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E de Wet*

1 Introduction

The current contribution analyses the decision of *Government of the Republic of Zimbabwe v Louis Karel Fick* (hereinafter the *Fick* case), which was decided by the Constitutional Court on 27 June 2013.¹ From the perspective of public international law, the decision was ground-breaking, as it relied on the common law to enforce a binding international judgment within the republic. In fact, it was the first time since its inception that the Constitutional Court was confronted with the status of a binding international decision within the domestic legal order.

The question of the standing of decisions of international courts in the domestic legal order is of great relevance to South Africa, which has become party to various international courts and tribunals since 1994. The *Constitution of the Republic of South Africa, 1996* is silent on the standing of decisions emanating from these bodies in the domestic legal order and it will be up to the courts to clarify such status on a case-by-case basis. Of particular relevance in the (southern) African

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¹ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22. For an earlier case in which the Constitutional Court used international law as a tool for interpreting the common law, *Carmichele v Minister of Safety and Security* 2001 ZACC 22. Relying *inter alia* on the *Convention on the Elimination of All Forms of Discrimination against Women* (1979), the court developed the law of delict to include a duty on the state to prohibit and prevent all gender-based discrimination that impairs the fundamental rights of women. Botha 2001 *SAYIL* 253, 259; Dugard "South Africa" 46.

context are the future decisions of the African Court of Human and Peoples' Rights,² as well as the (currently suspended) Southern African Development Community (SADC) Tribunal.³

Although South African courts have thus far not been faced with a binding international decision directed against the country itself, the *Fick* case (as it became known in South Africa) confronted the Constitutional Court with the enforcement of a binding judgment issued by the SADC Tribunal against Zimbabwe. The judgment resulted from the *Campbell* case, which concerned the expropriation practices of the Zimbabwean government and the disproportionate impact thereof on white farmers in the country.⁴ The SADC Tribunal concluded that the expropriation under the circumstances amounted to discrimination on the base of race and that Zimbabwe had to pay fair compensation to the applicants.⁵

In accordance with article 32(3) of the *Protocol on the SADC Tribunal*, the decisions of the Tribunal are binding upon the parties to the dispute in respect of that particular case and enforceable "within the territories of the states concerned". This broad wording (notably the ambivalent reference to "states concerned") implies that although the decision itself was directed only at Zimbabwe, other SADC member states have a role to play in its enforcement. More concretely, article 32(1) determines that the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the state in which the judgment is to be enforced shall govern enforcement. Article 32(2) also determines that the states and institutions of the Community shall take forthwith all measures necessary to ensure the execution of decisions of the Tribunal.

² The *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (1998).

³ *Treaty establishing the Southern African Development Community (SADC)* (1992); *Protocol and Rules of Procedure of the SADC Tribunal* (2000).

⁴ *Mike Campbell (Pvt) Ltd v Zimbabwe* 2008 AHRLR (SADC 2008).

⁵ See extensively De Wet 2013 *ICSID Review* 1 ff.

Subsequent to the unsuccessful attempts at registering and enforcing the *Campbell* decision in Zimbabwe,⁶ both the merits decision of 28 November 2008 and the non-compliance decision of 5 June 2009⁷ were successfully registered in accordance with article 32(3) of the *SADC Protocol* in the South Africa High Court, with the purpose of confirming the cost order of the Tribunal against Zimbabwe.⁸ The domestic legal basis for registration was the *Foreign Civil Judgments Act*, 1988 and the *Recognition of Foreign Arbitral Awards Act* 40 of 1977.

With the registration of the cost order in South Africa the way was paved for enforcing the judgment by means of attaching Zimbabwean property for execution of the cost order. In this particular instance, the enforcement of the SADC Tribunal's judgment faced two obstacles. The first concerned that of the potential immunity of Zimbabwe from jurisdiction as well as any execution against its property. The second obstacle related to the uncertainty as to whether or not the South African statutory rules of civil procedure for the enforcement of foreign judgments indeed also covered judgments of international courts and tribunals (as anticipated by article 32(1) of the *Protocol on the Tribunal*).

2 (Waiving of) immunity from jurisdiction and execution

Subsequent to the registration of the SADC Tribunal's decision in South Africa, the High Court ordered the attachment of Zimbabwean property in Cape Town, which was rented for commercial purposes at the time.⁹ This was done in accordance with section 14(3) of the South African *Foreign States Immunities Act* 87 of 1981 (FSIA), which exempts property of a foreign State that is used for commercial purposes from immunity for the purposes of execution. This decision of the High Court was subsequently confirmed on appeal by the South African Supreme Court of Appeal

⁶ De Wet 2013 *ICSID Review* 10-12.

⁷ *Mike Campbell (Pvt) Ltd v Zimbabwe* 2008 AHRLR (SADC 2008); *Campbell v Republic of Zimbabwe* 2009 SADCT 1.

⁸ *Louis Karel Fick v Government of the Republic of Zimbabwe* (GNP) unreported case number 3106/07 of 13 January 2010.

⁹ *Republic of Zimbabwe v Sheriff Wynberg North* 2010 ZAGPJHC 118.

(SCA) in September 2012 and ultimately by the Constitutional Court in June 2013 in what is now known as the *Fick* case.¹⁰

The SCA for its part confirmed that Zimbabwe had forfeited any immunity which it may have enjoyed from the jurisdiction of South African courts by committing itself to the *SADC Treaty* and the *Protocol on the Tribunal*.¹¹ The international law principle of sovereign immunity from jurisdiction before the domestic courts of a foreign State is incorporated in section 2 of the FSIA. However, in line with the international law doctrine of relative State immunity, section 3 of the FISA determines that such immunity is forfeited through express waiver. The SCA underscored that all parties conceded that article 32(3) of the *Protocol on the Tribunal* rendered decisions of the Tribunal enforceable in the territories of all member States. By its adoption of that article Zimbabwe clearly waived any immunity it might otherwise have been entitled to claim from the jurisdiction of the courts of member States, as well as agreed that orders of the Tribunal would be enforceable in those courts.¹²

This argument was subsequently confirmed by the Constitutional Court without attracting much discussion.¹³ This is most likely due to the fact that the questions pertaining to immunity were clear-cut and required a straight-forward application of well-developed principles of state immunity, as concretised in the FSIA.

3 The common law as a vehicle for the enforcement of international judgments

However, despite the fact that Zimbabwe could not rely on immunity from jurisdiction or execution to prevent the enforcement of the SADC Tribunal's judgment in South Africa, it remained disputed whether the South African law of civil

¹⁰ *Government of the Republic of Zimbabwe v Fick* 2012 ZASCA 122; *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22.

¹¹ *Government of the Republic of Zimbabwe v Fick* 2012 ZASCA 122 20.

¹² *Government of the Republic of Zimbabwe v Fick* 2012 ZASCA 122 44.

¹³ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 33, 35.

procedure for the enforcement of foreign judgments was also applicable to the enforcement of international judgments originating from an international court or tribunal. The Constitutional Court confirmed that the *Enforcement of Foreign Civil Judgments Act* 32 of 1988 was not the appropriate vehicle for enforcing international judgments, as it *inter alia* applied to Magistrate Courts only. As a result the common law remained the only possible avenue through which the SADC Tribunal's decisions could be enforced in South Africa.¹⁴

Under the South African common law, a "foreign judgment" had to meet certain conditions in order to be enforced. These notably included that the court which pronounced the judgment had jurisdiction to entertain the case; that this judgment was final and conclusive; that enforcement would not be contrary to public policy; that the judgment was not obtained by fraudulent means; that the judgment did not involve the enforcement of a penal or revenue law of the foreign state; and that enforcement of the judgment was not precluded by the provisions of the *Protection of Business Act* 99 of 1978.¹⁵

After concluding that the cost order of the SADC Tribunal met these criteria,¹⁶ there was still the issue of whether or not it amounted to a "foreign judgment" as recognized by the South African common law. Thus far the common law on the enforcement of civil judgments had developed only to a point where it provided for the execution of judgments made by domestic courts of a foreign state (ie decisions of other *national* courts). It did not yet encompass the enforcement of international judgments such as a cost order of the SADC Tribunal.¹⁷ However, the Constitutional Court came to the conclusion that the common law had to be developed in a manner that allowed for the decision of the SADC Tribunal to be interpreted (and subsequently enforced) as a "foreign judgment". It did so by relying on those

¹⁴ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 35-37.

¹⁵ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 38.

¹⁶ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 47-50.

¹⁷ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 53.

clauses in the *Constitution* that committed South Africa to its obligations under international law and to an international-law friendly interpretation of domestic law.

The Constitutional Court underscored that South Africa, in accordance with section 231 of the *Constitution* (which regulates the ratification of treaties), had become a party to those SADC instruments which obliged the country to give effect to decisions of the SADC Tribunal. In addition, the values and rights underpinning the *SADC Treaty* include the rule of law, which is also entrenched in the South African *Constitution* - *inter alia* through the right to access to courts guaranteed in section 34.¹⁸ This section determines that:

[e]veryone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

When courts are confronted with interpreting any of the rights in the Bill of Rights in the *Constitution*, section 39(1)(b) requires them to consider international law.¹⁹ Moreover, section 39(2) demands that:

[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Relying on these sections, the Constitutional Court linked the progressive interpretation of the common law to the purpose of the right to access to courts in section 34 and the need to give effect to such a purpose. It stated that the reason for developing the South African common law in order to facilitate the enforcement of foreign judgments was that it was necessary to ensure that lawful judgments were not evaded with impunity by any state or person. If the cost order of the SADC Tribunal were not enforced, the right of access to courts in the *Constitution* would ring hollow.²⁰

¹⁸ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 59-60.

¹⁹ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 66.

²⁰ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 54, 62.

The cumulative effect of these considerations justified the development of the common law in a manner that construed the words "foreign courts" to include the SADC Tribunal. Thereby the right of access to South African courts to facilitate the enforcement of the Tribunal's cost order was granted.²¹

4 The implications of equating "international judgments" with "foreign judgments" for the public policy exception

In principle, the Constitutional Court's willingness to use the common law as a tool for enforcing international decisions in South Africa is to be welcomed, as it underscores the *Constitution's* openness towards public international law. Even so, a word of caution is called for in relation to the equation of international decisions with foreign decisions for the purposes of domestic enforcement. In this particular instance such an equation was necessitated by the circumstances of the case, notably the wording of article 32(1) of the *Protocol on the SADC Tribunal*. However, generally speaking it is unusual for treaties regulating the competencies of international tribunals to determine that their decisions shall be treated as "foreign judgments" on the domestic level. Instead international decisions are more often treated as domestic judgments.²²

A crucial difference is the fact that the recognition and enforcement of a "foreign judgment" can be denied where it would result in a violation of public policy. The public policy exception is well established in the conflicts of law context, including where the enforcement of other *national* jurisdictions are at stake. However, it does not fit in a regime based on public international law such as the SADC regime, where States cannot use their domestic law as an excuse for not implementing their international obligations.²³ In this instance the binding character of the international

²¹ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 62, 69.

²² De Wet 2013 *ICSID Review*. 55; Bartels "Review of the Role, Responsibilities and Terms of Reference".

²³ See a 27 of the *Vienna Convention on the Law of Treaties* (1969).

obligations concerns the decisions of the SADC Tribunal. The public policy exception implied by article 32 of the *Protocol on the Tribunal* could therefore undermine the binding nature of the decisions of the SADC Tribunal from the perspective of public international law - if it allowed principles of domestic law to prevent the recognition and enforcement of the SADC Tribunal's judgment.²⁴

In fact, this was exactly the reason why the Zimbabwean High Court denied registration and enforcement of the SADC Tribunal's *Campbell* decision, when the applicants attempted to enforce this decision in Zimbabwe.²⁵ In the first part of its decision, the Zimbabwean High Court explicitly confirmed that Zimbabwe was bound under international law by the SADC's decision. It rejected Zimbabwe's arguments pertaining to the illegality of the creation of the SADC Tribunal in no uncertain terms, and rebuked Zimbabwe for its *ex post facto* repudiation of the SADC Tribunal's jurisdiction.²⁶ Yet the High Court refused to register the decision on the basis that it would violate domestic public policy.²⁷

Zimbabwe was faced with a similar dilemma as was South Africa, in the sense that the statute which regulated the recognition and enforcement of foreign judgments (the *Civil Matters (Mutual Assistance) Act* [Chapter 8:02]) could not be used as a vehicle for enforcement of the SADC Tribunal's decision.²⁸ Section 3, which extended the application of the Act to the judgments of those international tribunals specifically designated for the purpose of recognition and enforcement, did not include the SADC Tribunal.²⁹ As a result the common law remained the only possible avenue through which the SADC Tribunal's decisions could be recognised and

²⁴ De Wet 2013 *ICSID Review* 55-56; Bartels "Review of the Role, Responsibilities and Terms of Reference" 53.

²⁵ *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010.

²⁶ *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010 10 ff.

²⁷ *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010 5.

²⁸ *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010 5-6.

²⁹ *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010 4.

enforced on the Zimbabwean domestic level.³⁰ Under the common law as applied in Zimbabwe at the time, a foreign judgment had to meet (as is the case in South Africa) certain conditions in order to be recognized and enforced. One of these was that such enforcement might not result in a violation of public policy.³¹

The Zimbabwean High Court conceded that as a general rule, public policy would require Zimbabwe to give effect to its international treaty obligations and the binding decision of the SADC Tribunal resulting from such obligations.³² However, this obligation had to be balanced against public policy challenges specific to the case at hand. These included the fact that a recognition and enforcement of the SADC Tribunal's decision in the *Campbell* case would be manifestly incompatible with the land reform programme foreseen in the Zimbabwean *Constitution*, which had also been explicitly endorsed by the Zimbabwean Supreme Court.³³ Under these circumstances a registration of the *Campbell* case would violate domestic public policy.³⁴

In the *Fick* case the public policy exception was not raised and the Constitutional Court in passing merely noted that enforcement of the cost order would not be in contravention of public policy.³⁵ If this argument had been raised, the only solution from the perspective of public international law would have been to assume that South Africa's domestic public policy itself attached overriding weight to the country's international treaty obligations and binding decisions of international tribunals resulting from such obligations.³⁶

³⁰ *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010 5-6.

³¹ *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010 7.

³² *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010 13.

³³ *Mike Campbell (Pvt) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement* 2008 ZWSC 1.

³⁴ *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010 17-18.

³⁵ *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 39.

³⁶ De Wet 2013 *ICSID Review* 56.

In the final analysis, the *Fick* case introduced an interesting new phase in relation to South Africa's greater openness towards public international law. It confronted both courts and the legislature with the reality that the legal system does not yet sufficiently provide for the domestic enforcement of binding international judicial decisions. Until such time as the legislature adopts a statutory framework that enables the enforcement of a broad range of international decisions (as opposed to merely foreign decisions), the common law will remain the only available alternative avenue for their enforcement. It remains to be seen whether domestic courts will in future tend to treat all decisions of international courts and tribunals as foreign decisions for the purpose of enforcement, or whether they will find other creative ways for interpreting the common law in order to give domestic effect to decisions of international court.

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Vienna Convention on the Law of Treaties (1969)

LIST OF ABBREVIATIONS

SADC	Southern African Development Community
SAYIL	South African Yearbook of International Law
SCA	Supreme Court of Appeal
FSIA	South African Foreign States Immunities Act

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SUMMARY

The *Fick* case which was decided by the Constitutional Court on 27 June 2013 was the first time since its inception that the Constitutional Court was confronted with the status of a binding international decision within the domestic legal order. It concerned a binding decision by the (now suspended) Southern African Development Community (SADC) Tribunal against Zimbabwe, which was also enforceable in South Africa. A key issue before the Court was whether or not the South African statutory rules of civil procedure for the enforcement of foreign judgments also covered judgments of international courts and tribunals (as anticipated by Article 32(1) of the Protocol on the SADC Tribunal). As none of the relevant statutory legislation was applicable in this instance, the common law remained the only possible avenue through which the SADC Tribunal's decision could be enforced in South Africa.

At the time of the decision, the common law on the enforcement of civil judgments had developed only to a point where it provided for the execution of judgments made by domestic courts of a foreign state (ie decisions of other *national* courts). The Court was therefore confronted with whether or not an international decision in the form of a cost order of the SADC Tribunal amounted to a "foreign judgment" as recognized by the South African common law. The Court answered this question in the affirmative by relying on those clauses in the Constitution that committed South

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Africa to the rule of law, as well as its obligations under international law, and to an international-law friendly interpretation of domestic law.

Although the decision is to be welcomed and applied the law correctly to the facts of the case, it does raise the issue of the wisdom of equating international judgments with foreign judgments on a more general scale. This relates to the fact that it is generally accepted in most jurisdictions that the recognition and enforcement of a “foreign judgment” can be denied where it would result in a violation of domestic public policy. The public policy exception does not, however, fit well in a regime based on public international law, which does not permit States to use their domestic law as an excuse for not implementing their international obligations.

KEYWORDS: Relationship between international and domestic law; recognition and enforcement of foreign judgments; international civil procedure; SADC Tribunal; rule of law.