



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 64/2021

In the matter between:

**THE TRUSTEES FOR THE TIME BEING
OF THE BURMILLA TRUST**

FIRST APPELLANT

JOSIAS VAN ZYL

SECOND APPELLANT

and

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

FIRST RESPONDENT

**GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA**

SECOND RESPONDENT

Neutral citation: *Trustees for the time being of the Burmilla Trust and Another v President of the RSA and Another* (Case no 64/2021) [2022] ZASCA 22 (1 March 2022)

Coram: VAN DER MERWE, MBATHA, GORVEN and MABINDLA-BOQWANA JJA and MEYER AJA

Heard: 18 November 2021

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Summary: International law – appellants claimed before Southern African Development Community Tribunal (SADC tribunal) that Kingdom of Lesotho (Lesotho) had violated SADC treaty by expropriation of valid mining lease without compensation and were liable for moral damages – allegation that respondents violated appellants' rights under s 34 of Constitution by participating in prevention of prosecution of claims before SADC tribunal – exception to claim for constitutional damages under s 172(1)(b) in respect of value of mining lease, moral damages, costs of claim before SADC tribunal and wasted costs of subsequent legal proceedings – whether SADC tribunal could in law have held that mining lease was valid despite Lesotho court decisions to contrary – under international law SADC tribunal not bound by Lesotho court decisions – could reach different conclusion on proper ground – proper grounds alleged – whether *Van Zyl v Government of Republic of South Africa* 2008 (3) SA 294 (SCA) precluded claim in respect of value of mining lease – decision not *res iudicata* in respect of any issue in present action – exception should have been dismissed in respect of claim for value of mining lease and costs of prosecution of that claim before SADC tribunal – exception otherwise correctly allowed – claim for moral damages would in law have been denied by SADC tribunal for failure to exhaust domestic remedies – no basis pleaded for wasted legal costs to be awarded as constitutional damages.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tuchten J sitting as court of first instance):

- 1 The appeal of the first appellant is upheld with costs, including the costs of three counsel.
- 2 The appeal of the second appellant is dismissed with costs, including the costs of three counsel.
- 3 The order of the court a quo is set aside and replaced with the following:
'(a) The exception against the claims of the first plaintiff in respect of the value of the Rampai mining lease and the costs of the prosecution of that claim before the SADC tribunal, is dismissed with costs, including the costs of two counsel;
(b) The exception is allowed in respect of all other claims of the first plaintiff and they are struck out;
(c) The exception is allowed in respect of all the claims of the second plaintiff and they are struck out with costs, including the costs of two counsel.'
- 4 The appellants may seek to amend their particulars of claim by notice delivered within 30 days of the date of this judgment.

JUDGMENT

Van der Merwe JA (Gorven JA and Meyer AJA concurring)

[1] The first appellant, the trustees for the time being of the Burmilla Trust (the Burmilla Trust), and the second appellant, Mr Josias van Zyl, instituted action in the North Gauteng Division of the High Court, Pretoria against the first respondent, the President of the Republic of South Africa in his official capacity as head of state and the second respondent, the Government of the Republic of South Africa, for payment of damages in the total sum of approximately R800 million, as well as interest and costs. In their particulars of claim the appellants put forward various claims, which will

be fully discussed below. The respondents excepted to the particulars of claim, alleging on 14 grounds that they did not disclose a cause of action in respect of any of the claims. The court a quo (Tuchten J) upheld most of the grounds of exception. Although it did not say so explicitly, the effect of the order was to put an end to each of the claims of the appellants. The court a quo granted leave to the appellants to appeal to this court. In broad terms the issue on appeal is whether the amended particulars of claim disclosed a cause of action in respect of all or any of the claims.

Background

[2] As I shall explain, aspects of the protracted litigation between the parties were decided by this court in *Van Zyl and Others v Government of the Republic of South Africa* (*Van Zyl SCA*).¹ Already in that judgment, handed down during September 2007, Harms ADP said that the case had a long and convoluted history, the salient parts of which he proceeded to set out in the judgment. It is unnecessary to repeat that exposition. Nor is it necessary to fully set out the relevant events subsequent to the judgment in *Van Zyl SCA*, many of which have also been found to be facts in the arbitral award and foreign judgments referred to below, as well as in the judgment of the Constitutional Court in *Law Society v President of the RSA*². This is so, of course, because we are dealing with an exception and the question is whether on the facts alleged by the appellants, they disclosed a cause of action in law. I shall in due course embark upon a detailed analysis of the particulars of claim. For a proper understanding of this judgment it is necessary that I set out, at this juncture, the essential factual allegations upon which the appellants rely. These are the following.

[3] During 1988, the Government of the Kingdom of Lesotho (Lesotho) granted five mining leases to Swissborough Diamond Mines (Pty) Ltd (Swissborough), a company incorporated in Lesotho and controlled by Mr van Zyl. The mining leases would *inter alia* entitle Swissborough to mine on and extract diamonds from the land to which the mining leases related. These mining leases were registered in the Lesotho Deeds Registry, after having been approved by various officials of Lesotho. Only one of the

¹ *Van Zyl and Others v Government of Republic of South Africa and Others* [2007] ZASCA 109; 2008 (3) SA 294 (SCA).

² *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC).

mining leases is directly relevant to the present matter, namely the one that pertains to the Rampai area. This mining lease and the rights that emanated therefrom has for decades been referred to as the Rampai lease and I shall follow suit.

[4] It transpired, however, that the area of the Rampai lease would largely be submerged by the execution of the Lesotho Highlands Water Project, a joint venture in terms of a treaty between the second respondent and Lesotho. In order to avoid having to pay compensation for the expropriation of the Rampai lease, the emergent military government of Lesotho attempted to revoke the mining leases. These attempts were prevented by decisions of the Lesotho courts. During 1995, however, the Lesotho Highlands Development Authority (LHDA) applied in the Lesotho High Court for an order declaring the Rampai lease void *ab initio*. The application was essentially based upon the allegation that under Lesotho law the grant of any rights to land was subject to the consent of the relevant Chiefs and that such consent had not been obtained. The Lesotho high court granted the relief sought and during 2000 its order was upheld by the Lesotho Court of Appeal. As I shall demonstrate, these two decisions (the Lesotho court decisions) play a central part in the determination of the matter.

[5] The Treaty of the Southern African Development Community (the SADC treaty) came into force on 30 September 1993. It established the Southern African Development Community (the SADC). Lesotho was one of the original signatories of the SADC treaty. The Republic of South Africa acceded to the SADC treaty and this was duly ratified by both houses of Parliament. In terms of Article 10 of the SADC treaty, the Summit consists of the heads of all the member states and is ‘. . . responsible for the overall policy direction and control of the functions of the SADC’. Article 4(c) of the SADC treaty provides that the ‘SADC and its member states shall, [inter alia], act in accordance with . . . human rights, democracy and the rule of law’. Article 6.1 provides:

‘Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.’

[6] The Southern African Development Community Tribunal (the SADC tribunal) was established in terms of Article 16 of the SADC treaty. The SADC Tribunal Protocol approved by the Summit during 2001 (the Protocol) provided for the composition, jurisdiction and powers of the SADC tribunal. Article 3.1 of the Protocol determined that the SADC tribunal had to consist of no less than 10 members. Importantly, Article 15.1 provided that the SADC tribunal had jurisdiction over disputes between states and between natural or legal persons and states. In terms of Article 23 the Rules of Procedure of the SADC tribunal annexed to the Protocol (the Rules) formed an integral part of the Protocol.

[7] In terms of instruments entered into during 1994, 1996 and 1997, Swissborough *inter alia* ceded and transferred all its rights, title and interest in and to any claim of whatever nature that it might have against Lesotho, to the Burmilla Trust. On the strength of these instruments, during 2009, the Burmilla Trust launched an application in the SADC tribunal for relief against Lesotho (the SADC claim). Mr van Zyl and other related parties joined the Burmilla Trust as applicants in the SADC claim. In essence, the Burmilla Trust alleged in the SADC claim: that the five mining leases (including the Rampai lease) had been validly granted by Lesotho; that in breach of its obligations under Articles 4(c) and 6.1 of the SADC treaty and of customary international law, Lesotho had expropriated the mining leases without any compensation; and that the Lesotho court decisions constituted a denial of justice under international law. On this basis, the Burmilla Trust claimed compensation from Lesotho consisting of the value of the mining leases at the time. It claimed the amount of R641 109 723, as well as interest and costs in respect of the Rampai lease. Mr van Zyl claimed the amount of R80 million in respect of 'moral damages'. The parties duly exchanged pleadings and by 15 February 2011, the SADC claim was ripe for hearing.

[8] Meanwhile, on 17 August 2010, the Summit *inter alia* resolved not to renew the terms of office of five SADC tribunal judges, rendering it *inquorate*, and to, in effect, suspend the SADC tribunal. This prompted the appellants to institute proceedings in the SADC tribunal against the SADC itself, for relief designed to enable the SADC tribunal to continue to function (the SADC saving application). On 20 May 2011, however, the Summit decided to extend the suspension of the SADC tribunal and not

to re-appoint SADC tribunal judges. This rendered the SADC tribunal 'defunct and unable to hear and determine' the SADC claim and the SADC saving application.

[9] The resolutions of 17 August 2010 and 20 May 2011 were taken in the execution of a collusive scheme to prevent natural or legal persons from prosecuting claims against member states of the SADC before the SADC tribunal. As a result, the Summit subsequently replaced the Protocol with one strictly limiting the jurisdiction of the SADC tribunal to disputes between states. The then President of South Africa participated in all of this and thus assisted Lesotho to get rid of the SADC claim.

[10] The appellants proceeded to initiate arbitration proceedings against Lesotho before an ad hoc international tribunal under the auspices of the Permanent Court of Arbitration (the PCA tribunal). The ultimate aim of the proceedings before the PCA tribunal was to obtain an award in accordance with the relief that had been sought in the SADC claim. Lesotho objected to the jurisdiction of the PCA tribunal, but it rejected the objections by majority decision (Mr Justice P M Nienaber dissenting). In its (majority) award dated 18 April 2016, the PCA tribunal ruled that the parties had to establish a new tribunal to hear the merits of the claims for compensation. In terms of the award the new tribunal had to be seated in Mauritius (the Mauritius tribunal).

[11] Lesotho approached the High Court of the Republic of Singapore for the review and setting aside of the award of the PCA tribunal. In the meantime, the Mauritius tribunal was constituted and dealt with some preliminary skirmishes, pending the determination of the review. The Singapore High Court in due course upheld Lesotho's review application and set aside the award of the PCA tribunal, on the ground that it had no jurisdiction to determine the claims before it. On 27 November 2018, the Singapore Court of Appeal dismissed the appellants' appeal against that order. This, of course, put an end to the Mauritius tribunal.

[12] In their particulars of claim as expressly limited in argument before us, the appellants claimed payment of the following amounts:

- (a) R641 109 723 plus interest for the value of the Rampai lease (claim A);
- (b) R80 million for moral damages allegedly suffered by Mr van Zyl (claim B);

- (c) R15 004 729 plus interest for legal costs incurred in respect of the SADC claim (claim C);
- (d) R2 782 554 plus interest for legal costs incurred in respect of the SADC saving application (claim D); and
- (e) R64 324 672 plus interest for legal costs incurred in respect of the proceedings before the PCA tribunal, the Mauritius tribunal, as well as in the Singapore courts (claim E).

Apart from any other consideration, however, as far as the Burmilla Trust was concerned, the fate of the exception in respect of claims C, D and E was entirely dependent on whether claim A survived this exception. The same applied to Mr van Zyl and claim B.

[13] The court a quo upheld grounds 2, 3, 4, 6, 8, 9, 10 and 11 of the respondents' exception. It made no order on ground 12 and dismissed the remainder of the 14 grounds of exception. It directed the appellants to pay the costs of the exception, including the costs consequent upon the employment of two counsel.

[14] The court a quo erroneously regarded claim A as a claim for loss of profits. In respect of that claim it essentially reasoned that the Burmilla Trust could not 'escape the consequences' of the Lesotho court decisions that the Rampai lease had been void *ab initio* and that it was bound by *Van Zyl SCA* (as well as the judgment of the Pretoria High Court). In addition, it regarded the fact that it had originated in the hands of Swissborough as 'an insuperable obstacle' to claim A, on the ground that the respondents owed no duties to foreigners. The court said that claim B had been put forward in terms that were 'simply too terse to pass muster'. It did not deal separately with claims C or D, but swiftly disposed of claim E, mainly on the ground that these costs were incurred as a result of a wrong legal decision of the appellants that had not been caused by the respondents.

Discussion

[15] The respondents' grounds of exception substantially overlapped. It would be quite cumbersome to consider them separately. In the circumstances I regard it proper to consider whether the particulars of claim disclosed a cause of action in law, in

respect of each of claims A to E. This approach will also be reflected in the order of this Court.

[16] It is trite that in deciding an exception, a court has to accept the facts alleged in the relevant pleading (save for those that are palpably untenable). It is for the excipient to satisfy the court that upon every reasonable interpretation of those facts, the pleading is excipiable.³ An interpretation that disregards the context in which the factual allegations are made would generally not qualify as a reasonable one.

[17] It is apparent from what I have said that it was an integral part of the appellants' pleaded case that the SADC tribunal would (probably) have upheld the SADC claim against Lesotho. This brings principles of international law into play. The basic sources of international law are treaties (general or particular), customary international law, general principles of law, judicial decisions and 'the teachings of the most highly qualified publicists'.⁴

[18] There are two main requirements for the existence of a rule of customary international law. The first is that the rule is in accordance with general and widespread practices of states, which may, of course, be evidenced in a variety of ways. The settled practice must in the second place be accompanied by a sense of obligation on the part of states that they are bound by the rule in question.⁵ Because international law knows no doctrine of *stare decisis*, judicial decisions do not themselves constitute rules of international law. They do, however, provide a means for identifying international law rules. The same applies to the writings of jurists.⁶ Many international tribunals are constituted and make decisions under bilateral investment treaties and for this reason their decisions must be applied with caution. Article 21 of the Protocol should be seen against this backdrop. It provided:

'The Tribunal shall:

³ *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd* 1972 (2) SA 270 (A) at 275F-H; *Theunissen en Andere v Transvaal Lewendehawe Koop Bpk* 1987 ZASCA 93; 1988 (2) SA 493 (A) at 500D-E; and *Lewis v Oneanate (Pty) Ltd and Another* [1992] ZASCA 174; 1992 (4) SA 811 (A) at 817F-G.

⁴ J Dugard and M du Plessis *Dugard's International Law: A South African Perspective* 5 ed (2019) at 28; and 1 *Lawsa* 2 ed para 437.

⁵ *Ibid* p 31-37.

⁶ *Ibid* p 45-46.

- (a) apply the Treaty, this Protocol and other Protocols that form part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols; and
- (b) develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States.'

[19] In an argument not foreshadowed in their comprehensive heads of argument (nor in their supplementary heads of argument filed with the leave of this Court), the appellants contended that the particulars of claim disclosed three distinct main causes of action. As I understood the argument, they were the following: (a) a common law delictual claim on the basis that the respondents are liable as joint wrongdoers with Lesotho for dispossessing the Rampai lease without compensation; (b) a self-standing constitutional claim based on a conspiracy to prevent the prosecution of the SADC claim before the SADC tribunal; (c) a claim for constitutional damages under s 172(1)(b) of the Constitution as a just and equitable remedy for the violation of the appellants' rights under s 34 of the Constitution. As will soon become apparent, I agree with the respondents that in terms of the particulars of claim, (b) and (c) above are part and parcel of one alleged cause of action for constitutional damages. And for the reasons that follow, I am unable to detect a common law delictual claim in the particulars of claim.

[20] It must be stated at the outset that the appellants rightly accepted that the alleged delictual cause of action would have nothing to do with international law and would from its inception have been justiciable by a South African court. With this in mind, I turn to an analysis of the particulars of claim as amended. In paras 1 to 3 thereof, the appellants identified the parties to the action. Paragraph 4 read as follows: '4. The cause of action relied on is for an appropriate, just and equitable remedy for the Defendants' unlawful violation of the Plaintiffs' rights including their rights in terms of Sections 7(2), 9(1), 25, 34, 195 and 232 of the Constitution of the Republic of South Africa. Plaintiffs contend that the payment of compensation will be the appropriate, just and equitable remedy. Furthermore:

4.1 These rights were violated by the Defendants' knowing participation in the shuttering and dismantling of the SADC Tribunal at a time when the Plaintiffs had a pending case against Lesotho before that Tribunal. In so doing, the Defendants violated the Plaintiffs' right to access

to justice, as well as basic principles of human rights and the rule of law, as enshrined in the SADC treaty, international law and the Constitution.

4.2 The consequence of the shuttering and dismantling was to deprive the Plaintiffs of their right of access to justice before an independent and impartial tribunal having jurisdiction to decide the case.

4.3 The relevant facts pleaded below are of a wide scope and are interrelated. Subject to the foresaid the broad structure is:

4.3.1 The SADC Treaty and Tribunal are set out in paragraphs 5 to 11;

4.3.2 The Plaintiffs' pending case before the SADC tribunal and the procedural steps already taken in those proceedings are set out in paragraphs 12 to 28;

4.3.3 The key defences raised by Lesotho in those proceedings are set out in paragraph 29;

4.3.4 The reasons why none of Lesotho's defences would have been upheld are set out in paragraph 30;

4.3.5 The outcome of those proceedings in Plaintiffs' favour is set out in paragraphs 31 to 32;

4.3.6 The interests of South Africa in the outcome of those proceedings is set out in paragraph 33;

4.3.7 The Defendants' interference with those proceedings and the steps taken to shutter and dismantle the SADC Tribunal are set out in paragraphs 34 to 46;

4.3.8 The legal costs reasonably incurred by the Plaintiffs in the pursuit of their rights before the SADC Tribunal are set out in paragraph 47;

4.3.9 The Plaintiffs' further reasonable efforts to pursue their rights in an alternative forum and the costs reasonably incurred in the pursuit thereof are set out in paragraphs 48 to 60;

4.3.10 The unlawful violation of the Plaintiffs' rights by the Defendants are set out in paragraphs 61 to 64;

4.3.11 The Plaintiffs' primary claim against the Defendants is set out in paragraphs 65 to 66;

4.3.12 The Plaintiffs' alternative claim against the Defendants is set out in paragraph 67;

4.3.13 The reasons and circumstances supporting Plaintiffs' contention that the payment of compensation will be the appropriate just and equitable remedy are set out in paragraph 68 and 69.'

[21] Paragraphs 61 to 64 of the particulars of claim fell under the rubric 'THE CONSTITUTIONAL CLAIM OF THE PLAINTIFFS'. In para 63 it was alleged that the conduct of the then President of the Republic of South Africa 'when he acted, on behalf of South Africa, together with other SADC members in taking the SADC decisions' described above, had violated the rule of law, the appellants' fundamental right to access to court protected by s 34 of the Constitution and the appellants' right not to be arbitrarily deprived of property. All of this culminated in para 64, which read:

'The Plaintiffs are accordingly entitled, in terms of sections 38 and 172(1)(b) of the Constitution to appropriate and just and equitable relief from the Defendants for their unconstitutional conduct and violation of the fundamental rights of the Plaintiffs.'

The concluding paragraphs of the particulars of claim were paras 65 to 69. They set out the alleged primary and alternative 'appropriate and just and equitable relief as a remedy' for the aforesaid alleged violation of the appellants' constitutional rights, as well as the grounds relied upon by the appellants for this relief.

[22] Thus, no reasonable reading of the allegations in the particulars of claim supports a delictual cause of action. The appellants, however, particularly referred to paras 13 and 23.7 (the latter was further particularised in paras 68.6 and 69.1 to 69.3). But neither of these paragraphs assists the appellants' argument. Both formed part of the description of the SADC claim against Lesotho. Paragraph 13 stated that the SADC claim arose from Lesotho's conduct, acting in concert with the second respondent, in unlawfully dispossessing the mining leases to make way for the execution of the Lesotho Highlands Water Project, ' . . . in violation of the International Minimum Standard ("IMS"), international law, customary international law and the Constitution, in conflict with the SADC Treaty and the SADC Tribunal Protocol and related legal instruments'. In para 23.7 it was essentially stated that in terms of a 'combined litigation and legislation plan', of which details were pleaded, Lesotho unlawfully failed to pay compensation for the expropriated rights, with the consent of South Africa. Quite apart from the powerful indications to the contrary contained in the context of these allegations, they fall woefully short of disclosing a cause of action in delict.

Claim A (value of the Rampai lease)

[23] In my view the particulars of claim encapsulated the following averments in respect of claim A:

- (a) The SADC tribunal would have held in favour of the Burmilla Trust: (i) that the Rampai lease was validly granted in terms of the law of Lesotho; (ii) that the Lesotho court decisions constituted judicial expropriation of the Rampai lease; (iii) that the expropriation took place without compensation; (iv) that the expropriation without compensation constituted a violation of the SADC treaty justiciable before the SADC tribunal; (v) that the international law claim for compensation for expropriation without compensation was properly ceded and transferred to a South African national, to wit the Burmilla Trust; (vi) that Lesotho should be directed to compensate the Burmilla Trust in accordance with the value of the Rampai lease at the relevant time;
- (b) The then President of the Republic of South Africa deliberately participated in precluding the prosecution of the SADC claim before the SADC tribunal;
- (c) That conduct, for which the respondents are liable in law, constituted a violation of the Burmilla Trust's constitutional right under s 34 to have the SADC claim determined before the SADC tribunal;
- (d) In terms of s 172(1)(b) of the Constitution the just and equitable remedy is an award of constitutional damages in accordance with the compensation that the SADC tribunal would have determined.

[24] It cannot be gainsaid that these averments constitute a cause of action in our law. As I have said, the factual allegations have to be accepted for present purposes. These are contained in (a)(iii) (no compensation paid) and (b) (prevention of the prosecution of the SADC claim). There is no reason to question (a)(v) in fact or in law. The high court erred in this regard, by failing to recognise that claim A was that of a South African national based on the violation of its own constitutional rights by the respondents.

[25] The respondents rightly did not challenge most of the aforesaid conclusions of law. It could hardly be placed in dispute that judicial expropriation of valid rights without compensation would constitute a violation of the SADC treaty.⁷ There is no doubt that in principle the SADC tribunal could have awarded compensation to the Burmilla Trust based on the value of the Rampai lease. It must be accepted as a matter of law that

⁷ See *Van Zyl SCA* para 64.

the deliberate and collusive preclusion of the prosecution of the SADC claim would constitute a violation of s 34 rights. And decisions such as *Fose v Minister of Safety and Security*⁸ and *President of the RSA and Another v Modderklip Boerdery (Pty) Ltd*⁹ provide a sound basis for awarding constitutional damages as a just and equitable remedy under s 172(1)(b) of the Constitution.

[26] It follows that only two of these averments remained in contention, namely (a)(i) and (a)(ii) above. In this regard the respondents put forward two main arguments. These were, first, that as a matter of law the SADC tribunal could not interfere with the Lesotho court decisions and secondly, that the court a quo (and this Court) were bound by *Van Zyl SCA*. I shall deal with these contentions in turn. But first I need to say something about the appellants' reliance on the doctrine of estoppel.

[27] The principle of estoppel (also referred to as the principle of preclusion) forms part of international law.¹⁰ But its application is limited. It cannot create rights where none came into existence or was officially recognised.¹¹ In the present context the principle of estoppel is applicable where a state by official act granted a right and thereby represented or created a legitimate expectation that the right had been validly granted under its municipal law or would be honoured. If the grantee in good faith acted upon the representation the state may in appropriate circumstances be estopped from contesting the validity of the right on the basis of non-compliance with some internal requirement of municipal law.

[28] The decision in *Southern Pacific Properties v Egypt*¹² provides a good example hereof. There the government entered into comprehensive agreements with the claimant in terms of which the latter was granted the right to develop certain land and commenced the development. The tribunal dealt as follows with the contention that

⁸ *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 para 60.

⁹ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).

¹⁰ Dugard fn 4 at 201; *Bankswitch Ghana Ltd v The Republic of Ghana acting as the Government of Ghana* (PCA Case No.2011-10) (award save as to costs) paras 11.71 to 11.81.

¹¹ *Vestey Group Limited v The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/04) (award) para 257.

¹² *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3) (awards on the merits).

certain acts of Egyptian officials on which the claimant relied were void under Egyptian law:

'82. It is possible that under Egyptian law certain acts of Egyptian officials, including even Presidential Decree No. 475, may be considered legally non-existent or null and void or susceptible to invalidation. However, these acts were cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments.

83. Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts. If the municipal law does not provide a remedy, the denial of any remedy whatsoever cannot be the final answer.

. . .

85. The principle of international law which the Tribunal is bound to apply is that which establishes the international responsibility of States when unauthorized or *ultra vires* acts of officials have been performed by State agents under cover of their official character. If such unauthorized or *ultra vires* acts could not be ascribed to the State, all State responsibility would be rendered illusory. For this reason,

" . . . the practice of states has conclusively established the international responsibility for unlawful acts of state organs, even if accomplished outside the limits of their competence and contrary to domestic law."

This reasoning was adopted in *Kardassopoulos v Georgia*.¹³

[29] Although official acts of Lesotho represented that the Rampai lease was validly granted, there is in my view no room for the application of the doctrine of estoppel in respect of claim A as pleaded. This is so because Lesotho subsequently instituted successful proceedings to declare the Rampai lease void *ab initio*. The Burmilla Trust fully participated in the proceedings that culminated in the Lesotho court decisions. In the circumstances it was necessary for the Burmilla Trust to allege (and prove at the

¹³ *Ioannis Kardassopoulos v Georgia* (ICSID Case No. ARB/05/18) (decision on jurisdiction) paras 193-194.

trial) that the SADC tribunal would have held that the Lesotho court decisions were wrong and/or constituted judicial expropriation.

Could the SADC tribunal hold that the Rampai lease was valid and expropriated?

[30] It is a tenet of international law that the existence of property rights has to be determined under municipal law.¹⁴ However, international law governs the decision of whether an expropriation occurred.¹⁵ Although international tribunals exercise restraint in evaluating the decisions of municipal courts (especially the highest court of a state), they are not bound by those decisions.¹⁶ This was articulated as follows in *Amco v Indonesia*:¹⁷

‘177. . . . In any case, an international tribunal is not bound to follow the result of a national court. One of the reasons for instituting an international arbitration procedure is precisely that parties - rightly or wrongly - feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgment was binding on an international tribunal such a procedure could be rendered meaningless,

Accordingly, no matter how the legal position of a party is described in a national judgment, an international arbitral tribunal enjoys the right to evaluate and examine this position without accepting any *res judicata* effect of a national court. In its evaluation, therefore, the judgments of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal.’

[31] What this must necessarily mean is that an international tribunal may differ from the conclusion of a national court on the validity of property rights under municipal law, if there is a proper ground for doing so. In *Vigotop v Hungary*¹⁸, for instance, the claimant *inter alia* claimed that rights emanating from an agreement referred to as the

¹⁴ *Van Zyl SCA* fn 1 para 64; *Vestey Group Limited v Venezuela*, supra para 257; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya* (ICSID Case No. ARB/15/29) (award) para 319.

¹⁵ *Vigotop Limited v Republic of Hungary* (ICSID Case No. ARB/11/22) (award) para 583-584.

¹⁶ P Muchlinski et al (2008) *The Oxford Handbook of International Investment Law* at 1017; *Kardassopoulos v Georgia* supra para 146; *Burlington Resources, Inc v Republic of Ecuador* (ICSID Case No. ARB/08/5) (decision on liability) paras 410 and 419; *Luigiterzo Bosca v Republic of Lithuania* (PCA Case No. 2011-05) (award) para 163; *Vigotop v Hungary* supra para 508-509; *EDF International S.A., SAUR International and León Participaciones Argentinas S.A. v Argentine Republic* (ICSID Case No. ARB/03/23) (award) paras 1130-1131; *Infinito Gold Ltd v Republic of Costa Rica* (ICSID Case No. ARB/14/5) (award) para 359.

¹⁷ *Amco Asia Corporation and Others v Republic of Indonesia* (ICSID Case No. ARB/81/1) (award) para 177.

¹⁸ Footnote 15 supra.

Land Swap Agreement had been expropriated. This agreement had, however, been declared null and void by the Hungarian courts. The tribunal carefully considered the reasoning of the Hungarian courts and came to the conclusion that, contrary to the claimant's view, it was 'credible' and persuasive under the circumstances. The tribunal concluded at para 535: 'The Tribunal does not perceive any reason to disagree with the *Curia's* findings and will therefore treat the Land Swap Agreement as null and void in line with the *Curia's* decision'. Thus, the claimant's claim failed, not because the tribunal was bound by the decisions of the Hungarian courts, but because the claimant did not establish any ground for coming to a different conclusion.

[32] The two decisions that the respondents particularly relied upon in this regard, *Arif v Moldova*¹⁹ and *Cortec Mining v Kenya*,²⁰ do not support their contention and actually point the other way. In *Arif v Moldova* the Moldovan Government awarded a tender to the claimant for the creation of a network of duty free stores on its border with Romania. The award of the tender was formalised by agreements entered into between Moldova and the claimant. However, the Moldovan judiciary annulled the tender, as well as the subsequent agreements. The tribunal also carefully considered whether there was any ground to come to a different conclusion than that of the Moldovan courts. It concluded at paras 415-416:

'415. . . . Moreover, there is no evidence in the record that persuades the Tribunal to conclude that the Moldovan judiciary has not applied Moldovan law legitimately and in good faith in the proceedings commenced by Claimant's competitors.

416. Le Bridge has had a fair opportunity to defend its position under Moldovan law before the Moldovan courts. This Tribunal is not a court of appeal of last resort. There is no compelling reason that would justify a new legal analysis by this Tribunal regarding the invalidity of these agreements which has already been repeatedly, consistently and irrevocably decided by the whole of the Moldovan judicial system.'

[33] In *Cortec Mining v Kenya*²¹ the case of the claimants was that a mining licence had been expropriated. The Kenyan courts held that the alleged mining licence never had any legal existence, because the claimants failed to comply with statutory

¹⁹ *Mr Franck Charles Arif v Republic of Moldova* (ICSID Case No. ARB/11/23) (award).

²⁰ Footnote 14 supra.

²¹ Footnote 14 supra.

conditions precedent for the issuance of such a licence. The claimants had the duty to comply with these legal requirements. The tribunal held that the claimants knowingly failed to so comply and knew that they had no entitlement to the mining licence, but were 'successful in bending Mr Masibo (the relevant official) to their will'.²² This firstly illustrates that the matter is entirely distinguishable from the present matter. And in respect of the point under discussion, the tribunal held that the mining licence was void *ab initio* under international law, *inter alia*, because the tribunal agreed with the decisions of the Kenyan courts.²³ To state the obvious, the tribunal could have disagreed with the Kenyan courts if there was a proper ground to do so.

[34] The particulars of claim reveal that the Burmilla Trust relied on three independent grounds for the proposition that the SADC tribunal would have held that the Rampai lease was valid and thus expropriated. These were: (a) that in the pleadings before the SADC tribunal, Lesotho admitted the validity of the Rampai lease; (b) that after the Lesotho court decisions, the Burmilla Trust discovered new evidence which it would have presented before the SADC tribunal and which would have led it to conclude, contrary to the Lesotho court decisions, that the Rampai lease had indeed been validly issued; and (c) that the Lesotho court decisions constituted a denial of justice.

[35] A state may no doubt formally admit before an international tribunal that a right that was allegedly expropriated was valid, despite decisions of its courts to the contrary. This may, for instance, be based upon advice or because of a subsequent change of heart on whatever ground. There can be no reason in principle why a state should not be held to such an admission before an international tribunal. Whether the alleged admission was made, is obviously for the trial court to determine. And, in any event, the pleadings in the SADC claim were not before us. It follows that the SADC tribunal could have held that the Rampai lease was valid because Lesotho admitted that much before it.

²² Ibid *Cortec Mining* paras 222-223 and 363.

²³ Ibid *Cortec Mining* para 333.

[36] The alleged new evidence was that during the period from 1967 to 1972, the relevant Chiefs had transferred the land rights in question to a parastatal of Lesotho, namely the Lesotho National Development Corporation. This, so it was alleged, extinguished the need for the Chiefs to consent to the Rampai lease. It was not a ground of exception that the appellants had failed to aver that they exhausted domestic remedies in respect of the new evidence. The reason for this, no doubt, was that the appellants explicitly averred that they had exhausted all available domestic remedies, alternatively were excused under international law from further attempts at pursuing domestic remedies.²⁴ It is clear, moreover, that the SADC tribunal could have received the said new evidence. The Rules provided for the calling of witnesses by the parties,²⁵ as well as by the SADC tribunal of its own motion or on application by a party.²⁶ In terms of the Rules the SADC tribunal had wide powers to determine its own procedure²⁷ and had inherent power 'to make such orders as may be necessary to meet the ends of justice'.²⁸ As I have demonstrated, the SADC tribunal would not have been bound by the Lesotho court decisions and the new evidence could have constituted a good ground for it to reach a different conclusion.

[37] In terms of international law an indirect expropriation may be effected by a court order.²⁹ This is referred to as judicial expropriation. In *Sistem Mühendislik v Kyrgyz Republic*³⁰ the tribunal succinctly summarised the salient facts as follows (at paras 121 and 122):

'121. The Claimant was deprived of all of its rights in the hotel, and the appropriate form of reparation is compensation for the value of the hotel. Article III (2) of the Turkey-Kyrgyz BIT

²⁴ They pleaded: '23.12 Furthermore, Claimants had exhausted all local remedies available in Lesotho, to no avail. In any event, as the claimants suffered a denial of justice in Lesotho and as the pursuit of any local judicial remedies would have been futile, no further attempted exhaustion of local remedies was required under international law as applied by the SADC Tribunal.

...

30.14 In terms of international law as applied by the SADC Tribunal that Tribunal would have been satisfied that Plaintiffs had exhausted all available domestic remedies alternatively that Plaintiffs were entitled to rely on the futility exception and that there was no need to attempt to pursue any further domestic remedies in Lesotho.'

²⁵ Rule 48.

²⁶ Rule 49.

²⁷ Rule 46.

²⁸ Rule 2.

²⁹ *Saipem SpA v The People's Republic of Bangladesh* (ICSID Case No. ARB/05/7) para 129; *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania* (ICSID Case No. ARB/15/41) para 279.

³⁰ *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v Kyrgyz Republic* (ICSID Case No. ARB(AF)/06/1).

stipulates that in cases of expropriation compensation “shall be equivalent to the real value of the expropriated investment before the expropriatory action was taken or became known.”

122. The history of the investment in the Kyrgyz courts is convoluted. Two things are, however, clear beyond doubt. First, the Claimant operated the hotel and was treated by the Kyrgyz authorities as owner of the hotel from 1999 to March 2005 – and indeed, for some time afterwards, when the Kyrgyz authorities appeared disposed to take steps to restore control of the hotel to Sistem. Second, in March 2005, the Claimant lost control of the hotel as a matter of fact and, by virtue of the decision of the Kyrgyz court on June 27, 2005, the Claimant was deprived of all of the rights in the hotel which it had obtained under the 1999 Agreements.’

The court decision referred to, was that of the Kyrgyz Supreme Court. The tribunal said at para 118 that that decision ‘deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree’.

[38] Far be it from me to attempt to define a denial of justice under international law. I can do no better than repeat what was said in *Infinito Gold v Costa Rica*³¹ para 445: ‘From the authorities cited above, the Tribunal concludes that a denial of justice occurs when there is a fundamental failure in the host State’s administration of justice. The following elements can lead to this conclusion (i) the State has denied the investor access to domestic courts; (ii) the courts have engaged in unwarranted delay; (iii) the courts have failed to provide those guarantees which are generally considered indispensable to the proper administration of justice (such as the independence and impartiality of judges, due process and the right to be heard); or (iv) the decision is manifestly arbitrary, unjust or idiosyncratic. The Tribunal thus concludes that a denial of justice may be procedural or substantive, and that in both situations the denial of justice is the product of a systemic failure of the host State’s judiciary taken as a whole. The latter point explains that a claim for denial of justice presupposes the exhaustion of local remedies, a requirement that is met here as the complaint targets decisions of the highest courts.’

[39] In *OOO Manolium v Belarus*³² para 591, it was stated that judicial expropriation must result from a denial of justice. There are, however, convincing decisions to the contrary. They held that a denial of justice is not a requirement for judicial expropriation, in other words, that judicial expropriation is not limited to instances of denial of justice.

³¹ Footnote 16 supra.

³² *OOO Manolium-Processing v The Republic of Belarus* (PCA Case No. 2018-06) (final award) paras 536-537, where the consequential point was made that the mere bona fide misapplication of the law by a domestic court would not constitute the denial of justice.

In this regard I refer to the well-reasoned majority decision in *Infinito Gold v Costa Rica* paras 359-367,³³ as well as to *Standard Chartered Bank v Tanzania*³⁴ where the following was said at para 279:

'The Tribunal does not disagree with the Respondent that the judiciary should not be implicated, or its acts be described as "*judicial expropriation*" simply because judicial decisions were taken in error or may be considered aberrant. However, judicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its, property or property rights, can still amount to expropriation. While denial of justice could in some case result in expropriation, it does not follow that judicial expropriation could only occur if there is denial of justice.'

[40] This is also illustrated by *Sistem Mühendislik v Kyrgyz Republic*³⁵ where the tribunal held that the court decision constituted a judicial expropriation without consideration of whether there had been a denial of justice. It follows that at least at the exception stage, it has to be accepted that in developing its own jurisprudence under Article 21 of the Protocol, the SADC tribunal might have adopted the principle set out in these international tribunal decisions. Thus, the SADC tribunal could have held that the Rampai lease was valid because the respondents admitted that or the Burmilla Trust proved that before it. On this basis, it could have held that despite the absence of a denial of justice, the Lesotho court decisions amounted to judicial expropriation.

[41] In any event, the particulars of claim could reasonably be read as follows. The LDHA instituted the proceedings that culminated in the Lesotho court decisions. It failed to disclose in those proceedings that the Lesotho National Development Corporation had previously acquired the land rights in question from the relevant Chiefs and that they therefore had no further say in respect of whether the Rampai lease should be granted. This took place in the execution of a 'combined litigation and legislation plan' to unlawfully prevent payment of compensation for the expropriated

³³Footnote 16 supra. It concluded: 'The authorities cited above corroborate the Tribunal's majority conclusion that Costa Rica may incur international responsibility as a result of the decisions of its courts even in the absence of a denial of justice. The existence of such responsibility will depend on whether the requirements of the various treaty standards, such as FET or expropriation, are met.'

³⁴ Footnote 28 supra.

³⁵ Footnote 29 supra.

rights. Lesotho therefore deliberately suppressed vital evidence before the Lesotho courts. That constituted a denial of justice.

[42] In sum, on the pleaded case the SADC tribunal could well have held that the admittedly or proven valid Rampai lease was judicially expropriated, despite the absence or because of a denial of justice.

Did *Van Zyl SCA* preclude claim A?

[43] This is not about *stare decisis*, but about *res iudicata*. The question is not whether *Van Zyl SCA* constituted a binding precedent, but whether it finally decided any of the issues in the present action. The trite requirements of *res iudicata* are that the same relief on the same cause of action must have been finally decided in proceedings between the same parties. Our courts have, however, relaxed these requirements where appropriate situations gave rise to a form of *res iudicata* conveniently referred to as issue estoppel, that is, where the same issue of fact or law was finally decided in previous litigation between the same parties.³⁶ However, where the relaxation of the strict requirements of *res iudicata* is likely to give rise to potential inequity, issue estoppel should not preclude subsequent proceedings.³⁷

[44] There is a particular danger of unfair consequences in applying issue estoppel in this matter. Its application requires the comparison of the issues in two complex matters for vastly different relief instituted many years apart. Because many of the factual events relied upon in the second matter took place after the first had been decided, it would not have been easy to foresee their implications at the time of the first matter. Against this background I turn to an analysis of *Van Zyl SCA*.

[45] There the present appellants (and others) requested the present respondents to provide them with diplomatic protection in respect of the five aforesaid mining leases, including the Rampai lease. When this request was denied, the appellants approached the Pretoria High Court for an order reviewing and setting aside the decision to decline

³⁶ *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* [1994] ZASCA 144; 1995 (1) SA 653 (A); [1995] 1 All SA 517 (A) at 669F-G; *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) paras 10 and 23.

³⁷ *Prinsloo NO v Goldex* supra paras 23-27; *Hyprop Investments Ltd v NSC Carriers and Forwarding CC and Others* [2013] ZASCA 169; 2014 (5) SA 406 (SCA); [2014] 2 All SA 26 (SCA) paras 20-23.

diplomatic protection and for a *mandamus* essentially aimed at directing the respondents to provide diplomatic protection. The High Court dismissed the application and the appellants appealed to this Court. In the opening paragraph of the judgment on appeal, Harms ADP, writing for the court, characterised the matter as follows:

‘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.’

[46] The court proceeded to state that the appellants had recognised that their application was based on South African law, because international law did not recognise a right of a national to diplomatic protection.³⁸ This Court held, however, that under our law there was similarly no right to diplomatic protection; a national only had the right to the rational consideration of a request for diplomatic protection.³⁹ This Court held that the respondents had not in the circumstances been entitled to afford the appellants diplomatic protection. The essential reasons for this conclusion were threefold.

[47] The first and main reason was that the appellants did not establish that an international delict had been committed.⁴⁰ The court reasoned that there can only be an international wrong if there is an international right.⁴¹ Therefore the appellants had to show that the Rampai lease was valid under Lesotho law and subject to international law. They did not do so. The Lesotho court decisions held that the Rampai lease was void *ab initio*. It was in any event not internationalised by express or tacit agreement between the parties thereto.⁴²

[48] Secondly, the alleged delict had been committed against Lesotho companies (including Swissborough) and not against their South African shareholders. Under the

³⁸ *Van Zyl SCA* fn 1 para 60.

³⁹ *Ibid* paras 6 and 51.

⁴⁰ *Ibid* paras 76 and 81.

⁴¹ *Ibid* para 65.

⁴² *Ibid* para 65-72.

nationality rule the respondents were not in these circumstances entitled to exercise diplomatic protection in respect of their national shareholders.⁴³ Moreover, so the court said, in terms of the continuing nationality rule (an aspect of the nationality rule) the cession of rights by the Lesotho companies to Burmilla Trust disqualified it (and the companies) from diplomatic protection. A cessionary may be entitled to the proceeds of a ceded claim but cannot by virtue of the cession become a victim for purposes of diplomatic protection.⁴⁴

[49] Finally, the appellants did not exhaust all legal remedies against Lesotho, which was a prerequisite for the respondents to claim diplomatic protection in respect of the appellants from Lesotho.⁴⁵ The court pointed out that the Lesotho court decisions related only to the Rampai lease and were not *res iudicata* in respect of the four other mining leases. Importantly, the court said that the appellants were entitled to use the aforesaid new evidence in future proceedings aimed at showing that the Lesotho court decisions had been wrongly decided.⁴⁶

[50] This Court emphasised that the ‘real complaint’ of the appellants, namely that the Lesotho court decisions amounted to an expropriation without compensation and a denial of justice, had not been part of the appellants’ case before it.⁴⁷ In the result, this Court in *Van Zyl SCA* was not called upon (and was not clothed with jurisdiction) to decide whether the Lesotho court decisions that the Rampai lease was invalid withstood scrutiny under international law, nor whether they constituted judicial expropriation.

[51] *Van Zyl SCA* clearly did not determine the same relief on the same cause of action as in this matter. And for obvious reasons it did not determine: (a) what the SADC tribunal would have held in respect of the SADC claim; (b) whether Lesotho violated the SADC treaty; (c) whether the respondents violated the constitutional rights of the appellants; and (d) whether constitutional damages would be a just and equitable remedy for such violation. In my view *Van Zyl SCA* did not decide any of the issues set

⁴³ Ibid para 82.

⁴⁴ Ibid para 86.

⁴⁵ Ibid para 87.

⁴⁶ Ibid para 91.

⁴⁷ Ibid paras 48-49, 67-77.

out in para 23 above against the appellants. It follows that the present action is not barred by *Van Zyl SCA*.

[52] For these reasons I conclude that the particulars of claim disclosed a cause of action in respect of claim A. The exception should not have been allowed in respect thereof.

Claim B (moral damages)

[53] This curious claim was for ‘. . . severe humiliation and indignity, insult, damage to his good name and reputation and the fear and anxiety caused by harassment and intimidation’. No further particulars were pleaded. In context these allegations related to the conduct of Lesotho. The novel claim for a *solatium* or general damages as constitutional damages⁴⁸ was, of course, brought on the basis that the SADC tribunal would have allowed Mr van Zyl’s claim against Lesotho.

[54] Article 15.2 of the Protocol articulated a trite principle of international law as follows:

‘No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.’

It is clear from the particulars of claim that Mr van Zyl did not prosecute this claim against Lesotho in the Lesotho courts. It follows as a matter of law that the SADC tribunal would have dismissed the claim for moral damages. This point was adequately raised in ground 4 of the exception. Therefore, the particulars of claim did not disclose a cause of action in respect of claim B.

Claim C (costs of the SADC claim)

[55] In the light of my conclusion in respect of claim B, it is strictly speaking only necessary to consider the remaining claims as far as the Burmilla Trust is concerned. For completeness I shall nevertheless do so in respect of both appellants. Claim C is for constitutional damages on the same basis as claims A and B, namely that the SADC tribunal would have awarded the appellants the costs of their SADC claim. Article 29

⁴⁸ See *Minister of Police v Mboweni and Another* [2014] ZASCA 107; 2014 (6) SA 256 (SCA) paras 23 and 24; and *Komape and Others v Minister of Basic Education* [2019] ZASCA 192; 2020 (2) SA 347 (SCA) para 58.

of the Protocol provided that unless the SADC tribunal decided otherwise, each party to a dispute shall pay its, his or her own legal costs. This was echoed in Rule 78.1, but Rule 78.2 provided that the SADC tribunal might, in exceptional circumstances, order a party to proceedings to pay the costs incurred by the other party.

[56] The appellants did not allege that exceptional circumstances would have entitled them to a costs order. However, the respondents did not except to the particulars of claim on the ground that even if the SADC claim would have succeeded, costs would not have been awarded against Lesotho by reason of the absence of exceptional circumstances. In the circumstances I think that it must on exception be accepted that these costs could have been ordered against Lesotho and could therefore be awarded as constitutional damages in favour of the Burmilla Trust. On this basis the exception against claim C should also have been dismissed.

Claims D and E (wasted subsequent legal costs)

[57] The appellants did not plead any legal basis for claim D (legal costs incurred in respect of the SADC saving application). For this reason alone, the exception against claim D was correctly upheld. In respect of claim E (legal costs incurred in respect of the proceedings before the PCA tribunal, the Mauritius tribunal and in the Singapore courts), the appellants pleaded:

‘Those costs were reasonably incurred, and would not have been incurred but for the shuttering of the SADC Tribunal. The wrongful and unlawful conduct of the defendants was a direct cause of plaintiffs incurring those costs, which was reasonably foreseeable, and plaintiffs therefore include those amounts in their claim for compensation.’

[58] On a proper analysis of these allegations, they speak to causation in delict. But as I have demonstrated, claim E was not based on delict. It was a claim for constitutional damages under s 172 of the Constitution. For present purposes it must be accepted that unconstitutional conduct for which the respondents are liable precluded the prosecution of the SADC claim.

[59] In *Minister of Law and Order v Kadir*⁴⁹ at 318G-J Hefer JA said, in respect of the determination of wrongfulness in delict on exception:

'Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited earlier Fleming rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of all the circumstances of the case and of every other relevant factor. This would seem to indicate that the present matter should rather go to trial and not be disposed of on exception. On the other hand, it must be assumed - since the plaintiff will be debarred from presenting a stronger case to the trial Court than the one pleaded - that the facts alleged in support of the alleged legal duty represent the high-water mark of the factual basis on which the Court will be required to decide the question. Therefore, if those facts do not prima facie support the legal duty contended for, there is no reason why the exception should not succeed.'

The Constitutional Court expressly approved this passage in *Carmichele v Minister of Safety and Security*.⁵⁰ In my view this decision is equally applicable in the present context. It follows that the question is whether the factual allegations of the appellants did not even *prima facie* support the proposition that it would be a just and equitable remedy to award compensation for the legal costs incurred in respect of the proceedings before these tribunals and in the Singapore courts as constitutional damages under s 172(1)(b). Ground 10 of the exception specifically raised this issue.

[60] Because the appellants in this regard pinned their colours to the delictual causation mast, their particulars of claim lacked factual allegations that could support claim E as constitutional damages. Moreover, the particulars of claim made clear that the appellants' causes of action in respect of claims A and B had arisen by May 2011 at the latest. These claims against the respondents could therefore have been instituted forthwith. Yet, claim E was for the costs subsequently incurred in proceedings against Lesotho. In the absence of factual allegations that could fill this lacuna, I find no basis for claim E. It follows that claim E was not *prima facie* supported by factual allegations. The exception in respect thereof was correctly allowed.

⁴⁹ *Minister of Law and Order v Kadir* [1994] ZASCA 138; 1995 (1) SA 303 (A); [1995] 1 All SA 457 (A).

⁵⁰ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC) para 80.

[61] To summarise, the exception should have been dismissed in respect of claim A and claim C, only as far as the Burmilla Trust was concerned, but was otherwise correctly allowed. This finding results in substantial success for the Burmilla Trust in the court a quo and on appeal. As I have explained, the appeal of Mr van Zyl must fail *in toto*. Costs should follow these results. Both sides employed three counsel and I believe that that was reasonable in the circumstances. The appellants should, of course, be offered the opportunity to seek to amend their particulars of claim subsequent to this judgment.⁵¹

[62] In the result, I make the following order:

- 1 The appeal of the first appellant is upheld with costs, including the costs of three counsel.
- 2 The appeal of the second appellant is dismissed with costs, including the costs of three counsel.
- 3 The order of the court a quo is set aside and replaced with the following:
 - ‘(a) The exception against the claims of the first plaintiff in respect of the value of the Rampai mining lease and the costs of the prosecution of that claim before the SADC tribunal, is dismissed with costs, including the costs of two counsel;
 - (b) The exception is allowed in respect of all other claims of the first plaintiff and they are struck out;
 - (c) The exception is allowed in respect of all the claims of the second plaintiff and they are struck out with costs, including the costs of two counsel.’
- 4 The appellants may seek to amend their particulars of claim by notice delivered within 30 days of the date of this judgment.

C H G VAN DER MERWE
JUDGE OF APPEAL

⁵¹ *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Limited* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 8.

Mabindla-Boqwana JA dissenting (Mbatha JA concurring)

Introduction

[63] I have had the privilege of reading the carefully reasoned judgment of my brother Van der Merwe JA (first judgment). I agree with its conclusions in regard to Mr van Zyl's appeal, the inapplicability of the doctrine of estoppel in this case and its outcome on the wasted costs claimed by the appellants for the litigation embarked upon subsequent to the demise of the SADC tribunal. However, I differ with the first judgment in relation to the outcome of Burmilla Trust's appeal. These are my reasons.

[64] Naturally, I agree with my colleague that we are dealing with the matter at an exception stage and the well-established principles applicable therein, which he has set out above, should be kept in mind. It should also be emphasised that as a remedy an exception is available when the objection goes to the root of the opponent's claim or defence⁵² and its true objective is *either, to settle the case, if possible, or at least part of it in a way that would avoid a possibly protracted and costly trial*.⁵³ It is a useful mechanism to weed out cases without legal merit⁵⁴ at an early stage.

[65] This matter has a long and tortuous litigation history, the kernel of which began with the findings made by the Lesotho courts⁵⁵ more than two decades ago that the Rampai lease was null and void (the Lesotho Rampai judgment). The appellants have litigated in different fora, starting in the Lesotho high court with a trial that lasted more than 50 days in the 1990s. Having lost in both the Lesotho high court and appeal court, they continued to explore different avenues, across the world, seeking a claim rooted in the validity of the Rampai lease. The latest iteration of the appellants' claim developed into the case before the court a quo, from which this appeal arises. I demonstrate why I am of the view that the court a quo was correct in upholding the

⁵² A C Cilliers, C Loots and H C Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 632.

⁵³ *Ibid* at 630 and 632. '[I]t is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part.' (*Kahn v Stuart* 1942 CPD 386 at 391).

⁵⁴ D E van Loggerenberg *Erasmus Superior Court Practise* (vol 2) 2 ed (2015) at D1-294.

⁵⁵ In *Swissborough Diamond Mines (Pty) Ltd and Another v Commissioner of Mines and Geology and Others* (CIV/APN/394/91) [1999] LSHC 41 (28 April 1999) (*Swissborough I*) and in *Swissborough Diamond Mines (Pty) Ltd and Another v Lesotho Highlands Development Authority* [2000] LSHC 119; 1999-2000 LLR-LB 432 CA (01 January 2000) (*Swissborough II*).

wholesale of exceptions raised by the respondents, the effect of which was to dispose of the appellants' claim.

[66] The crux of the appellants' case at the trial, as defined by the appellants in their particulars of claim, is whether the now defunct SADC tribunal would have awarded them the claimed amounts, had it not been shuttered and dismantled by the SADC Summit, with the participation and signature of our then President, whose conduct was found to have been unlawful and unconstitutional by the Constitutional Court in *Law Society*.⁵⁶

[67] On the basis of that unlawful conduct the appellants claim constitutional damages against the respondents. These are made up of amounts claimed in the SADC tribunal, wasted costs for 'attempting' to have their dispute determined at the SADC tribunal and for taking their disputes before the PCA tribunal, the Mauritius tribunal and the Singapore courts.

[68] According to the appellants, a South African court would be called upon to step into the shoes of the SADC tribunal. While that may be required, it is important to state that the appellants' claim is for constitutional damages, brought under South African law and premised upon ss 38 and 172(1)(b) of the Constitution. Asking a question of what the SADC tribunal would have found does not transform the trial court seized with this action into the SADC tribunal. The question to be asked by the trial court is whether the appellants are entitled to constitutional damages on the basis that, had it not been for the actions of the respondents in concert with other SADC member states and their heads, the SADC tribunal would have found in the appellants' favour and awarded their claim.

The implications of the *Van Zyl SCA* judgment

[69] It is perhaps opportune to start with the impact of the *Van Zyl* judgments in the appellants' claim, if any. Mr van Zyl and associated entities approached the South African government to provide them with diplomatic protection against Lesotho on the basis that Lesotho had committed an international delict by cancelling and revoking

⁵⁶ Footnote 2 supra.

five mineral leases, including the Rampai lease. When the government refused, they brought an application to review that decision before the now Gauteng Division of the High Court, Pretoria contending that Lesotho had expropriated their property rights without compensation. The application served before Patel J, who gave a detailed judgment⁵⁷ dealing with international law, dismissing the application on a number of bases including that the mining leases concerned were a matter of domestic law and not internationalised. The matter came before this Court on appeal (*Van Zyl SCA*), which agreed in general terms with Patel J's reasoning.⁵⁸

[70] In his founding affidavit of that application Mr van Zyl had relied on the claim of a violation of the appellants' rights by cancellation of the mining leases by Lesotho without payment of compensation. He said that this constituted an expropriation that did not comply with minimum international standards and as a result Lesotho was obliged to pay the appellants damages in an amount of some R3 billion.⁵⁹ In considering whether the government was entitled to grant the appellants' diplomatic protection in international law, the court in *Van Zyl SCA* said that the appellants had to show that such a right vested in the government.⁶⁰

[71] The court went on to state a number of international law principles.⁶¹ These included the principle that the appellants were not subjects of international law, and therefore held no rights under international law; as well as the principle that aliens in a foreign country are subject to the laws of that country in the same way as nationals of that country. Importantly, for the purposes of this judgment, the court in *Van Zyl SCA* also stated the following pertinent tenets of international law.

[72] Firstly, that property rights are determined by municipal law, in particular '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'.⁶²

⁵⁷ *Van Zyl and Others v Government of the Republic of South Africa and Others* 2005 (11) BCLR (11) 1106 (T) (*Van Zyl HC*).

⁵⁸ *Van Zyl SCA* footnote 1 *supra* para 44.

⁵⁹ *Van Zyl SCA* para 37.

⁶⁰ *Van Zyl SCA* para 62.

⁶¹ *Van Zyl SCA* para 64.

⁶² *Ibid.*

In this regard, it referred to *Panevezys-Saldutiskis Railway (Estonia v Lithuania)*,⁶³ which stated the principle that '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*'.⁶⁴ (My emphasis.) In this vein, the court in *Van Zyl SCA* captured the following:

'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. 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.'⁶⁵

[73] Secondly, contracts between states and aliens may be made subject to international law principles and international adjudication by agreement, expressly or by necessary implication. And thirdly, a sending state may afford diplomatic protection only when a number of things have been fulfilled: (a) the victim must be a national of the sending state; (b) the victim must have exhausted local remedies of the state that acted errantly; and (c) '*an international delict whereby the victim has been injured by an unlawful act imputable to the other state [must have] been committed*'.⁶⁶ (My emphasis.)

[74] The court in *Van Zyl SCA* then went on to determine if there were any international rights and wrongs in the case before it. The court, firstly, held that, '[b]efore 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*'.⁶⁷ (My emphasis.) The court agreed with Patel J that because the lease was concluded between Lesotho and a Lesotho company under Lesotho mining laws, its validity had to be determined according to Lesotho law by Lesotho courts.⁶⁸

⁶³ *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* 1939 PCIJ (Reports Series A/B) no 76.

⁶⁴ *Panevezys-Saldutiskis Railway* para 73.

⁶⁵ *Van Zyl SCA* para 64.

⁶⁶ *Ibid.*

⁶⁷ *Van Zyl SCA* para 65.

⁶⁸ *Van Zyl SCA* para 66.

[75] Most importantly, the court emphasised that:

'[T]his 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.'⁶⁹ (My emphasis.)

[76] Then, the court proceeded to deal with whether Lesotho had agreed that the Rampai lease would be determined according to international law and by an international tribunal.⁷⁰ There, the appellants had argued that the mining leases in question, including the Rampai lease, were long-term international agreements or bilateral investment treaties, which by virtue of their character import international law by implication.⁷¹ The argument was found to be opportunistic and that the Rampai lease hardly had any characteristics in the authority referred to by the appellants, which largely spoke to foreign investments, co-operation and obligations between parties.⁷²

[77] The court stated, '[b]ecause the Rampai lease was invalid ab initio, 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)'.⁷³

[78] The court further rejected an argument that an arbitration clause, which was silent on the fact that Lesotho law was applicable or that the arbitration had to be local, meant that it had to be international. Similarly, a related argument that because Lesotho had acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), it was bound to submit to ICSID arbitration, was rejected. The court noted that article 25(1) of the ICSID provided that '[t]he jurisdiction of [this arbitral court] shall extend to any legal dispute arising directly

⁶⁹ *Van Zyl SCA* para 67.

⁷⁰ *Van Zyl SCA* para 68.

⁷¹ *Van Zyl SCA* para 69.

⁷² *Van Zyl SCA* para 70.

⁷³ *Van Zyl SCA* para 71.

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 [this arbitral court]*.⁷⁴ This finding becomes important in my later deliberation of the case, in relation to the international authorities that the appellants have relied on to suggest that the SADC tribunal would have had a free hand in assessing their claim without any preliminary constraints.

[79] Returning to the findings of the court in *Van Zyl SCA* on the aspect under consideration. Apart from finding that South Africa was not another contracting party to the ICSID, that Swissborough was not a South African national and that the parties did not agree in writing otherwise to submit to the ICSID arbitration, the court found that the Rampai lease *was not an investment contract*.⁷⁵ (My emphasis.)

[80] The court then concluded 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’.⁷⁶

[81] Lastly, the court went on to say something about the appellants’ actual underlying claim: the insinuation that the Lesotho Rampai judgment amounted to expropriation without compensation for which Lesotho was responsible; and further that it amounted to an international wrong, because it was a denial of justice by the Lesotho courts. In this regard, the court made two observations: first, it stated that it had shown that that was not part of the appellants’ case before the court; and secondly, that the underlying requirement of the existence of an international right was absent. The latter statement suggests that even if the case of denial of justice was before it, the existence of the international right would need to be shown. The court went on to say that to succeed the appellants had accepted that they had to show ‘a fundamental failure of justice’.⁷⁷ And since the main thrust of the appellants’ argument was really directed at the merits of the Lesotho Rampai judgment, and because the appellants

⁷⁴ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), art 25(1).

⁷⁵ *Van Zyl SCA* para 74.

⁷⁶ *Van Zyl SCA* para 76.

⁷⁷ *Van Zyl SCA* para 77.

believed that the Lesotho courts were wrong, they had assumed that there must have been a denial of justice.⁷⁸

[82] What is demonstrated by the analysis of the *Van Zyl SCA* judgment above is that although the cause of action was different, namely, the seeking of diplomatic protection, the factual underlying basis – which was the alleged expropriation without compensation, that resulted from a finding that the Rampai lease was void *ab initio* – formed the same factual basis for the claim in the present matter as well as at the SADC tribunal. As it has been illustrated by the court in *Van Zyl SCA*, in order to determine whether the appellants were entitled to diplomatic protection, it had to consider, among others, if an international delict was committed. In doing so, it set out legal principles applicable to come to that conclusion and made firm findings as regards the law applicable internationally, and as to how the alleged expropriation of the Rampai lease was to be examined. It found that no rights had been established, and accordingly no international wrong.

[83] The appellants submitted that the courts in the *Van Zyl* judgments found that there was no international delict committed by the Lesotho courts based on customary international law, however, they were not asked to consider the violation of the SADC treaty, and the relevant treaty was in any event not applicable at the time. Articles 4(c) and 6.1 of the SADC treaty are general obligations dealing with protection and promotion of the rule of law and fundamental rights by member states. They say nothing about the acquisition of mining rights or how those rights are created, their ownership or expropriation.

[84] Whether the courts involved in the *Van Zyl* judgments were asked to deal with the question of the breach of the SADC treaty does not assist the appellants in my view, because that would undoubtedly be a conclusion reached when an international wrong is committed by a member state. To get to that conclusion, a determination of the fundamental question relating to the existence of the rights under the Rampai lease would be required, and *Van Zyl SCA* has stated in many ways how that is to be done. Reliance would still need to be placed on international law principles, including

⁷⁸ *Van Zyl SCA* paras 76 and 77.

customary international law (as did the *Van Zyl* courts) and/or any other relevant treaty that deals directly with the questions of whether expropriation had occurred and whether compensation was due. The claim of constitutional damages rests on the finding by the trial court that the SADC tribunal would have found the Rampai lease to be valid. It is not a self-standing claim for an injury caused simply by the respondents infringing the appellants' constitutional rights. As regards the entitlement of the use of new evidence mentioned by the court in *Van Zyl SCA*, this was made in the context of the Lesotho judgments not being *res iudicata* in respect of the four remaining leases and not the Rampai lease.⁷⁹

[85] In light of this, I agree that the case is not *res iudicata* in the traditional sense, as the first judgment has described. However, I am of the view that this is a kind of case where the doctrine should be relaxed and issue estoppel applied. It will not be unjust to apply issue estoppel in this case, for the reason that the appellants have had a fair chance of the issues determined by the courts in lengthy hearings. In both the high court and before this Court there has been an enquiry of issues of fact and the law that underlie the appellants' claim. While there is no commonality in the cause of action and the relief claimed, the issue raised in this case constitutes an integral part of the issues determined in *Van Zyl SCA*.

[86] Even if the doctrine of *res iudicata* cannot be relaxed in this case, in my view, there is something to be said about the fact that the court a quo was bound by the reasoning in *Van Zyl SCA* insofar as the findings were made as to how the issue of the alleged expropriation of the Rampai mining lease was to be treated.⁸⁰ In *Mkhize NO v Premier of the Province of KwaZulu-Natal and Others*,⁸¹ in the Constitutional Court, Dlodlo AJ held that a 'final determination of a legal issue is relevant to the application of the doctrine of *res judicata*, but also to that of precedent'.⁸² The doctrine of precedent requires that where a legal issue has been authoritatively decided by a higher court,

⁷⁹ *Van Zyl SCA* para 91.

⁸⁰ *S v Zuma and Another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) para 157.

⁸¹ *Mkhize NO v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 50; 2019 (3) BCLR 360 (CC).

⁸² *Ibid* para 46.

later issues arising from similar facts must be resolved on the authority of the precedent set by the higher court.⁸³ Dlodlo AJ importantly observed:

'Irrespective of whether we apply the doctrine of precedent or issue estoppel, the crucial question is whether the Supreme Court of Appeal made a final determination on the legal issue that subsequently came before Sishi J. If it did not, neither precedent nor *res judicata* – even in the extended form of issue estoppel – can assist Ms Mkhize. If it did, then Ms Mkhize must succeed on the basis of issue estoppel and the doctrine of precedent, *which overlap in this case.*' (My emphasis.)

[87] In my view the same can be said about this case. A determination was made in *Van Zyl SCA* not only on factual issues peculiar to this case but also on legal issues which I have dealt with above. Thus, the court a quo was not wrong in its finding that it was bound by the findings of the court in *Van Zyl SCA*. Be that as it may, the findings pronounced by the court in *Van Zyl SCA* were consonant with international law and, even independently, the SADC tribunal would have asked the same questions posed and determined by the court in *Van Zyl SCA*.

[88] Before I deal with that issue, *en passant*, let me address what I thought was a submission made by counsel for the appellants during oral argument which seemed to suggest that because the trial court would be required to inquire into questions of what the SADC tribunal would have found, it could not be bound by the South African judgments. To the extent that such a suggestion was made, I differ. The trial court as a South African court would still be bound by the Constitution, the law and judgments of the Republic.

The approach to be followed by the SADC tribunal

[89] The views taken by the court in *Van Zyl SCA* and earlier in the high court by Patel J are in concert with international law, namely, that the creation and existence of a property right is determined by the relevant domestic law. Further, that a clear legal title to the property is a requisite to compensation for expropriated property. This much was also found in the SADC tribunal's own decision of *Mike Campbell (Pvt) Ltd and*

⁸³ Ibid para 47.

*Others v Republic of Zimbabwe*⁸⁴ (*Campbell*). In *Campbell*, the applicants' legal title was beyond question, so it was not the issue the SADC tribunal had to determine. The question (apart from the issues of jurisdiction and denial of justice) was whether compensation was payable for agricultural land compulsorily acquired by the Republic of Zimbabwe under the land reform programme it had undertaken.⁸⁵ In other words, there was no dispute as to the title of the applicants to the land.

[90] The same view was followed by the Singapore Court of Appeal in *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho*,⁸⁶ the Singapore leg of the dispute between the appellants and Lesotho. Referring to investment treaty case law, there the court held:

'In *Emmis International Holding, BV and others v Hungary*, (ICSID Case No ARB/12/2), Award, 16 April 2014, the tribunal noted (at [162]) that:

"[i]n order to determine whether an investor/claimant holds property or assets capable of constituting an investment *it is necessary in the first place to refer to host State law*. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law. . . ."

Similarly, in *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award, 8 December 2016, the tribunal observed (at [556]) that:

". . . [g]eneral international law does not accurately define the concepts of contract, action, patent, etc. This is provided for by domestic law. These rights, once defined, are protected by certain rules of international customary and treaty law."⁸⁷

[91] It is, thus, incorrect for the appellants to suggest that domestic law will have no bearing on international law, or rather a leap could be made to consider international law regardless of the domestic law. The SADC tribunal would have had to determine

⁸⁴ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* SADC (T) Case No 2/2007 [2008] SADCT 2 (28 November 2008) at 57.

⁸⁵ *Campbell* at 17.

⁸⁶ *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2018] SGCA 81 (27 November 2018) (*Swissbourgh*, Singapore Appeal Court).

⁸⁷ *Ibid* paras 105 and 106. See also para 103 where the court held: '. . . "[I]t is the municipal law of the host state that determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests. It is the investment treaty, however, that supplies the classification of an investment and thus prescribes whether the right *in rem* recognised by the municipal law is subject to the regime of substantive protection in the investment treaty'. See also United Nations Conference on Trade and Development (UNCTAD), *Expropriation: A Sequel* (2012).

the validity of the Rampai lease, if it gets to that stage, in terms of Lesotho law. It would have to assess whether a right in title was acquired in terms of Lesotho law.

[92] Without a clear legal right,⁸⁸ international law is not triggered, as there is no expropriation.⁸⁹ The issue, in my view, is not whether the SADC tribunal would be bound by the Lesotho court judgments. The question is whether, taking into account the principle of subsidiarity in international law, the SADC tribunal would show the attendant deference to the Lesotho courts' decisions.

[93] It has been recently held by the Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*.⁹⁰

'In fact, far from international law being reified to some superior status, crystallised as a structural, even constitutional, principle of international law is the doctrine of subsidiarity, and, more regionally-specific, the margin of appreciation doctrine. . . . As a principle, subsidiarity recognises the centrality of State consent in creating legal obligations and the exercise of discretion in binding themselves thereto. It is a manifestation of an understanding, at the international level, that the main social function of international law is to supplement, not supplant, domestic law. *Thus, latitude is granted to States, the conduits through which international law is given effect, in recognition of the fact that national institutions are better situated and equipped to implement this law domestically. And, far from reifying international law as some ultimate paragon, when measuring a State's compliance with international obligations, international fora exercise restraint and defer to the measures adopted by the member State.*' (My emphasis.)

[94] It was stated in *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, *Merits, Judgment*,⁹¹ that 'it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the

⁸⁸ 'Clear title is a title free of claims, doubts, or disputes about ownership'. See Cornell Law School, Information Institute, available at: https://www.law.cornell.edu/wex/clear_title.

⁸⁹ United Nations Conference on Trade and Development (UNCTAD) Expropriation: A Sequel (2012) at 22, available at: <https://unctad.org/search?keys=+EXPROPRIATION%3A+A+SEQUEL+-+UNCTAD>.

⁹⁰ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) para 119.

⁹¹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, ICJ Reports 2010 p 639 para 70.

power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts . . . Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation'. I deal with this issue more when I examine the denial of justice question. On the strength of this authority, as to the question of whether the Rampai lease was void *ab initio*, the SADC tribunal would not undertake a new legal analysis of the Lesotho law, but would defer to the Lesotho courts on this issue unless exceptional reasons exist for it to interfere. The nuanced issue proposed in the first judgment is that it would be up to the SADC tribunal to decide whether to evaluate the issues afresh or confirm the analysis adopted by the domestic courts.

[95] It is important to note that, in advancing the proposition that the SADC tribunal would be free to assess the facts afresh with no preliminary considerations or constraints (as long as expropriation is involved or alleged), the appellants significantly placed reliance on international investment arbitration decisions which were made pursuant to matters brought in terms of international investment treaties, including bilateral investment treaties and/or multilateral investment treaties. However, the appellants' claim before the SADC tribunal is not premised on any bilateral or multilateral investment treaty. Investment treaties bind states that are members to those treaties. They are directed at the overall aim of encouraging foreign investment and strengthening the parties' mutual economic relations. They define the nature of the investment. And for present purposes, they tend to define what constitutes expropriation, and the requirement to pay compensation, as well as provide rights in relation to those investments and member states.⁹² Such was found by the Singapore Court of Appeal in the *Swissborough, Singapore Appeal Court*⁹³ matter when it said: 'In any event, we doubt whether the Appellants even had a right to refer to begin with. The Kingdom asserts that the SADC Treaty and the Tribunal Protocol are *not* investment protection instruments, and confer upon the Appellants no enforceable right of access to the SADC Tribunal and no corresponding obligation on the part of the SADC Member States to protect or defend the existence of the SADC Tribunal. This submission, taken to its logical conclusion,

⁹² C McLachlan, L Shore and M Weiniger *International Investment Arbitration: Substantive Principles* 2 ed (2017) Chapter 2 'The Basic Features of Investment Treaties' at 26ff.

⁹³ Footnote 86 *supra*.

would suggest that the right of investors to refer a dispute to the SADC Tribunal did not even exist at the time the SADC Claim was brought. In our judgment, the SADC Treaty and the Tribunal Protocol are indeed *not* investment protection instruments, and there was indeed no substantive right to refer. . . .⁹⁴

[96] As already stated, in *Van Zyl SCA*, this Court found that the Rampai lease was not an investment contract.⁹⁵ Reliance on the ICSID was therefore not helpful to the appellants' cause. The SADC treaty upon which the appellants rely is not an international investment treaty and is not pleaded to be such by the appellants, but as a treaty that generally protects human rights and the rule of law. The cases relied upon must accordingly be treated with caution. This takes me to what I would term 'preliminary constraints' that the SADC tribunal would have had to take into account before it could get to assess the merits of the case.

Denial of justice and exhaustion of local remedies

[97] In an attempt to get around the difficulty posed by the fact that the existence of rights is assessed under the Lesotho law – and in terms of that law the Rampai lease was found to be void *ab initio*, which means there could be no expropriation under international law – the appellants seek to rely on judicial expropriation. As stated in *Van Zyl SCA*, even this type of expropriation requires there to be a right or a title to start with. As mentioned before, even though the case of denial of justice was not before the court in *Van Zyl SCA*, it nevertheless stated that the existence of the right must still be shown.⁹⁶

[98] The appellants have argued that the annulment of the Rampai lease by the Lesotho courts, in itself, constituted a judicial expropriation, which constitutes a violation of Lesotho's international obligations. Indirect expropriation based on a judicial decision has been recognised. However, in order for there to be judicial

⁹⁴ *Swissborough, Singapore Appeal Court* para 146. See also *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (Judgment) 1970 ICJ Reports 3 para 63, where it was held that most cases in the general arbitral jurisprudence 'rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case'.

⁹⁵ *Van Zyl SCA* para 74.

⁹⁶ *Van Zyl SCA* para 77.

expropriation there must be a denial of justice or some kind of illegality by the courts.⁹⁷ In *OOO Manolium-Processing v Belarus*,⁹⁸ it was concluded that '[w]hile taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice'.

[99] The appellants refer to the case of *Saipem SpA v People's Republic of Bangladesh*⁹⁹ (*Saipem*) to advance an argument that a judicial act could result in an expropriation where a domestic court's ruling was tantamount to a taking of residual contractual rights arising from the investments. *Saipem* was discussed in *Swisslion DOO Skopje v Macedonia* (*Swisslion*),¹⁰⁰ where it was pointed out that Saipem (the claimant in that case) had itself recognised that 'a predicate for alleging a judicial expropriation is unlawful activity by the court itself'.¹⁰¹ In that regard, the tribunal in *Swisslion* held:

'The award [in *Saipem*] recounts the claimant's acknowledgement that it is "an *illegal action of the judiciary* which has the effect of depriving the investor of its contractual or vested rights constitutes an expropriation which engages the State's responsibility". This point, with which the respondent in that case agreed, was accepted by the tribunal, which noted that it concurred "with the parties that expropriation by the courts *presupposes that the courts' intervention was illegal*. . .".'¹⁰²

[100] As observed in *Swisslion*, viewed in its context, the tribunal's finding, in *Saipem*, which favoured the claimant, was focused on the abusive manner in which the Bangladeshi courts had intervened.¹⁰³ There, the tribunal had found the courts to have

⁹⁷ See A Reinisch and C Schreuer *International Protection of Investments: The Substantive Standards* (2020) at 76-81.

⁹⁸ *OOO Manolium-Processing v Belarus*, (PCA Case No 2018-0), Final Award, 22 June 2021 para 591 referring to M Paparinskis *The International Minimum Standard and Fair and Equitable Treatment* (2013) at 208. See also *The Loewen Group Inc and Raymond L Loewen v United States of America* (Award) (ICSID Case No ARB(AF)/98/3), Award dated 26 June 2003 para 141, where it was held 'Claimant's reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen established a denial of justice under 1105'.

⁹⁹ *Saipem SpA v People's Republic of Bangladesh*, (ICSID Case No. ARB/05/07), Award, 30 June 2009.

¹⁰⁰ *Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia*, (ICSID Case No. ARB/09/16), Award, 6 July 2012.

¹⁰¹ *Swisslion* para 313.

¹⁰² *Ibid.*

¹⁰³ *Swisslion* fn 377 therein.

exercised their 'supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights'.¹⁰⁴ The tribunal in *Swisslion* accordingly concluded, in respect of the case before it, that '[s]ince there was no illegality on the part of the courts, the first element of the Claimant's expropriation claim [was] not established'.¹⁰⁵

[101] A similar approach was adopted by the tribunal in the more recent case of *Infinito Gold Ltd v Republic of Costa Rica*,¹⁰⁶ where it was held:

'... The Administrative Chamber found that the 2008 Concession was vitiated by a legal flaw that rendered it null and void *ab initio*. This means that the 2011 Administrative Chamber Decision merely confirmed this legal status. *Had this decision been rendered in bad faith, in order to deprive Industrias Infinito of a validly held concession, it would have been open to the Tribunal to assess whether it was expropriatory.* However, this is not the case here: as discussed in Section VI.C.2.c *supra*, the 2011 Administrative Chamber Decision cannot be characterized as a denial of justice, nor was it fundamentally arbitrary or unfair. *It was a bona fide decision of the Costa Rican Supreme Court that found that Industrias Infinito did not hold valid rights under Costa Rican law. Accordingly, it cannot be characterized as an expropriatory measure.*' (My emphasis.)

[102] Further, the passage from the decision of *Standard Chartered Bank*,¹⁰⁷ which the appellants rely on to submit that the SADC tribunal can simply interfere without any illegality or denial of justice by the courts, in fact, starts with the tribunal's agreement that 'the judiciary should not be implicated, or its acts be described as "judicial expropriation" simply because judicial decisions were taken in error or may be considered aberrant'.¹⁰⁸ Clearly something more is required. Reference to 'judicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its property or property rights',¹⁰⁹ accentuates that there must be some form of abuse of power or illegal action by the courts for there to be judicial expropriation other than resulting from denial of justice. The conduct of the judiciary in

¹⁰⁴ *Saipem* para 161.

¹⁰⁵ *Swisslion* para 314.

¹⁰⁶ *Infinito Gold Ltd v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award 3 June 2021 para 718.

¹⁰⁷ *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania* (ICSID Case No. ARB/15/41) Award 11 October 2019.

¹⁰⁸ *Standard Chartered Bank* para 279.

¹⁰⁹ *Ibid.*

this case was called into question and described as being injudicious and reckless by allowing an illicit and fictitious sale.¹¹⁰ In any case, to establish expropriation, it must be remembered that the claimant needs to show *the rights* it would otherwise enjoy have been deprived.¹¹¹ (My emphasis.)

[103] The weight of authority including that which is relied upon by the appellants supports the view that for there to be judicial expropriation, there must have been some illegality or denial of justice by the domestic courts. A denial of justice cannot arise from a mere misapplication of the law.¹¹² To get a foot in an international ‘investment’ tribunal, more is required than an allegation of the misapplication of the law by a domestic court; the domestic courts must have ‘misapplied the law in such an egregiously wrong way, that *no honest*, competent court could have possibly done so’.¹¹³ (My emphasis.). This is because an international tribunal is not a court of appeal of last resort.¹¹⁴

[104] Therefore, absent an infringement of a fundamental obligation of international law, international tribunals are not there to scrutinise whether court proceedings of member states were free from error or defect. This is even if it were to be shown that their decisions were obviously wrong. Such incorrect application of the law does not permit interference from an international tribunal, except if there is illegality or denial of justice by the domestic courts. If this were not to be the standard for international intervention, one can imagine a flurry of cases, brought by unsuccessful litigants who are unhappy with how the domestic courts had applied the law, to the SADC tribunal. This could potentially undermine not only the sovereignty and independence of states, but the principle of subsidiarity as well as the doctrine of finality which, in my view, forms part of the substratum of justice and the rule of law.

¹¹⁰ *Standard Chartered Bank* para 380.

¹¹¹ *Standard Chartered Bank* para 277.

¹¹² *AMTO v Ukraine* SCC Case No. 080/2005.

¹¹³ *Arif v Republic of Moldova* (ICSID Case No ARB/11/23), IIC 585 Award 8 April 2013 para 442. See also *Krederi Ltd v Ukraine* (ICSID Case No. ARB/14/17) paras 442-490, which dealt with different forms of violation of the fair and equitable standard through unpacking of jurisprudence on denial of justice and its interpretation of the various components through notable cases.

¹¹⁴ *Krederi Ltd v Ukraine* para 449.

[105] After the creation of the Lesotho Highlands Development Authority (LHDA) by statute in 1986 and the conclusion of the lease agreement in respect of the Rampai area between Lesotho and Swissborough in August 1988, it was envisaged that a dam would be built by November 1991 and the area would be flooded, which would make it impossible to mine. Before the Lesotho courts, the dispute between the parties was whether ss 6 and 7 of the Mining Rights Act 43 of 1967 (Mining Rights Act), which required, among others, consultation with the Chiefs prior to the granting of mineral rights, were abolished following *coup de tats*, which took place in Lesotho during the period of 1970 executed by Prime Minister Chief Leabua Jonathan and in 1986 by Major General Lekhanya. The matter served in the Lesotho high court before Chief Justice Kheola. Evidence was led, which took more than 50 days to conclude, as illustrated in *Swissborough Diamond Mines (Pty) Ltd and Another v Commissioner of Mines and Geology and Others*.¹¹⁵ The Lesotho high court declared the Rampai lease void *ab initio*. The basis for this finding, in summary, was that the office of the King of Lesotho continued to exist both under statutory and customary law, without break. As the office continued to exist, the constitutional recognition and confirmation of the holder of the office continued to be valid, both under statutory and customary law. The allocation of land or grant of rights in the land were the function of the King and Chiefs under customary law. These rights are derived from customary law and not from the executive functions, and such was confirmed by s 93(2) of the 1966 Constitution of Lesotho,¹¹⁶ which provided:

‘(1) The power to allocate land that is vested in the Basotho Nation, to make grants of interests or rights in or over such land, to revoke or derogate from any allocation or grant that has been made or otherwise to terminate or restrict any interest or right that has been granted is vested in the King in trust for the Basotho Nation.

(2) The power that is vested in the King by subsection (1) of this section shall be exercised by him and, on his behalf, by the Chiefs in accordance with the provisions of this Constitution and any other law and the King and the Chiefs shall, in relation to the exercise of that power, be subject to such duties and have such further powers as may be imposed or conferred on them by this Constitution or any other law.’¹¹⁷

¹¹⁵ *Swissborough Diamond Mines (Pty) Ltd and Another v Commissioner of Mines and Geology and Others* (CIV/APN/394/91) [1999] LSHC 41 (28 April 1999) (*Swissborough I*).

¹¹⁶ *Swissborough I* at 21 and 28.

¹¹⁷ *Swissborough I* at 28-29.

[106] On appeal before a bench mainly composed of South African judges, the Court of Appeal of Lesotho gave a detailed analysis of Lesotho's system of government, its history and the evolvment of various laws and how they were affected by the respective coups.¹¹⁸ It was accepted on behalf of Swissborough that the 1966 Constitution had remained in force, but that the peremptory nature of the s 6 requirements had fallen away with the 1970 and 1986 coups. The appeal court found that while the 1966 Constitution put an end to the King's unfettered powers, the Mining Rights Act was given continuity. Section 6 dealt with how applicants for prospecting and mining rights made their applications. No different statutory provision was ever made in 1970 or thereafter to regulate the procedure for the making and consideration of such applications.¹¹⁹

[107] The following were the key findings of the court:

'... [T]he dictates of both common sense and of deeply rooted tradition enshrined in customary law concerning grants related to land point to prior consultation with, and agreement of, the relevant Chiefs being an absolute necessity. The peremptory requirement of section 6 of the Mining Rights Act that "the King and the Chiefs on his behalf, may in accordance with the terms of a recommendation of the Mining Board and in the manner prescribed in this Act, but not otherwise, grant mineral titles" is not inconsistent with section 9(2) of the Lesotho (No.2) Order 1986. *To be validly granted, an application for a mining lease must be dealt with by the King and the Chiefs in the manner prescribed by section 6 of the Mining Rights Act and the power vested in the Military Council to overturn such a grant, should it not agree with it, does not render the compulsory procedures that are enjoined by section 6 of the Mining Rights Act for validly obtaining the grant inconsistent with the provisions of section 9(2) of the Order.*

If these section 6 procedures had become mere directory procedures the Military Council would have been free to grant a mining lease without the application ever having been

¹¹⁸ *Swissborough Diamond Mines (Pty) Ltd and Another v Lesotho Highlands Development Authority* [2000] LSHC 119; 1999-2000 LLR-LB 432 CA (01 January 2000) (*Swissborough I*).

¹¹⁹ *Swissborough II* at 440 and 441. The Lesotho Orders 1970, 1973 and 1986 which followed the coups all had a s 3, which said the following:

'(1) Subject to this Order, all laws which were enforceable in Lesotho immediately before the coming into operation of this Order shall continue in full force and effect.

(2) Any existing law which is inconsistent with this Order shall, to the extent of such inconsistency, be void.

(3) This section is without prejudice to any powers to make provision for any matter, including the amendment or repeal of any existing law.

(4) The existing laws shall, from the coming into operation of this Order, be construed with such modification, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order.' (See *Swissborough II* at 441.)

considered by the Mining Board or by the Chiefs. Not only is such a conclusion impractical, as well as being contrary to the long established tradition that rights pertaining to land fall to be dealt with by the Chiefs, but nowhere in the evidence was it ever suggested that this is how matters were understood at the time. On the contrary, General Lekhanya himself, who was called as a witness by [Swissborough], said that “Without the Council of Minister’s recommendations the Military Council would not approve any application”. (The Council of Ministers, as set out above, was regarded by the Military Council as the body which was tasked with the functions of the Mining Board). Documents were also produced which emanated, in 1988 and 1989, from the Minister of Water, Energy and Mining, addressed to the Mining Board, in which the Minister wrote “The Mining Board may wish to note that in terms of section 6 of the Mining Rights Act No.43 of 1967, His Majesty the King and the Chiefs on his behalf may, in accordance with the advice of the Mining Board, grant mineral titles. Therefore, consultations with Principal Chiefs is mandatory.” And in a Brief addressed by the Attorney-General to the Minister of Law, Constitutional and Parliamentary Affairs in 1988 the Attorney-General wrote “the Mining Rights Act 1967 lays down the conditions and procedures for mining”.¹²⁰

[108] As with the Lesotho high court, the appeal court found no evidence to support allegations of conspiracy against the Lesotho government.¹²¹ I go to this level of detail to demonstrate that insofar as the interpretation of the law is concerned, the Lesotho courts took time to analyse the law and gave reasons in detail as to why they reached the conclusions they did, based on their application of the Lesotho law. Whether they were wrong, or applied the law incorrectly is not a mere entitlement, making it open for the SADC tribunal to re-look at the issues.

[109] In order to disregard these decisions, the SADC tribunal would have had to find that there was illegality committed by the Lesotho courts. The appellants, in their particulars of claim, give a long list of instances where it alleges that the Lesotho government committed litigation misconduct. This is not judicial expropriation. To try and entangle the courts to this alleged misconduct, the appellants tersely plead that the Lesotho courts misconducted themselves by (a) sanctioning Lesotho’s misconduct, (b) disregarding the material evidence and applicable law and (c) that ‘the President of the Lesotho Court of Appeal refused to reopen the case C of A (civ) 9/1999 following

¹²⁰ *Swissborough II* at 445-446.

¹²¹ *Swissborough II* at 453.

the discovery of the LNDC leases after judgment was delivered in the Lesotho Court of Appeal on 6 October 2000’.

[110] The Lesotho courts dealt with the conspiracy levelled against that country. In fact, most of the days in the 54-day trial were dedicated to hearing the evidence of conspiracy by Lesotho.¹²² Six lever arch files containing between 1500 and 2000 pages were placed before the trial court in Lesotho in pursuance of the conspiracy allegations. Subpoenas were issued to more than 109 witnesses, including one of the former South African State Presidents, and erstwhile Ministers. Of all the witnesses who were subpoenaed only three were called, including General Lekhanya, who was the appellants’ key witness, and who denied that there was any conspiracy as alleged by the appellants.¹²³

[111] The fact that the appellants do not like the decision of the courts as regards the conspiracy allegations against Lesotho does not amount to judicial expropriation. Furthermore, in an earlier matter arising from the same set of facts, involving the same parties, the Lesotho courts had called out the government for its conduct of unilaterally cancelling the mining lease and set Lesotho’s decision aside. Lesotho’s misconduct cannot be imputed to the judiciary to find judicial expropriation. In an attempt to locate the claim within the illegality realm, the appellants make broad and vague allegations against the courts. How the court sanctioned such misconduct is not alleged.

[112] Allegations of lack of independence of the Lesotho courts are not made for the first time in the current action either. They were made by the appellants and found to be spurious by the Singapore Court of Appeal, given that the Court of Appeal and the High Court of Lesotho both ‘struck down the Military Council’s 1992 revocation order. Further, the domestic courts in the Kingdom had not hesitated to be “critical and dismissive of the actions of [their] own government during the earlier stages” of the proceedings in the Expropriation Dispute’.¹²⁴ A similar rebuke was handed to Mr van Zyl and the then appellants by Patel J.¹²⁵ While the court in *Van Zyl SCA* had stated

¹²² *Swissborough I* at 257 and *Swissborough II* at 451-453.

¹²³ *Swissborough II* at 451-452.

¹²⁴ *Swissborough, Singapore Appeal Court* para 222.

¹²⁵ *Van Zyl HC* para 104.

that the issue of denial of justice was not part of the appellants' case, it nevertheless found attacks made on judges of the Lesotho Court of Appeal to be without merit.¹²⁶

[113] The appellants claim that the President of the appeal court refused to reopen the case after new evidence was discovered. To this end, the respondents raised an exception stating that, that allegation, among others, lacked the necessary averments to sustain a cause of action and/or was vague and embarrassing. It was on this basis that the court a quo was entitled to determine the matter and make the findings which I deal with below. As regards the appellants' averments that they had exhausted all available remedies, the context in which those allegations were raised, in my view, was in relation to the non-availability or ineffectiveness of any claim for damages. According to the appellants, pursuing these legal proceedings would be futile, because of the finding made by the Lesotho courts that the Rampai lease was void *ab initio*; a finding which would follow in respect of the other four remaining leases. This explains the respondents' exception raised in relation to this point, which I do not address in the judgment. To the extent that the averments relating to exhaustion of local remedies could be read to include the allegations on new evidence, the particulars of claim were excepted on the basis that they lacked the necessary averments to sustain the cause of action, as discussed below.

[114] As found by the court a quo, what is lacking in the particulars of claim is any description of the process by which the appellants sought to have the proceedings reopened. The court a quo said:

'The plaintiffs would have to allege and ultimately show that by denying the plaintiffs a hearing or otherwise improperly frustrating the plaintiffs from having their case on the new material heard in accordance with Lesotho law, Lesotho committed an international wrong. If the then claimants did not follow the proper procedural path to have their case on the new material heard, then the plaintiffs could not have been the victims of an international wrong. And if the plaintiffs have not properly sought relief on the new material in the courts of Lesotho, then the plaintiffs are in the position of having unutilised domestic remedies available to them. On either basis, their present claim, as formulated, must fail.'¹²⁷

¹²⁶ *Van Zyl SCA* para 78.

¹²⁷ *Trustees for the time being of the Burmilla Trust v Van Zyl and Others* [2020] ZAGPPHC 802; [2021] 1 All SA 578 (GP) para 56.

[115] Article 15 of the SADC tribunal's Protocol articulates the scope of the tribunal's jurisdiction as follows:

'SCOPE OF JURISDICTION

1. The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States.
2. *No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.*
3. Where a dispute is referred to the Tribunal by any party the consent of the other parties to the dispute shall not be required.' (My emphasis.)

[116] In *Campbell*,¹²⁸ the SADC tribunal observed that the exhaustion of local remedies was not unique to the Protocol. It referred to Article 26 of the European Convention on Human Rights, which provides that '[t]he Commission (of Human Rights) may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law'. It also made reference to Article 50 of the African Charter on Human and Peoples' Rights, which states:

'The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving the remedies would have been unduly prolonged'.

[117] The rationale to exhaust local remedies through the local court system, as stated in *Campbell*, 'is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts'.¹²⁹

[118] It is so, that exhaustion of internal remedies is not a bar to accessing the SADC tribunal. However, this rule will only be relaxed when the municipal law offers no

¹²⁸ *Campbell* at 19.

¹²⁹ *Campbell* at 20. See also *Swissborough, Singapore Appeal Court* para 210 where it was held '[t]he rationale for the requirement is 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 system" (Report of the International Law Commission on the work of its fifty-eighth session, Draft Articles on Diplomatic Protection with commentaries, reprinted in Yearbook of the International Law Commission, 2006, vol II, Part Two, UN Doc A/CN.4/SERA/2006/Add1 (Part 2) ("the Draft Articles" and "ILC Commentary") at p 71 (Draft Art 14, para 1), quoting the *Interhandel* case at 27)'.

remedy or the remedy offered is ineffective.¹³⁰ In *Campbell*, the SADC tribunal dispensed with the requirement of internal exhaustion, because 16B(2)(a)(i) and (ii) of Amendment 17 of the Zimbabwean Constitution,¹³¹ under which Campbell's land was acquired, precluded judicial review of any matter challenging acquisition of agricultural land under the relevant sections. It was clear in that case that there would be no effective remedy available to Campbell before the Zimbabwean courts.

[119] In some international courts the issue of exhaustion of internal remedies is seen as a matter of admissibility rather than jurisdiction,¹³² given that it may be a temporary impediment to the exercise of jurisdiction. Whichever way this rule is characterised, the principle is the same and it is as follows: in order for a dispute to be entertained by the international tribunal, parties must show that, in the circumstances of their case, remedies in domestic courts would have been unduly prolonged, ineffective or unavailable.¹³³

[120] The appellants had legal recourse in the Lesotho courts. This is on the basis, that new evidence had come to light after the appeal court judgment was handed down, which was substantively determinative of the matter, such that it could render the prior judgment erroneous, in that it was made on old or incorrect or fraudulent facts or law, and that a gross injustice and/or a patent error was brought upon the parties, or so their contention might go.

[121] In *Hippo Transport (Pty) Ltd v The Commissioner of Customs and Excise and Another*,¹³⁴ it was held that the Lesotho appeal court had the power to review its earlier decisions, in exceptional circumstances.¹³⁵ The said power derived from s 123(4) read with s 118 of the Constitution.¹³⁶ Circumstances would be viewed as exceptional 'only when gross injustice and or a patent error has occurred in the prior judgment. The power of this court to review its own decisions should therefore not be a disguised

¹³⁰ *Campbell* at 21.

¹³¹ *Campbell* at 21, 37-41.

¹³² *Swissborough, Singapore Appeal Court* para 206.

¹³³ *Campbell* at 21.

¹³⁴ *Hippo Transport (Pty) Ltd v The Commissioner of Customs and Excise and Another* (C of A (CIV) 06 of 2017) [2018] LSCA 5.

¹³⁵ *Ibid* para 20.

¹³⁶ *Ibid* para 21.

rehearing of the prior appeal. It is therefore not a disguised rehearing of the prior appeal, going over it with a fine comb for the re-determination of aspects of that judgment. It is therefore not done for purposes other than to correct a patent error and or grave injustice, realised only after the judgment had been handed down'.¹³⁷

[122] The appellants cannot claim to have properly and fully exhausted all possible avenues for legal recourse through the judicial system of Lesotho, unless and until the parties have made application for a review of the impugned judgment by the Court of Appeal of Lesotho. This is especially pertinent where the claim lies against the Lesotho government and legal authorities themselves. This is so, as it may provide the opportunity for the new evidence to be fully ventilated in court, where all relevant parties may have the chance to challenge the new evidence in reply, should the court deem this necessary. There is no basis to have this alleged new evidence aired for the first time in the SADC tribunal without having given an opportunity to the Lesotho courts to pronounce on it. It seemed in argument that this allegation of new material was a sole string that the appellants were pinning their hopes on, to have the matter returned in their favour by the SADC tribunal.

[123] Counsel for the appellants conceded in oral argument that (from the reading of the particulars of claim) it did not look like that any application to reopen the case was ever brought before the Court of Appeal of Lesotho. It therefore cannot be assumed that no justice would have been received, had that application been brought. In *Van Zyl SCA* at para 80, it appears that the appellants wrote a letter to the President of the Lesotho appeal court and *insisted that he revoke the judgment*. He refused, and his refusal was alleged to be further evidence of bias of the Lesotho courts. Litigation is not conducted by way of correspondence. Writing a letter to the President of the Court of Appeal, as appears to have been the case (a fact not even alleged in the particulars of claim), is not a process to reopen legal proceedings. It would not be surprising that any such correspondence would be met with a flat refusal or not be heeded to at all (this would be the case in any court).

¹³⁷ Ibid para 22.

[124] The alleged new evidence is that the relevant Chiefs in Lesotho had transferred the land rights to the Lesotho National Development Corporation (LNDC), a Lesotho parastatal organisation, during the period 1967 to 1972, and therefore they no longer had any say on the grantor of further rights to the land. It is alleged that this was in compliance with the United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 and that Lesotho and other states took steps in terms of that resolution to vest powers to grant mining rights in the State. Accordingly, all mining leases were correctly granted by the Lesotho government without the need for the Chiefs to consent.

[125] No allegation is made in the particulars of claim that the LHDA knew or must have known about the alleged new evidence and that it failed to disclose it in the proceedings which resulted in the Lesotho judgments. The LHDA appears to be a different organisation to the LNDC. Such is apparent from the particulars of claim. The transfer is alleged to have been to the LNDC and not the LHDA. The LHDA only came into existence after the signing of the Lesotho Highlands Water Project (LHWP) between South Africa and Lesotho on 24 October 1986, while the transfer to the LNDC is said to have taken place between 1967 and 1972. The LHDA was set up to manage that part of the LHWP that fell within Lesotho's borders. No allegation is made that the LHDA conspired with Lesotho to hide the alleged new evidence. I accordingly differ with the first judgment that the particulars of claim could reasonably be read to show deliberate actions by the LHDA to suppress vital evidence in collusion with Lesotho.

[126] As regards to the admission the respondents are alleged to have made regarding the validity of the Rampai lease, in my view, the reasonable reading of the particulars of claim does not bear this out. I differ with the first judgment that the particulars of claim reveal that in the pleadings before the SADC tribunal, Lesotho admitted the validity of the Rampai lease. In the particulars of claim, the appellants allege that 'Lesotho admitted in the pleadings before the SADC tribunal that the rights were vested as alleged by the Claimants'. This is somewhat vague.

[127] In their heads of argument, counsel for the appellants submitted that this alleged admission is drawn from para 46 of the SADC claimants' heads of argument,

which is annexed to the particulars of claim. According to this paragraph, what was admitted by Lesotho in its answering affidavit was: '*The registration of the leases vested the stated rights in the 1st applicant*'. In the founding affidavit, the claimants had alleged that they had been granted mining rights by virtue of the registration of the lease and accordingly had rights flowing from that. It is clear that the admission was solely directed at the fact that mining leases were lodged, granted, executed and registered in the Deeds Registry in Maseru in 1986.

[128] Since then the Rampai lease was found to be null and void by the courts. Accordingly, no rights existed therefrom. The meaning of what was admitted is clear from the appellants' argument. Their contention is that the Rampai lease vested *de facto* in Swissborough by virtue of the registration in the Deeds Registry and thus existed as a fact, producing legal consequences. This was so, but only until set aside by the Lesotho courts.

[129] In addition, on the principle that pleadings must be considered as a whole,¹³⁸ the reading that Lesotho admitted the validity of the Rampai lease is inconsistent with the stated defences imputed to Lesotho, the gravamen of which is that failure to consult with the Chiefs prior to the granting of the Rampai lease invalidated the mining lease, as found by the courts. Meaning, the appellants had no rights under Lesotho's domestic law. The pleadings and hence the appellants' claims are geared at dislodging that alleged defence.

[130] I agree with the first judgment that the question of whether Lesotho admitted the validity of the Rampai lease is relevant at the trial stage. However, at this stage the question asked is whether the particulars of claim, reasonably read, bear out that admission. In my view, they do not, as indicated above. As to reference to the SADC pleadings, the portion relating to the admission, allegedly made therein, was sourced from the SADC tribunal claim document annexed to the particulars of claim, to which counsel for the appellants referred. It is accordingly relevant in the construal of the allegation in question.

¹³⁸ *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F.

[131] In the end, the issue in any event turns on the interpretation of the Lesotho law. Assuming Lesotho had made an admission that the Rampai lease was valid, which in my view on the contextual reading of the pleadings it did not, its admission does not change the law, which is a matter for the courts to determine.¹³⁹ Thus, I am of the view that, on the reasonable reading of the pleaded case, the SADC tribunal would not have held that there was expropriation, judicial or otherwise.

Conclusion

[132] In conclusion, I have found, firstly, that the findings made in *Van Zyl SCA* were integral to the appellants' current claim. Accordingly, the court a quo was bound by them whether by extension of *res iudicata* on the application of issue estoppel or by precedent, as findings were made that were not only on factual but legal issues similar to those in the present case. Secondly, the international principles and findings made in *Van Zyl SCA* were in any event consistent with international law and thus would have been similarly applied by the SADC tribunal. Thirdly, the SADC tribunal would have deferred to Lesotho based on the principle of subsidiarity. It would also not interfere, because before it could do so denial of justice or some illegality on the part of the domestic courts must be shown - misapplication of the law is not enough. In regard to the alleged misconduct by the Lesotho courts, the particulars of claim lack the necessary allegations to disclose the cause of action, and no allegations were made that an application was brought before the Lesotho courts to introduce new evidence. Accordingly, domestic remedies were not utilised. Finally, on a contextual reading of the particulars of claim, the SADC tribunal would not have held that there was expropriation. On those grounds, the court a quo was correct to uphold the various exceptions.

¹³⁹ *Potters Mill Investments 14 (Pty) Ltd v Abe Swersky & Associates and Others* [2016] ZAWCHC 5; 2016 (5) SA 202 (WCC) paras 11-13.

[133] In the result, I would have dismissed the appeal with costs including the costs of three counsel.

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

Appearances:

For appellants: M du Plessis SC (with him T Ngcukaitobi SC and B Winks)
(heads also prepared by M Chaskalson SC)

Instructed by: Couzyn Hertzog & Horak, Pretoria
Pieter Skein Attorneys, Bloemfontein

For respondents: N Maenetje SC (with him A Coutsoudis and L Zikalala)

Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein