

MINISTER OF FOREIGN AFFAIRS
versus
MICHAEL JENRICH
and
STANDARD CHARTERED BANK ZIMBABWE LIMITED
and
THE SHERIFF OF ZIMBABWE.

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 14 January, 11, 18 and 20 February, and 11 March 2015

Urgent Chamber Application

P Machaya, for the applicant
Mrs J Wood, for the 1st respondent
M CKamba, for the 2nd respondent

UCHENA J: The applicant is The Minister of Foreign Affairs of the Republic of Zimbabwe. He through this urgent application, applied for a provisional order intended to protect The Food and Agriculture Organisation of the United Nations, which I will refer to as FAO, from a garnishee order granted by this court against its bank account with, the second respondent in favour of the first respondent. He made the application in his official capacity as the Minister responsible for foreign Affairs, and thus responsible for FAO with which, the Republic of Zimbabwe has existing agreements for the establishment of The FAO Sub-Regional office for Southern and Eastern Africa. The agreements granted FAO immunity against legal suits in the national courts of Zimbabwe.

The first respondent was an employee of FAO who despite FAO's immunity sued it in the Labour Court which granted him an order which has now been registered as an order of this court. The first respondent sought to execute the order through a writ which was granted by this court. His pursuit for remedy in Zimbabwean courts was interrupted by the applicant's application under HC 5213/14 in which this court, granted, the applicant, a provisional order, on 27 June 2014, on the following terms;

“That pending the determination of this matter the applicant is granted the following relief;

1. The Sheriff for Zimbabwe and any deputy appointed under his hand be and they are hereby interdicted and prohibited from in any way enforcing or executing the writ of execution against property issued by the Registrar of the High Court on 3rd June, 2014 in Case HC 3432/14 in favour of one Michael Jenrich and against Food and Agriculture Organisation of the United Nations.”

The first respondent thereafter circumvented the provisional order granted on 27 June 2014. He applied for a garnishee order against FAO’s bank account with the second respondent. The Sheriff in compliance with the garnishee order served it on the second respondent who but for this application could have complied. The applicant being prevailed upon by the FAO made this urgent application seeking the following order.

“That pending the determination of this matter the applicants are granted the following relief:

That the Sheriff for Zimbabwe and any deputy appointed under his hand be and they are hereby prohibited and interdicted from any further enforcement or execution of the garnishee order issued by this court on 31st December, 2014 under case No HC 9895/14”

The second respondent though participating in these proceedings did not take an active part indicating that it will abide by the court’s decision

The Sheriff who is the third respondent on being served with this application, in a move which took the sting from the urgency of this case, indicated that he was not proceeding with the enforcement of the garnishee order and would abide by the decision of the court.

Mrs *Wood* for the first respondent strenuously opposed the application, while Mr *Machaya* for the applicant exerted a lot of energy and his knowledge of International Law towards securing an order stopping the execution of the garnishee order. They both filed voluminous Heads of Argument and attached a lot of authorities on International Law on the immunity of foreign Governments and International Organisations. They both sought sufficient time to enable them to prepare and file Heads of Arguments leading to this case being postponed to 11 February 2015. On 11 February 2015 only Mrs *Wood* appeared. Mr *Machaya* who was then the Deputy Attorney General was out of the Country on business. Mr *Kamba* for the second respondent was also out of the country leading to the case being postponed to 18 February 2015.

Mrs *Wood* for the first respondent submitted that the applicant had no *locus standii* to make this application. She submitted that FAO should have personally responded to this application and raised the courts lack of jurisdiction due to its immunity. She criticised its having merely written to the Registrar of this court, bringing to its attention its claim for

immunity. Mr *Machaya* in response submitted that the applicant has *locus standii* to file this application. He submitted that customary International Law compels him to act on behalf of FAO with which Zimbabwe entered into Agreements which granted it immunity from the jurisdiction of Zimbabwean Courts.

Mrs Wood also submitted that the deponent of the applicant's founding affidavit does not have personal knowledge of the facts she deposed to in that affidavit. Mr *Machaya* in response submitted that she clearly has personal knowledge of the facts of this case.

Founding Affidavit

Mrs *Wood's* attack on the founding affidavit is based on the need for the deponent to have personal knowledge of the contents of his or her affidavit. The attack on Mrs *Zvedi's* founding affidavit must therefore be assessed against the provisions of r 227 (4) (a) of the High Court Rules 1971, which provides as follows;

“An affidavit filed with a written application—
(a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein; and”—

Mrs *Zvedi* in her founding affidavit's paras 1 to 3 said;

1. “I am a legal practitioner of this honourable court, duly sworn and admitted, and am presently employed as a Chief Law Officer in the Civil Division of the Attorney General's Office, the legal practitioners of record of the within named Applicant. I have been duly authorised to depose to this affidavit on behalf of the applicant as the substantial content of the affidavit relates to matters of law and procedure which applicant himself has little or no knowledge of.
2. The matters of fact which I depose to herein are, save where otherwise indicated or the context so suggests, within my personal knowledge and belief.
3. I have acquainted myself with the matters which I refer to herein by perusal of all relevant files which the Civil Division has in its possession, and also by personal inquiry with my colleagues who have knowledge of those matters”.

A reading of these three paragraphs reveals that the deponent has three sources of knowledge which entitles her to depose to the affidavit, her legal training and experience, personal knowledge and knowledge acquired from reading files held by Civil Division and inquiries held with colleagues.

Rule 227 (4) (a) of the High Court Rules 1971 simply requires the deponent to be the applicant or respondent “or a person who can swear to the facts or averments set out in

therein”; All Mrs Zvedi had to do to qualify was to read files held at Civil Division on the facts relating to the FAO Agreements and the applicable law. She then could fill in that with inquiries with officers who had previously dealt with such cases. Armed with that information she had every right to depose the founding affidavit. I therefore find no merit in Mrs Wood’s challenge to her capacity to depose to the founding affidavit. There is no doubt that apart from establishing the existence of the Agreements the rest depends on the history of the case which has been handled by Civil Division and the law which Mrs Zvedi is expected to know or ascertain as she said she did.

Locus Standii

Mrs Wood for the respondent submitted that FAO should have personally come to court to establish its immunity and oust the court’s jurisdiction. She further submitted that the applicant does not have *locus standii* to file this application.

Mr *Machaya* for the applicant relying on customary international law submitted that FAO need not have personally participated to enforce its immunity, as the applicant has *locus standii* to file and prosecute this application.

The issue as to how foreign Nations and International Organisations should raise their immunity before National Courts has not been clearly settled in our jurisdiction though one can take guidance from the case of *Barker McCormac (PVT) LTD v Government of Kenya* 1983 (1) ZLR 137 (HC). In that case McNally J (as he then was) while considering a chamber application realised the existence of possible sovereign immunity and referred the case for hearing. WADDINGTON J (as he then was), on hearing the case did so in the absence of the government of Kenya which was only represented on 24 February but the hearing continued on 3,4, and 10 March when the Government of Kenyan was not in attendance nor represented. Commenting on why he proceeded in the absence of representation or a claim of immunity from the Government of Kenya, WADDINGTON J (as he then was) at pages 141 C to 142 F said;

“In my view, this supine attitude would have been wrong. The Courts in at least two similar and recently decided cases in South Africa adopted anything but a supine attitude. In the Government of Bolivia case (*supra*), at 939H, GOLDSTONE AJ (as he then was) is reported in the following terms:

‘Mr Southwood, who appeared for the applicant, in a helpful argument, submitted that all the requisites entitling the applicant to the orders sought by it were established. **However, he realised that the difficulty in the way of such relief being granted was the principle of public international law that the courts of a**

country will not by their process make a foreign State party to legal proceedings against its will . . .’

It is clear to me that had counsel for the applicant in that case not raised the question, the learned ACTING JUDGE most certainly would. There is another case brought ex parte where a similar course was adopted. In *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 (2) SA 709E at 711E, EKSTEEN J is reported as saying:

‘There was therefore no appearance for the respondent, but Mr Kroon, who appeared on behalf of the applicant, very properly dealt with the possible objection that the respondent may enjoy sovereign immunity against any process in our Courts. He submitted, however, that the application related to a purely commercial transaction and that, by virtue of the restricted view international law took of the doctrine of sovereign immunity today, respondent would not be entitled to claim any such immunity in the circumstances of this case.’

Once again, therefore, it is demonstrated that a proposal to sue a sovereign State in the Courts of another State is regarded as a very serious matter justifying action mero motu by the Court. The reason is explained by LORD DENNING MR in his judgment in *Thai-Europe Tapioca Service Ltd v Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies Imports and Shipping Wing* [1975] 3 All ER 961 at 965a-b:

‘Counsel for the Plaintiffs has taken us through a fascinating study of sovereign immunity and its development. But I do not think we need follow him today through its ramifications. **The general principle is undoubtedly that, except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages.** The reason is that, if the courts here once entertained the claim, and in consequence gave judgment against the foreign sovereign, they could be called upon to enforce it by execution against its property here. **Such execution might imperil our relations with that country and lead to repercussions impossible to foresee.** We have quite recently had examples in our courts where this general principle has been applied.’

‘So it seems to me that the general principle must be applied unless it comes within any of the recognised exceptions. But the exceptions are several and they are important.’

It seems to me that it is essential **that in cases of this description where the harmonious relations between Zimbabwe and another State could be adversely affected by the institution of civil action in the Courts of this jurisdiction, it is the clear duty of the Court to ensure that action is brought against the foreign sovereign State only in the most proper of circumstances. The need for caution in this field is no less pressing in Zimbabwe than it is in the United Kingdom. I think that caution should be exercised in this case.**

It was for the reason given above that on 3 March 1983 when argument was first addressed to the Court, I adjourned the proceedings. The purpose of the adjournment was to enable the Registrar to obtain a certificate from the Minister of Foreign Affairs concerning the status of

the premises in question in this case. On the papers at that time there was doubt whether the building was in fact the High Commission of the Government and, if so, for how long it had been recognised by the Government of Zimbabwe as the High Commission. **It seemed to me that the recognition of a building as an Embassy or High Commission is no less an act of State than the recognition of the sovereign power itself. It is an act of a Government concerning its foreign relations with another country.**”(emphasis added)

It is therefore clear that the two judges who first dealt with the *Barker McCormac* case (*supra*) were of the view that in cases of immunity the court should *mero motu* inquire into whether or not the sovereign state has immunity. I am aware that the Supreme Court in the case of *Barker McCormac* 1983 (2) ZLR 72 did not conclusively deal with whether or not a court should *mero motu* raise the issue of immunity, but it heard the appeal when there was no appearance for the respondent. This confirms the duty of the court to ensure that a sovereign state or International organisation which has been clothed with immunity is not improperly sued in our courts. GEORGES JA (as he then was) at p 82 F-H said;

“In the view which I take of this matter it is unnecessary to rule on that issue. It can be argued that a municipal court has jurisdiction over a claim by reason of the nature of the claim and that such jurisdiction is barred only when the defendant raises the issue of sovereign immunity. **On the other hand it can be argued that the jurisdiction is barred once it appears on the record that the defendant can raise the issue of sovereign immunity and that the court should not proceed unless satisfied that the defendant consents or that the claim does not fall within the category of claims in regard to which sovereign immunity can be raised.**” (emphasis added)

The fact that the Supreme Court heard an unopposed appeal suggests that it attached importance to the issue of immunity. It itself confirmed the need for the court to inquire and establish the issue of immunity once it appears on the record. It further did not say the two judges who said that the court should *mero motu* raise the issue of immunity were wrong.

This in my view means if the Registrar had brought FAO’s letter to him, to the court’s attention it should from there on have *mero motu* inquired into whether or not FAO had immunity in this case.

Mr *Machaya* for the applicant relied on the advisory opinion given by the International Court of Justice in the case of “*Curamaswamy*”, officially cited as “Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I. C. J. Reports 1999. P. 62,” for his submission, that the applicant has *locus standii*. He submitted that the Government of Zimbabwe, has a duty to ensure that FAO’s immunity is observed, as failure to do so can expose it to proceedings in terms of customary international law.

A reading of that case, at ps 86 to 88 paras 59, 60, 61, 62 and 63, which Mr *Machaya* relied on, merely stresses the need for the host state to inform the national courts of the existence of immunity. The case does not specifically say the State can itself institute proceedings to claim or protect the guest Nation or International Organisation's immunity.

At p 86, para 59 the International Court of Justice simply said;

“The difference which has arisen between the United Nations and Malaysia originated in the Government of Malaysia not having informed the competent Malaysian judicial authority of the Secretary-General's finding that Mr Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was therefore entitled to immunity from legal process---”.

This does not in my view authorise the host state to do more than inform the national courts of the guest Nation of the foreign Sovereign or International Organization's immunity.

At p 87 para60, the International Court of Justice said;

“This means that the Secretary – General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and in particular, to request it to bring his findings to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.”

Again this paragraph places on the host State the duty to inform the local courts and not to itself be part of the litigation.

At p 87 para 61, the International Court of Justice said;

“The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information. Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Art VIII, s 30, of the General Convention”.

Mr *Machaya* heavily relied on the possible proceedings against the Government of Zimbabwe and the courts' apparent failure to deal with the issue of immunity in *limine litis*, as the basis for the applicant's *locus standii* to make this application on behalf of FAO. This though possible, does not change the nature of the state's responsibility, according to this case, which remains that of informing the local courts of the existence of immunity.

At p 87, para 62 the International Court of Justice said;

“The Court concludes that the Government of Malaysia had an obligation, under article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary General. According to a well-established rule of

international law, the conduct of any organ of a State must be regarded as an act of that State.”---

There is no doubt that at customary international law the acts of the courts are deemed to be the acts of their State. I also accept that the Government of Zimbabwe is genuinely worried about the court’s failure to timeously act on the information it and FAO supplied. That anxiety might as an extreme possibility, justify its having to come to court as a party to litigate on behalf of FAO. I appreciate that after the court’s failure to act appropriately when FAO wrote to the Registrar, and again after applicant’s earlier application in HC 5213/14, the State must have been very anxious that it could be exposed to proceedings referred to in para 61. That however does not change the nature of its obligation to inform the courts, in terms of para 62 to one of litigating for FAO. In my view the applicant could have informed the courts at an appropriate higher level, to cause them to take over their responsibility of carefully ascertaining in *limine litis*, whether or not FAO was clothed with immunity.

I must also comment on what the Internal Court of Justice said on p 88 para63, about the responsibility of the national courts. It said

“By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided in *limine litis*. This is a generally recognised principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysia courts did not rule in *limine litis* on the immunity of the Special Rapporteur----- . As indicated above, the conduct of an organ of a State- even an organ independent of the executive power- must be regarded as an act of the State. Consequently, Malaysia did not act in accordance with its obligations under international law.”

Mr *Machaya* said if the State had not applied to stop the execution of the garnishee order as it did, it would have left its self, open to proceedings as FAO has absolute immunity against execution. It is accepted that the state can in terms of international law be proceeded against for the acts of its organs including those of the judiciary, even though the judiciary enjoys independence from executive power. This may in exceptional circumstances not mentioned in this case warrant the state’s involvement in litigation on behalf of sovereign nations and international organisations. The courts should therefore *mero motu* act expeditiously to determine immunity issues in *limine litis*. That would take away the state’s anxiety for the nation to act appropriately in terms of customary international law.

The possibility of the state making applications on behalf of foreign Governments and International Organisations to plead their immunity was commented on by Guido den Dekker at pages 17 to 18 of the Hague Justice Journal Volume 31 Number 2/2008, referred to by Mr *Machaya*. Dekker was commenting on the possibility of the state making applications such as

the one the applicant made in this case. His comments were based on the case of Mothers of Srebrenica et al. v. State of the Netherlands and United Nations 10 July 2008, where a District Court of The Hague heard an application by the State in which it claimed immunity for the United Nations which had instead of appearing before the court send a letter to the UN representative of the Netherlands invoking its immunity. The State forwarded the letter to the District Court which, in spite of that letter granted leave to proceed in default of appearance against the UN. This prompted the State to intervene which the District Court allowed. Dekker commented that the State felt compelled to intervene due to previous failure by the court to assess as a preliminary matter the (scope of) immunity of an international legal person. He at ps 17 to 18 said;

“The District Court can be followed in its interpretation that “under the UN Charter the State has bound itself to warrant as much as possible the immunity laid down in the Charter, irrespective of how far it extends” and that “pleading the immunity (of the UN) in proceedings before a national court of law at least falls within the bounds of possibility”. It seems to be a matter of policy of the State in each case to decide whether or not it will intervene in court proceedings. To my knowledge there are not yet sufficient examples in Dutch case law to consider invoking immunity in defence, of anon appearing international legal person before the domestic courts as a common and established practice of the State.”

Dekker’s article though not backed by my own reading of the District Court’s judgment, which was not made available, has a persuasive effect. It points to situations when the State may be left with no option besides having to litigate to ensure that the courts determine in *limine litis* the scope of the foreign sovereign’s immunity. It can be driven to such a possibility by the courts failure or delay in playing their part as clearly spelt out in *Bakker McCormac (supra)* and *Curamaswamy (supra)*.

In this case FAO wrote to the Registrar of this court when an application to register the judgment of the Labour court was made. It seems this was not brought to the attention of the court which registered the order. While the Registrar had the letter an application for a writ of execution was made and granted. The Sheriff was thereafter informed of the immunity to which he responded to the effect, that he would proceed with execution, if he was not stopped by a court order. The applicant being prevailed upon by FAO which had send it two notices in which it sought the enforcement of its immunity, and faced by the extreme urgency to protect its reputation, and guard against its exposure to proceedings against it in terms of customary international law made its first application for a provisional order in HC 5213/14 which was granted. It is my view that a State may in such circumstances be allowed to litigate. Its *locus standii* being rooted in the danger to which it will have been exposed.

Mrs Wood submitted that FAO should have come to court to enforce its immunity. Mr *Machaya* submitted that would amount to FAO waiving its immunity. I do not agree. A litigant who pleads immunity, or the court's lack of jurisdiction, does not waive his immunity nor clothe the court with the jurisdiction he says it does not have, but enforces his immunity, or stresses the court's lack of jurisdiction. I am therefore of the view that subject to international customary law and in appropriate circumstances a Sovereign State or an International Organisation can come to court to enforce its immunity. This view draws support from the case of *Rahimotoola v Nizan of Hyderabad* (1958) AC 379 @ 418; (1957) 3 ALL ER 441 @461 where Lord DENNING commenting on the need for Sovereign states to come to court said;

“It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction.”

In view of the above I am persuaded that the applicant has *locus standii* to file this application. Mrs *Wood*, prompted by the applicant's application to amend the order sought submitted that a litigant who is not a holder of the right in issue has no *locus standii*, to apply for a declaratory order. This will, if, necessary be dealt with when I consider the applicant's application for the amendment. Even if a finding that applicant does not have *locus standii*, were to be made, that does not mean that I have to for that reason, dismiss this application as I have a duty to *mero motu* determine FAO's immunity, in *limine litis*, as was done in the first *Barker McCormac* case (*supra*). The issue of immunity is already before me. I must determine it on the facts and law which has already been placed and argued before me.

The Status of the FAO Agreements

Mrs Wood for the respondent submitted that even if the applicant could come to court to enforce FAO's immunity it was not entitled to do so in this case because the Agreements between Zimbabwe and FAO are not yet binding on Zimbabwe as they do not have the force of Law as they have not yet been domesticated.

Mr *Machaya* for the applicant submitted that an Agreement becomes binding on being approved by Parliament and can be enforced before its domestication by being incorporated into Zimbabwean law. He further submitted that such agreements are binding in terms of, customary International law which was made part of our law by s 326 of the Constitution. Section 326 of the Constitution provides as follows;

“(1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.

(2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law.”

Section 326 (1) clearly states that customary international law is part of the law of Zimbabwe. It can only be excluded if it is not consistent with the Constitution or an Act of Parliament. Subsection (2) is important as it requires courts to reasonably, interpret local statutes with an inclination towards making them consistent with customary international law as opposed to in a manner inconsistent with customary international law.”

A reading of s 326 of the Constitution together with the courts’ dicta in the three *Barker McCormac* cases, confirms that customary international law is part of our law. What remains to be determined is whether or not FAO’s Agreements with the Republic of Zimbabwe had become binding and enforceable at the time these proceedings were instituted.

Mr *Machaya* relied on the interpretation of s 327 (2) (a) of the Constitution to prove that they had become binding at the time these proceedings were instituted. Mrs Wood relied on the same section but inseparably including subs (2) (b) for her submission that the Agreements could only become binding on Zimbabwe when they were domesticated. She further submitted that at the time of the applicant’s application FAO had not been granted immunity in terms of s 7 of The Privileges and Immunities Act [*Chapter 3:03*] which only granted FAO immunity through the Government Gazette of 25 January 2015. On the other hand Mr *Machaya* submitted that FAO’s Agreements with the Republic of Zimbabwe became binding on Zimbabwe on 23 July 1996 when the Parliament of Zimbabwe approved them. A literal interpretation of s327 (2) (a) and (b) of the Constitution, as well as an interpretation required by s 326 (2) supports Mr *Machaya*’s submission. Section 327 (2) (a) and (b) of the Constitution provides as follows;

“An international treaty which has been concluded or executed by the President or under the President’s authority—

(a) does not bind Zimbabwe until it has been approved by Parliament; and

(b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament-----”

Section 327 (2) (a) of the Constitution, can only mean that the agreement by the President or under his authority becomes binding on its being approved by Parliament. It need not be domesticated for it to be binding on Zimbabwe. The only impediment to its attaining binding status is its approval by Parliament. Mrs *Wood*’s attempt to link the

Agreements' binding effect after their approval by Parliament to the domestication of the law by incorporation through an Act of Parliament is a result of inseparably linking s 327 (2) (a) and (b) which is not consistent with the literal meaning of the words used and has the effect of excluding customary international law contrary to the provisions of s 326 (2) of the Constitution. Section 327 (2) (a) standing alone gives the Agreements a binding effect even if they have not yet been incorporated into Zimbabwean law. Mrs Wood submitted that the Agreements could not be enforced before their being partly domesticated by the Government Gazette of 25 January 2015. That cannot be a correct statement of the law as it suggests that courts can only enforce laws. Courts can enforce agreements and laws. Mr *Machaya* was therefore correct when he said FAO's Agreements became enforceable on 23 July 1996 when they were approved by Parliament. I therefore find that the agreements became binding on Zimbabwe on 23 July 1996.

This case does not therefore only, depend on the Privileges and Immunities Act which granted FAO immunity on 25 January 2015. The issue of immunity was determinable from 23 July 1996 when the Agreements became binding on Zimbabwe.

The immunity

This case stands or falls on whether or not FAO has the immunity claimed by the applicant. The issue of immunity is determined by our customary international law. The customary international law referred to in s 326 (1) of the Constitution is the customary international law developed from how nations of the world related with each other over the years in terms of conventions and treaties which have become binding on participating nations.

Mr *Machaya* for the applicant submitted that FAO enjoys absolute immunity. Mrs Wood for the respondent submitted that FAO like all Nations and International Organisations only enjoys restricted immunity. Absolute immunity protects the claimant from all suits before the national courts of the host country. Restricted immunity on the other hand only protects the claimant against suits based on acts *jure imperii*. This means courts of the host nation have jurisdiction to hear the guest Nations' or International Organisations' cases based on acts *jure gestionis*. Acts *jure imperii* are for example governmental public activities such as, the legislative or international transactions of a foreign government, while acts *jure gestionis*, are commercial activities by a foreign sovereign or international organisation of a private law nature.

In the case of *Barker McComarc (Pvt) LTD v Government of Kenya* 1983 (2) ZLR 72 (SC) at p 79 G-H Georges JA (as he then was), after analysing cases from several jurisdictions said;

“I am completely satisfied therefore that the doctrine of sovereign immunity generally applied in international law is that of restrictive immunity. There are no decisions of courts of this country and no legislation inconsistent with that doctrine and it should be incorporated as part of our law.”

He as a result upheld the appeal allowing the appellant to serve the Government of Kenya by substituted service. The Supreme Court maintained the same position in the case of *ICRC v Sibanda & Anor* 2004 (1) ZLR 27 (SC) where at ps 31 D to 32 A SANDURA JA said;

“It is therefore, clear that the doctrine of sovereign immunity applicable in this country is that of restrictive immunity as opposed to absolute immunity. In other words, a foreign sovereign would enjoy immunity from suit and legal process where the relevant act which forms the basis of the claim is an act “*jure imperii*” i.e. a sovereign or public act. On the other hand, he would not enjoy such immunity if the act which forms the basis of the claim is an act “*jure gestionis*”, i.e. an act of “a private law character such as a private citizen might have entered into.”

The position in South Africa is the same. It was stated by CORBET CJ in *Shipping Corporation of India Ltd v Evdomon Corporation & Anor* 1994 SA 550 (A) at 565 A- B as follows;

“The legal position in this country regarding the doctrine of sovereign immunity was carefully and comprehensively surveyed by the Full Bench of the Transval Provincial Division in the case of *Inter- Science Research and Development services (Pty)Ltd v Republica Popular de Mocambique* (1980 (2) SA 111 (*supra*)). As this survey shows, South African Courts initially applied the doctrine of absolute immunity, but in the *Inter- Science* case the court..... decided **to follow the world- wide trend and to apply the restrictive doctrine.**”

In my view, an International organisation, such as the ICRC, enjoys immunity from suit and legal process subject to the provisions of international law, and the doctrine of restrictive immunity applies to it. It could hardly have been the intention of the legislature to grant absolute immunity from suit and legal process to such an organisation when a foreign sovereign did not enjoy such immunity.” (Emphasis added)

The ICRC case (*supra*) involved a labour dispute between an International Organisation and its employees. This case also involves a labour dispute between an international organisation and its employee. It is therefore on all fours with the ICRC case (*supra*). The Supreme Court held that an international organisation only enjoys restrictive immunity, and

therefore does not have immunity in cases of a labour nature such as the one before me. The Supreme Court's decision in ICRC (*supra*), is therefore binding on this Court and must be followed.

A finding that FAO like all foreign sovereign states and other international organisations only enjoys restrictive immunity which does not include immunity against labour suits, means the applicant's application for a provisional order cannot be granted.

In the result I order that;

- 1 The applicant's application for a provisional order, being based on an erroneous assumption that FAO had absolute immunity should be dismissed.
- 2 The applicant shall pay the respondents costs.

Attorney General's Civil Division, legal practitioners for the applicant
Messers Ventuirus & Samukange, first respondent's legal practitioners
Second Respondent Represented by Mr Kamba from Its Legal Department