinghuys proceeded to deal with the additional heads. His main point was that the appellants had suffered a denial of justice at the hands of the Lesotho courts. The nub of the argument was that 'national legal systems can be judged objectively for acts and omissions of its courts with respect to aliens' and that 'a state incurs international responsibility if it administers justice to aliens in a fundamentally unfair way'. He relied on art 10 of the Universal Declaration of Human Rights, which provides that

[17] A party is in principle not entitled to rely on new matter, even if it has not been struck out: *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) 635H-636B; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T).

[18] At the end of argument, when Mr van Zyl was told he could file further argument in reply, he immediately produced a third set of heads running to 65 pages that had nothing to do with the reply. The appellants also filed 2 600 pages of authorities.

'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

[49] Mr Redelinghuys was asked on what basis could he argue this point since it did not form part of the case set out in the founding affidavit – indeed, the case of the appellants was, as mentioned, that the application was no reflection on the Lesotho courts – nor was it the case in the high court or in the main heads of argument. He sought in response to rely on unsupported allegations made against the judiciary in the attached correspondence to which he added *ex cathedra* allegations. It was pointed out to Mr Redelinghuys that he, as an officer of the court, could not make submissions that do not have an evidential basis. Mr Redelinghuys subsequently retracted and abandoned the point.

[50] This gave Mr van Zyl the opportunity to attack this Court for having already decided the case; to lecture the Court about justice; and to renew the attack on the Lesotho judiciary.[19] Those courts, he said, were not only biased, they were manipulated. Mr van Zyl was given more than one opportunity to identify the passages in the record where the allegation of a denial of justice had been made. He did not. I do not wish to belabour the point. Although the failure of justice was raised in the preceding correspondence, the appellants deliberately chose to omit it as a cause of complaint from the founding affidavit and, apart from a generalised statement, also from the replying affidavit. The appellants are not entitled in this manner to resurrect an abandoned case.[20]

THE REVIEW

[19] Mr van Zyl's wrath was not limited to the judges of Lesotho. It spilled over to local judges who had held against him and counsel who appeared against him. All were involved in a Machiavellian plot. He even made snide remarks about a professor of law who, he said, was in court and advised Government.

[20] Relying on J Paulsson's *Denial of Justice in International Law* (2005). The argument of a denial of justice at the hand of the Government of Lesotho was just a variation of the argument which will be dealt with later.

[51] The approach to Government and the Government's response occurred before the Constitutional Court delivered the *Kaunda* judgment,[21] which brought some clarity on the issue of the right to diplomatic protection. For purposes of this case the following principles there set out are relevant:

- Traditional international law acknowledges that states have the right to protect their nationals beyond their borders but they are under no obligation to do so (para 23).
- Diplomatic protection is not recognised by customary international law as a human right and cannot be enforced as such and it remains the prerogative of the state to exercise it at its discretion (para 29).
- It would be inconsistent with the principle of state sovereignty for South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own laws, but also the rights that our nationals have under our Constitution (para 44).
- Although there is no enforceable right to diplomatic protection, South African citizens are entitled to request South Africa for protection under international law against wrongful acts of a foreign state and the citizen is entitled to have the request considered and responded to appropriately (para 60).
- The entitlement to request diplomatic protection flows from citizenship and is part of the constitutional guarantee given by s 3 of the Constitution, which provides that all citizens are equally entitled to the rights, privileges and benefits of citizenship (para 67, 178, 188, 236).
- The government has an obligation to consider the request and deal with it consistently with the Constitution (para 67, 192).
- There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the

[21] *Kaunda and Others v President of the RSA* 2004 (10) BCLR 1009 (CC), 2005 (4) SA 235 (CC).

evidence is clear would be difficult, and in extreme cases possibly impossible to refuse (para 69, cf 242).

- A court cannot tell the government how to make diplomatic interventions for the protection of its nationals (para 73).
- A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy that is essentially the function of the executive (para 77).
- 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 (para 80, 193). This does not mean that courts could substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection (para 79).

[52] The appellants' request was premised on a 'right' to diplomatic protection and not on a right to have a request considered. It was further based on the duty of Government to provide a particular type of diplomatic protection. These demands were, in the light of the Constitutional Court's judgment, ill-founded.[22] A further demand (coupled with a threat of an urgent court application) that Government should withhold all royalties due to the Government of Lesotho under the treaty until the latter had agreed to mediate or arbitrate was not only ill-founded but also presumptuous.

[53] I have at the outset of this judgment set out the advice given to the President.[23] From this (and further documentation attached to the answering affidavit) it appears that the Government acted within the framework of the principles of the *Kaunda* judgment: Government knew that the appellants did not have a 'right' at international law; it recognised the fact that the Constitution might impact on the matter; it recognised the appellants' right to

[22] The argument submitted at the end of the proceedings was that the appellants have an unwritten constitutional right to diplomatic protection and that Government has an unwritten duty to provide it. It is in conflict with the main submission that the appellants have a right to submit a request and have a right that the request should be properly considered.
[23] Because the President made the ultimate decision the preceding decisions were subsumed and do not require separate consideration.

have a request considered; it was acutely aware of the appellants' serious attack on the Lesotho judiciary as evidenced by the first letter of request; and it realised that it had to make a policy decision bearing in mind what it called the sensitive relationship between the two countries. (Such decisions are always political and the prime consideration remains the relationship with the defendant state[24] and the grounds for refusing to act may be unrelated to the particular case.[25]) The Government obtained legal advice from different persons; it held meetings with Mr van Zyl and his delegation of lawyers and international legal experts; inter- and intra-departmental memoranda were prepared; the Government considered the request carefully over a period of time; and it made a policy decision – first by the Deputy Minister, then by the Minister and, eventually, by the President himself who twice considered the matter.

[54] Patel J dealt with the facts correctly and fairly there is no need to redo a job done well. Once again the appellants' position shifted in the replying affidavit. The justification for the new case was the fact that they did not have the Government's internal documents when the application was launched. The answer to this is that had they bothered to follow Uniform rule 53, they would have had the documents before the answering affidavit was filed; they would have been entitled to amplify their founding affidavit; and the case would have proceeded in an orderly manner and without complications.

[55] The appellants argue that the Government was not entitled to introduce a 'new' reason during a judicial review, the new reason being the reliance on policy considerations. This reason was not mentioned to the appellants in the preceding correspondence. The first answer is that had the appellants followed rule 53, the Government would have disclosed the policy reason. The second answer is that the case on which the appellants rely for the principle that an organ of state is not entitled to raise new reasons for an administrative decision in an answering affidavit was one where the new reasons were *ex*

[24] Dugard *International Law: A South African Perspective* 3 ed at 290.
[25] *Kaunda v President of the RSA (2)* 2004 (10) BCLR 1009 (CC) para 23.

post facto reasons and, accordingly, not the true reasons for the decision.[26] The third answer is that the English line of cases[27] on which the principle is based applies where there is a statutory duty to give reasons (which is not the case in this instance because the decision is not covered by PAJA). A court is entitled to admit evidence that elucidates an administrative decision. In any event, Government had sufficient reason for not disclosing the policy considerations: international relations by their very nature are confidential.

[56] There are a number of subsidiary points that have no merit. For instance, it is said that the evidence of Mr Pahad that the President received and accepted advice amounts to hearsay. Then there are 'new' points, some raised in the reply and others in the heads. These include allegations of mala fides, a denial that the relations between the two countries are indeed sensitive, complaints of unequal treatment and the violation of the right to equal provision of diplomatic protection.

THE MANDAMUS SOUGHT

[57] The prayer for an order requiring Government to afford the appellants diplomatic protection appears to be an independent prayer, and not conditional on the success of the review application. Whether this relief could be sought independently is an issue that need not be decided. At this stage of the judgment I merely wish to mention that the founding affidavit did not spell out what is required of Government although, as stated, the appellants insisted in the correspondence that Government had to mediate or litigate in international *fora*. The replying affidavit dealt with the matter in some detail. It was no longer a matter of diplomatic protection – the appellants sought 'effective' diplomatic protection in line with the demand set out in the correspondence.

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[26] *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) at para 12. The court nevertheless dealt with the additional reasons and found them bad.
[27] Discussed in *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302 (CA), a case quoted in *Jicama* (supra).

[58] The notice of appeal filed in this Court recited the relief sought in the notice of motion and, once again, gave no indication of what order was sought. Appellants' heads of argument were, however, of a different order. Government must be ordered to 'demand' the payment of compensation. Should this demand not be met, Government must 'require' of the Government of Lesotho to submit to international arbitration or to adjudication before the International Court of Justice. And, finally, if adequate compensation is not paid within 90 days, the Government of the RSA must pay these claims as constitutional damages.

[59] The order now sought is procedurally out of order (the claim for constitutional damages was not anticipated in nor does it reasonably arise from the founding affidavit); it flies in the face of the *Kaunda* principle that a court cannot tell the Government how to conduct foreign affairs and make diplomatic interventions; and it ignores the fact that the Government of Lesotho has stated repeatedly and explicitly that it will not engage in international dispute settlement (its consent is required for both arbitration and engaging the International Court of Justice).

THE INTERFACE BETWEEN NATIONAL AND INTERNATIONAL LAW

[60] A major problem with the appellants' case is the way they seamlessly move between national and international law, depending on what is convenient at any particular moment. They recognise that their application is based on South African municipal law because international law does not recognise a right of a national to diplomatic protection. However, when arguing their entitlement under local law, they rely on international law principles that deal with the power of states to provide diplomatic protection. Although customary international law is part of our law,[28] it is conceptually difficult to understand how an international law rule dealing with one relationship (state : state) can be transformed into a local rule regulating another relationship (citizen : state).

[28] Constitution s 232.

[61] One example suffices. The right to ask for diplomatic protection derives from s 3 of the Constitution as an aspect of citizenship – and nothing else.[29] How then can the Lesotho companies claim diplomatic protection from Government? The appellants seek the answer in a proposal of the International Law Commission[30] that the state of nationality of shareholders (the RSA) in a corporation is entitled to exercise protection 'on behalf of' such shareholders (Mr van Zyl and the two Trusts) in the case of an injury to the corporation (Swissbourgh) if the corporation had, at the time of the injury, the nationality of the delinquent state (Lesotho) and incorporation under the 'law' of Lesotho was required as a precondition of doing business there. Even if one accepts that this is a rule of international and, therefore, South African law, I fail to see how this 'rule' can determine the corporate appellants' entitlement to diplomatic protection under municipal law.

[62] Having said this, it remains necessary to consider whether Government is entitled in terms of international law to grant the appellants diplomatic protection. Unless the appellants are able to establish such a right vesting in Government their application has to fail for this further reason, both in relation to the review and the mandamus.

[63] The appellants argue that they only have to make out a prima facie case of entitlement but this understates the position. An applicant must make out a clear case for a mandamus or a review. Whether an applicant has a right is a matter of substantive law and whether that right is clear depends on evidence. But the test is not really germane for present purposes. In this case the material and admissible facts are mainly common cause and the general principle applies that in motion proceedings the case has to be determined on the respondent's version.

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[29] Gerhard Erasmus and Lyle Davidson 'Do South African have a right to diplomatic protection?' (2000) 25 *SAYIL* 113 at 130.

[30] 'Seventh Report on Diplomatic Protection' by John Dugard, Special Rapporteur (7 March 2006). The appellants laid great score on this report as setting out international law in spite of the fact that it has not yet been adopted. In what follows I shall assume in favour of the appellants the correctness of the supposition.

[64] It is necessary to state a number of trite international law principles in order to understand the debate that follows.

- The appellants are not subjects at international law and have, accordingly, no rights at international law.[31]
- Aliens in a foreign country are subject to the laws of that country to the same extent as the nationals of that country.
- Property rights are determined by municipal law. The questions whether any rights have been granted, exist or whether they have terminated are all questions that have to be determined according to local law:

  'In principle, the property rights and the contractual rights of individuals depend in every State on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals.'[32]
- There is no universally acceptable concept of property rights because the Western concept based on Roman law principles does not apply everywhere. According to African customary law, as expressed in the Lesotho Constitution, land belongs to the nation, in this case the Basotho Nation, and all interests in land are granted by the nation, represented by the King and the Chiefs. Chinese law, for instance, has its own complexities.[33] The finding by Patel J that there is no support for the thesis that international law recognises the protection of property (at least in the Roman-Dutch legal sense) as a basic human right appears to have merit.[34]
- Contracts concluded between states and aliens, are also governed by municipal law. [35]
- Contracts between states and aliens may be 'internationalised', i.e., the contracts may be made subject to international law principles and

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[31] Dugard *International Law: A South African Perspective* 3 ed and Booysen *Principles of International Trade Law as a Monistic System* deal with most of the propositions that follow.
[32] *Panevezys-Saldutoskis Railway case (Estonia v Lithuania)* 1939 PCIJ Reports Series A/B no 76 at 18.
[33] Cf *International Marine Transport SA v MV 'Le Cong' and Guangzhou Ocean Shipping Co* (Case 080/05) unreported SCA judgment of 23 November 2005 at para 9.
[34] Cf Annemarieke Vermeer-Künzli '*A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes*' 46 (2007) *International & Comparative Law Quarterly* 550.
[35] *Serbian and Brazilian Loans Case* [1929] PCIJ Series A No 20/21 at 41.

international adjudication by agreement, expressly or by necessary implication. [36]

- Aliens are entitled to request the country of their nationality to protect them against a breach of international minimum standards such as the breach of a basic human right. These basic rights are defined in international human rights instruments:

  'It is an elementary principle of international law that a State is entitled to protect its subject, when injured by acts contrary to international law committed by another State, from which they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, a State is in reality asserting its own rights ─ its rights to ensure, in the person of its subject, respect for the rules of international law.' [37]

- A sending state that is willing to afford diplomatic protection can only do so if: (a) the victim has the nationality of the sending state; (b) the victim has exhausted local remedies in the errant jurisdiction; and (c) an international delict whereby the victim has been injured by an unlawful act imputable to the other state has been committed.[38]
- An international delict presupposes the existence of a right because without a right there cannot be a wrong.[39]
- A state may confiscate or expropriate the property of an alien provided it is in accordance with a law of general application, in the public interest and prompt and adequate compensation is paid.
- The responsible state is under an obligation to make full reparation for the injury caused by an internationally wrongful act.

INTERNATIONAL RIGHTS AND WRONGS

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[36] *Revere Copper and Brass Inc v Overseas Private Investment Corp* (1978) 56 ILR 258 at 275.
[37] *Mavrommatis Palestine Concessions* 1924 PCIJ Series A No 2.
[38] 'Seventh Report on Diplomatic Protection' art 1; Gerhard Erasmus and Lyle Davidson 'Do South African have a right to diplomatic protection?' (2000) 25 *SAYIL* 113 at 130.
[39] 'Draft Articles on State Responsibility' provisionally adopted by the International Law Commission.

[65] Before there can be an international wrong there must be an international right. In this case the appellants have to show that the Rampai mineral lease was subject to international law, i.e., that it had been internationalised. (Although I am limiting this part of the discussion to the Rampai lease, what follows applies equally to the other four leases save for the fact that their invalidity has not yet been determined by the Lesotho courts.)

[66] As Patel J held, and is apparent from the terms of the lease discussed earlier, the Rampai lease was entered into in Lesotho by the Government of Lesotho with a Lesotho company under the Lesotho mining laws in respect of Lesotho diamond rights. Therefore, its validity had to be determined under Lesotho law by Lesotho courts.

[67] It is important to emphasise that this is not a case of expropriation or confiscation of existing rights. The issue is whether rights had come into existence according to local law that requires compliance with prescribed formalities. All the authorities quoted by the appellants, and there were many, deal with a situation where a state that had agreed not to amend its laws in order to undo an international contract (so-called stabilisation clauses), reneges on its undertaking. This is not such a case. A state is as much bound by its own laws as are its citizens and I do not know of a principle whereby a state, when entering into contract with a corporation with alien shareholders, can ignore municipal law that governs that type of contract.[40]

[68] For the sake of completeness I proceed to consider whether the Government of Lesotho had otherwise agreed to internationalise the agreement, i.e., agreed that its validity would be determined according to international law and by an international tribunal. This depends on an interpretation of the lease, i.e., whether there are any tacit terms to that effect.

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[40] Cf the approach of the arbitrator, Sir Herbert Sisnett in the *Shufeldt Claim* (*United States of America v Guatemala* II RIAA 1080.

[69] The appellants argue that the lease was not covered by the general principle that agreements between governments and aliens are governed by one or other municipal law[41] because (they submit) these leases were long-term international economic agreements or bi-lateral investment treaties.[42] Such leases may by virtue of their 'character' import international law by implication. In this regard they rely on the opinion of Prof Dupuy referred to in the *Revere Copper* case.[43]

'In this latter respect he refers to such characteristics of these agreements as their broad subject matter, their introduction into developing countries of investments and technical assistance, their importance in the development of the country concerned, their long duration implying "close cooperation between the State and the contracting party" and "requiring permanent installations as well as the acceptance of exclusive responsibilities by the investor", and the close association of the foreign contractor "with the realization of the economic and social progress of the host country". Because of the required cooperation between the contracting party and the State "and the magnitude of the investments to which it agreed", the contractual nature of the legal relation "is intended to bring about an equilibrium between the goal of the general interest sought by such relation and the profitability which is necessary for the pursuit of the task entrusted to the private enterprise".'

[70] The appellants' argument is opportunistic. The lease had hardly any of the characteristics referred to in the cited passage. Apart from the fact that the lease was of a relatively long duration, there was no 'required cooperation' between the parties; there was no obligation to introduce any foreign investment (unless the R13 000 per annum can be regarded as foreign investment) or technical assistance; there is no evidence that the lease was important for the development of Lesotho; and there was no requirement of permanent installations or the acceptance of exclusive responsibilities by Swissbourgh.

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[41] *Serbian and Brazilian Loans Case* [1929] PCIJ Series A No 20/21 at 41.
[42] See in general Wenhau Shan 'Is Calvo Dead?' 55 (2007) *American Journal of Comparative Law* 123. The appellants have mentioned concessions as another exception. Exactly what must be understood under a concession is unclear. It may refer to a unilateral administrative grant, which is not the case in this instance: *Amco-Asia Corp v Republic of Indonesia* 1985 (24) ILM 1022 at 1034.
[43] *Revere Copper and Brass Inc v Overseas Private Investment Corp* (1978) 56 ILR 258 at 275.

[71] Because the Rampai lease was invalid ab initio,[44] whatever the Government of Lesotho did by cancellation or revocation to undo the putative lease was without effect because there was nothing to undo. The acts of the Government of Lesotho at the time may have been wrong in the moral sense but they were not wrongful (at least not with full knowledge of the facts).

[72] The appellants furthermore rely on the arbitration clause in the lease. According to the argument the clause, in spite of its minimalist terms, has far-reaching consequences: because it does not say that Lesotho law applies and because it does not say that the arbitration was to be a local one, it follows from the fact that Swissbourgh had foreign shareholders that international law applied and that the arbitration had to be an international one. The argument need merely be stated to be rejected.

[73] A related argument concerns the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention of 18 March 1965), referred to as ICSID. The Government of Lesotho acceded to this Convention and enacted the Arbitration (International Investment Disputes) Act 23 of 1974. The appellants argue that because of this the Government of Lesotho is bound to submit the dispute to ICSID arbitration. The Convention (art 25) provides that the jurisdiction of this arbitral court 'extends to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre'.

[74] Without delving any deeper into this murky argument it suffices to state that South Africa is not 'another contracting party' to the Convention;[45] that the lease was not an investment contract; that Swissbourgh was not a South

[44] *Swissbourgh Diamond Mines (Pty) Ltd v LHDA* 2000 Lesotho LR 432 (CA).
[45] The 'failure' of Government to accede to the Convention became another bone of contention. The appellants argue that this violates their right to access to courts or other tribunals under s 34 of the Constitution. Apart from the fact that the respondents were never called upon to justify this neglect the argument has no merit. The appellants had their days in court. They lost. Now they want another court. That is not what the Constitution guarantees.

African national; and that the parties did not agree – in writing or otherwise – to submit to this form of arbitration.

[75] There remains the issue concerning the so-called extension leases. According to Mr van Zyl, the Government of Lesotho undertook to extend the terms of the four leases in settlement of their dispute. He, in turn, agreed to cancel the Rampai lease. The extension leases were also to be subject to the provisions of the Minerals Rights Act and required the same formalities as the original leases. The extension leases were never signed. The Government of Lesotho did not sign, why is irrelevant. Mr van Zyl says that he refused to sign because someone demanded a bribe in spite of an anti-corruption clause in the draft agreement. His refusal was noble but how this entitles him to relief in relation to non-existent leases is not understood. A promise to contract is not a contract.[46]

[76] I accordingly conclude that the appellants did not establish that they had any rights and, accordingly, that no international wrong could have been committed against them which would have entitled the Government to afford diplomatic protection. It is, however, necessary to say something about the appellants' subtext. Their real complaint is that the Rampai judgment amounted to an expropriation without compensation committed by an organ of state (the courts) for which the Government of Lesotho was responsible; and this was an international wrong because of a denial of justice by the Lesotho courts.

[77] I have already shown that this was not part of the appellants' case and that the underlying requirement of the existence of an international right is absent. As the appellants correctly accept, they have to show a fundamental failure of justice.[47] The main thrust of the argument was, however, directed at the merits of the judgment and because the appellants believe that the courts have reached a wrong conclusion they assume that the courts must have

[46] Cf *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1991 (4) SA 718 (A).
[47] *Loewen v USA* (ICSID case ARB (AF)/98/3) (2003) 42 ILM 811.

been biased, another fanciful proposition. But there are other attacks, which I shall mention briefly to illustrate the lack of merit of the appellants' case.

[78] They allege that the Court of Appeal was manipulated because it consisted of acting judges and the permanent judges of the court did not sit in the matter.[48] Because this issue was not raised on the papers it was not possible for Government to respond with evidence. Nevertheless, the appellants knew (according to Mr van Zyl) a month in advance, of the composition of the bench. They did not complain. If they had a ground for complaint they were obliged to raise it then. They chose not to do so, maybe because four of the five judges were retired South African judges. (The fifth, according to the published report, was a permanent Lesotho appeal judge.) As far as the permanent judges are concerned, we know that Mr van Zyl was of the view that the President of the court was disqualified to hear the matter.[49] Another member of the court (as appears from the law reports) acted as counsel for the Government of Lesotho in the revocation appeal and was therefore disqualified to sit.[50] There may have been similar explanations why the other two judges did not sit.

[79] The appellants also complain about the amount of security they had to provide for the Rampai appeal and say that it was many times higher than the amount set for the revocation appeal. We do not know what evidence was before that court in relation to both matters but one could guess that security for an appeal on a 58-day trial and one for an appeal on an application could differ materially. In any event, the determination of security did not lead to a

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[48] The Court of Appeal judges are mostly part-time judges drawn from the ranks of retired South African judges and practicing advocates. On the appointment of acting judges to hear specific cases see Morné Olivier 'The Appointment of Acting Judges in South Africa and Lesotho' 27 (2006) *Obiter* 554.

[49] This is based on the allegation that the President, when he sat on the revocation appeal, was a director of the Development Bank of SA. The complaint is that he wrote the judgment dealing with the interdict (where Swissbourgh was not successful) but there is no complaint about him concurring with the favourable judgment on the invalidity of the revocation order. Swissbourgh had a local remedy which was not pursued: *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (no 2) [1999] 1 All ER 577 (HL).

[50] This illustrates the importance of procedural rules and the danger of relying on Mr van Zyl's assertions, whether on affidavit, in the annexed documents or during argument.

denial of justice because the appellants were able to provide and did provide security.

[80] The third point under this heading relates to the fact that the appellants allege that they discovered new evidence after judgment. They wrote a letter to the President of the court, insisting that he revoke the judgment. His refusal is said to be yet further evidence of the bias of the Lesotho courts.

NATIONALITY[51]

[81] I have therefore found that Government is not entitled to intervene on behalf of the appellants because no international delict had been committed. The claim of the corporate appellants and the trusts has to fail on an additional ground, namely the issue of nationality or citizenship[52]

[82] It is necessary to distinguish between an international wrongful act that causes 'direct injury to the rights of shareholders as such' (in which event the state of nationality of the shareholders is entitled to exercise diplomatic protection in respect of its nationals) in contradistinction to injury to the rights 'of the corporation itself' (where that state is not entitled to act on behalf of its national shareholders). This case concerns a delict against the companies and not one against the shareholders 'as such'.[53]

[83] As mentioned earlier, the appellants rely on draft art 11 contained in the International Law Commission report. It bears quoting:

'The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

(a) . . .

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[51] Cf *Nottebohm case (Liechtenstein v Guatemala)* (1955) 22 ILR 349 (ICJ).
[52] 'Seventh Report on Diplomatic Protection' art 3 and 9. FS Dunn *The Protection of Nationals: A Study in the Application of International Law* (1932) 27-28.
[53] 'Seventh Report on Diplomatic Protection' art 12. See also *Standard Oil Co Tanker* (1926) 2 RIAA 781 at 782 and *Agrotexim v Greece* [1996] 21 ECRR 250 (ECHR).

(b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury, and incorporation under the law of the latter State was required by it as a precondition for doing business there.'

[84] The shareholder appellants rely on art 11 because the Government of Lesotho required the incorporation of Swissbourgh in Lesotho as a precondition for entering into the mining leases. Patel J, however, found that art 11 does not reflect customary international law – it is but a recommendation that awaits acceptance by the international community. I tend to agree with his reasoning, which is partly based on the *Barcelona Traction* case,[54] but do not find it necessary to decide the issue because the shareholders' claim fails for reasons stated and that follow.

[85] The corporate appellants cannot rely on the rule as formulated. The rule is expressed in favour of shareholders who are nationals of the sending state, and not in favour of the corporation itself. Article 11 is not and does not purport to be an exception to the nationality rule (art 3). (It is different with stateless persons and refugees; they are expressly stated to be exceptions to art 3.)

[86] Another aspect of the nationality rule is the continuing nationality rule. According to the amended proposal of the International Law Commission, a state is only entitled to exercise diplomatic protection in respect of a person who was a national of that state continuously from the date of the injury to date of claim.[55] As Patel J held, the cession by the corporate appellants to Burmilla Trust disqualified both the corporate appellants and the Trust from diplomatic protection.[56] The whole object of diplomatic protection is to protect

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[54] *The Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* 1970 ICJ 3 to which must now be added *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Preliminary Objections 2007 ICJ General List no 103.
[55] 'Seventh Report on Diplomatic Protection' art 5 comments. *Loewen v USA* (ICSID case no ARB(AF)/98/3) (2003) 42 ILM 811.
[56] The appellants rely on a report of the International Law Association (2006) according to which the rule may be dispensed with 'in the context of global and financial markets'. Why this possible exception is mentioned I fail to understand. The appellants also argue that the rule

a national against a wrong committed against that national. Someone who has not been wronged cannot, by virtue of a cession, become a victim. The cessionary may be entitled to the proceeds of any claim but that does not transform the cessionary into a victim. Likewise, a cedent cannot be entitled to diplomatic protection in relation to a right which that person no longer holds. It follows from this that the nationality rule disqualified the Government from affording any diplomatic protection to all the appellants save, possibly, Mr van Zyl and the family trust.

EXHAUSTION OF LOCAL REMEDIES

[87] There is yet another reason why Government is not entitled to grant the appellants diplomatic protection. A state may not bring a claim for diplomatic protection before the injured person has exhausted all local legal remedies unless these do not provide a reasonable effective redress or there is undue delay attributable to the state concerned.[57].

[88] The wrong, as defined in the founding affidavit, was the cancellation and revocation of the mining leases without payment of compensation: initially the Commissioner of Mines cancelled the leases and they were then cancelled by means of the revocation order. (The Rampai judgment did not cancel any lease; it merely held that the Rampai lease was void from the beginning.)

[89] It is common cause that these two acts were wrongful. This the Lesotho courts have held and the Government of Lesotho conceded in relation to the acts of the Commissioner and accepted by abiding by the revocation judgment. It means that the Lesotho courts have rectified the wrongs by declaring the acts void and without effect. One of the reasons for the existence of the 'local remedy' rule is that it is necessary

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does not apply to a continuing wrong. There was no continuing wrong in this case although there may have been a series of wrongs.

[57] 'Seventh Report on Diplomatic Protection' arts 14 and 16. The other exceptions are not relevant. *Panevezys-Saldutoskis Railway case (Estonia v Lithuania)* 1939 PCIJ Reports Series A/B no 76. This rule presupposes the existence of an international delict and compliance with the nationality rule.

'that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.'[58]

If this principle is applied the violation by the Government of Lesotho has been redressed within the framework of its domestic legal system. The appellants are not entitled to hark back, resurrect the past and ignore the supervening facts.

[90] If the cancellation and revocation of the four leases was illegal, Swissbourgh would in principle be entitled to damages. As mentioned, Swissbourgh cancelled these leases and instituted action for breach of contract against the Government of Lesotho but the action has not been pursued by Swissbourgh.

[91] The appellants argue that their acceptance of the repudiation must be discounted because they were forced by the actions of the Government of Lesotho to cancel the four leases. The argument is disingenuous because if that were the case they would also have had to cancel the Rampai lease, something they studiously avoided doing. Their second argument is that they cannot succeed in the case because of the Court of Appeal judgment on the Rampai lease. The argument lacks substance: that judgment is not *res judicata* in respect of the four leases and the appellants are entitled to use the 'new' evidence, which they say they have since uncovered, to show that the Rampai judgment was wrongly decided. Furthermore, if they never had any valid mineral rights (on the supposition that Rampai was decided correctly) they can hardly have any cause of complaint.

[92] Another claim to which their request relates is the claim for damages for the loss and destruction of Swissbourgh's plant. The cause of this is said (without any evidence) to have been unlawful acts committed by servants or

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[58] *Interhandel Case (Switzerland v United States)* 1959 ICJ 6 at 27 quoted with approval in the *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Preliminary Objections 2007 ICJ General List no 103 at para 42.

agents of the Government of Lesotho. This cause of action, as mentioned, forms part of the litigation, which has been pending in Lesotho for more than ten years. There is no valid explanation why these actions have not been pursued and local remedies exhausted.

CONCLUSION

[93] The conclusion is therefore that the appeal must be dismissed with costs. The employment by the respondents of three counsel was fully justified.

[94] ORDER: The appeal is dismissed with costs, including the costs consequent on the employment of three counsel.

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L T C HARMS
ACTING DEPUTY PRESIDENT

AGREE:

HEHER JA
CACHALIA JA
HURT AJA
MHLANTLA AJA

ANNEX:

Letter from the attorneys of the Government of Lesotho to the attorneys of the appellants dated 19 November 2001.

Dear Sir,

Re: SETTLEMENT OFFER IN THE MATTER BETWEEN THE STATE OF LESOTHO AND THE SWISSBOURGH GROUP, JOSIAS VAN ZYL, THE JOSIAS VAN ZYL FAMILY TRUST AND THE BURMILLA TRUST

1. Introduction

We have now had an opportunity to study the voluminous documents in which your clients' offer of settlement has been set out and motivated and to consult with our client in that regard. The documents occupy some 1600 pages in all and range from the two-page document left by your clients' counsel, Mr H Louw, with the Deputy Attorney-General, Mr K R K Tampi, on or about 2 May, 2001, in which payment of M300 000,00 plus costs, coupled with some conditions is called for; to the "Financial Claims against the Kingdom of Lesotho and Claims in respect of the Extension Leases" handed to Mr Tampi on 3 May, 2001, and five volumes of attachments thereto subsequently received; the "Proposed All in Settlement", dated 21 May 2001 and signed by Mr Louw, claiming M79 941 943,00, plus interest thereon; and, finally, the Supplementary Memorandum of 6 August 2001, explaining why the dispute must be settled, ─ or adjudicated upon if settlement is not reached, ─ according to the rules of Public International Law.

No useful purpose will be served, in view of the decision on the offer which has been reached by our client, in debating the various arguments advanced on behalf of your clients as to their entitlement to compensation. But there are a number of premises put forward for such arguments which are, to the knowledge of your clients, so fundamentally inaccurate that we can only believe that they are intended for readers who do not have knowledge of the facts, and must be corrected:

2. Expropriation without compensation

> The oft repeated justification for the claims made on behalf of your clients is that their rights were expropriated without the payment of compensation. The following are the facts in this regard:

It is correct that the Revocation of Specified Mining Leases Order, No 7 of 1992, purported to deprive SDM and its associated companies, without compensation, of their rights in the mining leases they held. That legislation was passed by the military government which succeeded the military government of General Justin Lekhanya which had granted the leases. However, that legislation was struck down as unlawful by the High Court of Lesotho whose judgment was confirmed by the Lesotho Court of Appeal on 13 January, 1995.

By the time the courts' judgments were delivered SDM and its subsidiaries, (save for Rampai Diamonds (Pty) Limited) had already, on 15 March, 1993, cancelled four of the mining lease agreements pertaining to them on the grounds that the Government of Lesotho ("GOL") had unlawfully repudiated its obligations under such agreements, *inter alia*, by passing the Revocation Order aforementioned.

Consequently, as far as four of the five leases in question are concerned there is no longer any question of expropriation without compensation. Expropriation by the Revocation Order was declared unlawful and there has been no subsequent expropriation. It is SDM and its subsidiary companies who terminated the leases by electing to cancel them and claim damages (as to which, see paragraph 3 below).

As to the Rampai lease, this was indeed, subsequent to the Revocation Order, expropriated. It lies largely in the catchment area of the Katse Dam and was expropriated under provisions providing for expropriation against payment of full compensation, appearing in the Lesotho Highlands Development Authority (Amendment) Act, No 5 of 1995. (It was to the introduction of this legislation that the Minister of Natural Resources was referring in the Memorandum to Cabinet quoted at pp 18/19 of your clients' memorandum dated 6 August 2001).

However, that Act provides for compensation (by LHDA) only to the holder of a "duly granted and executed mineral right registered in terms of the Deeds Registry Act, 1967". Consequently the finding of the High Court and the Court of Appeal that the Rampai lease was not lawfully granted prevents SDM and Rampai from claiming compensation from LHDA. But it is not without remedy (see paragraph 4.3 below).

3. Claimants have exhausted their remedies in the courts of Lesotho

In paragraph 3.8 of your clients' Supplementary Memorandum of 6 August 2001 it is said:

> "This also demonstrates that all judicial remedies have been exhausted. This requirement for diplomatic protection to be exercised has been met."

The averment that Claimants have exhausted their remedies in the courts of Lesotho is exactly contrary to the facts.

3.1 As to the Motsoku, Patisang, Orange and Motete lease areas, under Case No CIV/T/213/96, SDM and the four subsidiaries just mentioned instituted action against the Government of Lesotho for damages amounting, in all, to M958 702 281,00 on 20 May 1996.

3.2 Further particulars to the claim were requested and supplied, and a Plea was filed on behalf of Defendant on 9 October, 1996. The pleadings have been closed and the matter is ripe for hearing.

4. As to the Rampai lease:

On 23 July, 1996, SDM and Rampai filed a claim for compensation under the provisions of section 46A of the LHDA Order, as amended by Act 6 of 1995, in the amount of M521 846 548,00.

As pointed out in paragraph 2.5 above the provision for compensation by LHDA applies only to a lease duly granted an records have held that the lease in question was not lawfully granted to SDM or Rampai.

However, there is nothing to prevent SDM and Rampai from instituting action against GOL in the courts of Lesotho, claiming such damages as are alleged to have been suffered.

5. Loss of confidence in the courts of Lesotho

It is the courts of Lesotho which struck down, at the instance of your clients, the legislation which is repeatedly invoked as justification for turning to other *fora* for assistance, namely the Revocation of Specified Mining Leases Order, No 7 of 1992.

In a memorandum submitted to the Government of South Africa by SDM (before the result of its application to strike down the Revocation Order was known) and quoted in your clients' Supplementary Memorandum on settlement of 6 August 2001 it is said that:

> "SDM has not yet exhausted the available judicial remedies in Lesotho. As the Lesotho Court of Appeal has a high reputation both for competence and independence it cannot seriously be suggested that if the application pending before Cullinan, CJ, fails, it would be "obviously futile" to appeal against such decision."

Of course, not only were your clients successful before Cullinan, CJ, but the Court of Appeal upheld his judgment.

Now that a judgment goes the other way, it is said by your clients that the Judges of Appeal were biased and their findings one-sided. In correspondence Mr Van Zyl has gone further, insulting the President of the Court of Appeal and the present Chief Justice, who set aside the Rampai lease and whose decision was confirmed on appeal.

There is no foundation to these scurrilous remarks. The five judges who sat on the appeal, four of whom have held high judicial office in other Southern African countries and do not live in Lesotho, behaved throughout with perfect propriety. The distasteful accusations which you have seen fit to forward in this regard are rejected.

6. The settlement offer

Our client has carefully considered the settlement offer presented to it and has decided that it is not prepared to accept it. Naturally, the factual distortions dealt with above have contributed to that decision. Some additional considerations are mentioned below.

The financial averments upon which the offer is based:

Fundamental to the offer of settlement is that your clients have spent in the region of M18 million in developing the lease areas. Examination of the figures put forward in that regard, and knowledge of what occurred in the lease areas, gives rise to what appears to our client to be a well-founded suspicion that they are fabricated. No original vouchers bearing witness to the expenditure allegedly incurred have ever been presented. The figures are all taken from financial statements prepared in respect of each company by a firm of chartered accountants, Messrs Glutz and Hlasa, practising in Maseru.

However, it is not Messrs Glutz and Hlasa who substantiate the correctness of the statements, but a Mr A N Walker, a chartered accountant conducting a one-man practice in the town of Potchefstroom in the Republic of South Africa. Mr Walker states that he has verified your clients' not expenditure "from the audited accounts prepared by Messrs Glutz and Hlasa". That, in our client's respectful view, hardly constitutes reliable impartial substantiation of the claim.

The reliability of Mr J van Zyl, the chief source of information for the claim:

The impression is created throughout the submissions made on behalf of your clients that one is dealing here with people and bodies of substance who have contributed very large amounts of money to mining development in Lesotho. That is misleading.

The driving and controlling force behind all the Plaintiffs is Mr Josias van Zyl. In the papers opposing the application for an interdict by SDM some idea of the chequered career of Mr Van Zyl is provided, together with details of the trail of debt which his enterprises have left. Our clients have reason to doubt that the millions of Maloti it is claimed were spent were indeed either spent or, to the extent that expenditure may have been incurred, paid for by any of the Claimants. Mr Van Zyl's word is not considered acceptable and it is felt that the only way to test the essentially unsupported contentions about expenditure upon which your clients' claims rest is by reference to proper documentary proof through the process of discovery for which the Court Rules provide, and by cross-examination of the witnesses who are called to substantiate them, chief of whom must be Mr Van Zyl.

Defences to the claim:

The submissions motivating the settlement are based on the premise that no defence exists to the claims. That is not so. On the contrary, the latest information regarding the cession of the claims to the Burmilla Trust give rise to a further defence which will be raised in an amendment to the Plea in the aforementioned action instituted by SDM and four of its subsidiaries.

Government's resistance to corruption:

This elected Government has demonstrated, by word and deed, that it is implacably opposed to corruption. The manner in which the leases giving rise to your clients' claims were awarded, especially that in the Rampai area, by the Military Government of General Lekhanya give rise to grave suspicion of impropriety. Not only were none of the area chiefs consulted (the reason why the lease was set aside) but General Lekhanya did not provide a satisfactory explanation, when called as your clients' witness, as to how his government came to award a mining lease for, effectively, 15

years, in an area which was to be flooded in five years' time. On the information available to Government, no mining was done in that area until work on the Katse dam was well advanced, when there was an attempt to hold Government to ransom by a court interdict.

By the same token, while huge amounts are claimed for expenses and lost profits, no cent was ever paid by way of royalties to Government by any of your clients, who alleged that no profit had been made and, indeed, that the leases granted to them could not be viably mined without further rights to large tracts of land.

It is true that Government is not in possession of hard proof of corruption. But it is felt that the circumstances giving rise to these claims are such that they should be resisted and thoroughly tested. And it is Government's view that the best way to test them is by subjecting them to scrutiny in open court.

7. We have dealt herein with only the most glaring examples of misinformation contained in the documents put forward and some of the reasons for rejecting the proposals therein. As part of settlement negotiations, what is contained in that offer and this response is privileged from disclosure in further proceedings. But in case your clients should not abide by that rule of law we record that apart from what is set out herein, none of the averments made on your clients' behalf in the documents in which the settlement offer is contained are admitted.

8. Finally, as to the contention that the claims will be pursued in other *fora*, we are instructed to advise you that if that should occur our client will resist any such attempt to the extent that it may be advised that that is necessary. It is denied that any other forum has jurisdiction in the disputes which exist. Your clients' remedies lie in pursuing the claims already instituted and, if so advised, instituting fresh claims in the courts of Lesotho. (Subject, of course, to our client's right to raise whatever defences are available to it.)