



## IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**Von Abo vs. Government of the Republic of South Africa; President of the Republic of South Africa; Ministers of Foreign Affairs; Trade and Industry and of Justice and Constitutional Development.**

**CCT 67/08**

**Date of Judgment: 5 June 2009**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today, the Constitutional Court handed judgment in the above matter which is an application for the confirmation of part of an order handed down by the North Gauteng High Court, Pretoria, on 29 July 2008. The High Court declared certain conduct of the President to be unconstitutional.

The applicant, Mr Von Abo, is a South African citizen with farming and land interests in Zimbabwe. In 1997 Zimbabwe implemented a new land policy which resulted in his farms being expropriated. Mr Von Abo sought to resist the expropriation and also made numerous requests to the South African Government for assistance and diplomatic protection.

Dissatisfied with the response of the Government, Mr Von Abo brought an application in the Pretoria High Court against the President and the Government of South Africa in 2007. He sought an order declaring that the Government had failed to properly consider his request that he be granted diplomatic protection relating to the violation of his rights by the Government of Zimbabwe.

The High Court declared that the President had failed to take diplomatic steps to protect the applicant's various farming and proprietary interests in Zimbabwe and the matter was referred to this Court for confirmation because section 172(2)(a) of the Constitution states that an order of constitutional invalidity regarding "any conduct of the President" has no force unless it is confirmed by the Constitutional Court."

At the initial hearing on 11 November 2008, the President requested a postponement to enable him to file a formal application to tender new evidence, a portion of which they would request the Court to keep confidential. The Court postponed the hearing to the 26 February 2009. The Court then directed that the parties confine their argument to whether the order of the High Court was subject to confirmation by this Court in terms of section 172(2)(a).

The applicant contended that because the High Court had included the President in its order, the matter was properly before this Court. Moreover, the words in section 172(2)(a), “conduct of the President,” should be given a broad meaning. The President contended in reply that because diplomatic protection fell into the terrain of the executive, the President’s conduct was not, and could not be implicated. Thus, the matter had been brought erroneously to this Court.

Moseneke DCJ, writing for a unanimous Court, found that in essence diplomatic protection was the responsibility of the government as a whole, and not of the President alone. He emphasised the collaborative nature of executive functions, finding that although the President is indeed involved in executive functions, “conduct” as described in section 172(2)(a) did not include this category of obligations. Moreover, on the facts of this case, it was clear that it was the Department of Foreign Affairs that had dealt with the matter, and not the President, despite the applicant’s appeals to the President for diplomatic protection.

The matter had accordingly been erroneously brought to this Court, and was thus struck off the Court roll. He observed however, that neither the President, nor any of the government respondents had appealed the decision of the High Court, despite them having an automatic right of appeal. Thus, the order of the High Court remained and Mr Von Abo’s relief as contained in the order would not be diminished in any way.