

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-MOT-REV-2017/00112

In the matter between:

CLEAR ENTERPRISES (PTY) LTD

APPLICANT

and

MINISTER OF FINANCE

1ST RESPONDENT

**MINISTER OF FOREIGN AFFAIRS AND
INTERNATIONAL RELATIONS**

2ND RESPONDENT

SOUTHERN AFRICAN CUSTOMS UNION

3RD RESPONDENT

Neutral Citation: *Clear Enterprises (Pty) Ltd v The Minister of Finance* (HC-MD-CIV-MOT-REV-2017/00112) [2019] NAHCMD 156 (17 May 2019)

CORAM: **MASUKU J**

Hearing date: 13 September 2018

Delivered on: 17 May 2019

Flynote: Diplomatic immunity – meaning and implications - Service of process on diplomatic mission – Diplomatic Privileges Act and SACU Headquarters Agreement prohibiting service of process on SACU – Failure to publish conferees of diplomatic immunity likely to put a strain on diplomatic

relations – Immunity of diplomatic mission however, not absolute – appropriate remedies available and may be sought in deserving cases.

Summary: The applicant instituted action proceedings in 2016 against 3rd respondent, SACU. The summons was based on the alleged unlawful failure of SACU to implement and enforce, as it was obliged to do, the undertakings made by the Republic of South Africa, one of the member states forming SACU. Applicant claiming that South Africa is in breach of its undertaking and thereby causing prejudice to it and contending therefore, that SACU has the obligation to ensure that member states comply with their undertakings. Further, that as a citizen of Botswana, also a state party to the SACU agreement, it has a lawful and legitimate expectation that SACU and its member states will act in accordance with their obligation in terms of the agreement.

At the heart of applicant's matter is its inability to cause the summons it has issued to be served on SACU to whom "absolute immunity" was allegedly granted by Namibia. Respondents contend that applicant is not entitled to the relief it seeks. Further, that applicant has failed to exhaust the internal remedies afforded to it by SACU which include; requesting SACU to waive its immunity and/or requesting the ad hoc SACU Tribunal to deal with the dispute between the parties.

The relief sought by applicant in its notice of motion was to have the immunity accorded to SACU reviewed and set aside. This position was abandoned by applicant and the only question left for determination by the court being whether, the court is in a position to authorise service of summons on SACU. The Respondents object this relief and argue that it is in violation of the Diplomatic Privileges Act as well as on the laws conferring immunity to any organization or entity.

Held: The court is of the view that the call by the respondents for the invocation of s. 2(1) of the Act is appropriate in the circumstances and accordingly comes to the conclusion that in terms of the said provision, ' . . .

all legal process sued out against the persons or property mentioned in subsection (1) shall be void.'

Held further: That the court may not, in the circumstances authorise the issue of process that is declared to be void by the Legislature.

Held: That a Headquarters Agreement was entered into between the Government of Namibia and SACU on the hosting of the SACU Headquarters and SACU, as an entity cannot be subjected to legal process and this, in the court's view, includes the issue of process and service of a summons on SACU. In this regard, it would appear to the court that the option open to the applicant would have been to approach SACU and request it to waive the immunity, which, if the request was granted, would enable the applicant to cause the summons issued to be served on SACU.

Held further: That the Minister of Foreign Affairs and International relations needs to comply with the requirements relating to the publication of the list of conferees and those removed from the list of immunity.

Court concluding that in the circumstances, it cannot come to the aid of the applicant in its quest to prosecute its claim against the applicant. Application consequently dismissed with costs.

ORDER

1. The application is dismissed.
2. The Applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed Counsel.
3. There is no order as to costs in relation to the application for condonation moved by the Respondents.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Serving before court is an application for review. The relief sought by the applicant in the notice of motion, is couched in the following terms:

‘1. The decision by the Minister of Finance, representing the Government of the Republic of Namibia, to confer absolute diplomatic immunity on the Southern African Customs Union by means of clause 1 and 2 of article 4 of the Headquarters Agreement between the Government of the Republic of Namibia and the South African Customs Union on the hosting of the Southern African Customs Union (hereinafter called “the Headquarters Agreement”) is reviewed and set aside.

2. Clause 1 and 2 of the article 4 of the Headquarters Agreement are declared invalid.

3. Any applicants who oppose the making of the application pay the costs of the application.’

[2] Needless to say, the application was opposed by the Minister of Finance, who in this regard, enlisted the Office of the Government Attorney, to enter his appearance. The latter Office represents the 2nd respondent as well. I pertinently should mention that the 3rd respondent, the Southern African Customs Union (“SACU”), it would appear, was not served with the application. It accordingly did not file its intention to oppose nor did it file and opposing papers stating its position in this debacle. This is an issue that may take centre stage in the determination of this matter, considering the trajectory

the matter assumed in argument, as shall be apparent as the judgment unfolds.

The parties

[3] The applicant is Clear Enterprises (Pty) Ltd, a company incorporated according to the Company Laws of the Republic of Botswana. It conducts its business at Farm Readfontein, 19-JO, in Lobatse, in the Republic of Botswana. It is represented by Mr. Eric Andre Muller in these proceedings. He described himself as the largest shareholder and managing director of the applicant.

[4] The 1st respondent is the Minister of Finance, as aforesaid. He is cited in his official capacity as such and operates from the head office situate at Moltke Street, Windhoek. The 2nd respondent, on the other hand, is the Minister of Foreign Affairs and International Relations of the Republic of Namibia, whose offices are situate along Robert Mugabe Avenue, Windhoek. The 3rd respondent, SACU, is described as an international organisation established in terms of article 3 of the 2002 SACU Agreement. It is headquartered at the corner of Sam Nujoma Street and Robert Mugabe Avenue, Windhoek, Republic of Namibia.

[5] I interpose to mention that when reference is made to “the respondents” in this matter, that must be understood to refer to the Government respondents, namely, the 1st and 2nd respondents. The 3rd respondent, SACU, will be referred to in this judgment as such.

Background

[6] From the contents of the applicant’s founding affidavit, the background giving rise to this application can be summarised as follows: The applicant claims that in 2016, it instituted action proceedings against the 3rd respondent in this court. The summons was based on the alleged unlawful failure of the

3rd respondent to implement and enforce, as it was obliged to do, the undertakings made by the Republic of South Africa, one of the member States forming SACU.

[7] It would appear that the applicant's complaint is that Article 27 (3) of the SACU Agreement contains an undertaking by Member States to extend the motor operators registered in the areas of the other Member States treatment no less favourable than that accorded to motor transport operators registered within its own area. This is in respect of the conveyance of goods or passengers for reward or in the course of any trade or business.

[8] The applicant contends that the Republic of South Africa ('RSA') is in breach of this undertaking, thus causing prejudice to it. It claims that SACU has the obligation to ensure that Member States comply with their undertakings and that as a citizen of Botswana, also a State Party to the SACU Agreement, it has a lawful and legitimate expectation that SACU and its Member States will act in accordance with their obligations in terms of the Article of the agreement stated above.

[9] The applicant, catalogues a litany of manners in which RSA has allegedly not complied with the undertakings set out in Article 27(3) referred to above. In a nutshell, the applicant contends that RSA has proactively prevented the applicant from operating in RSA; directly violated the provisions of Art. 27(3); amended the provisions of the Cross Border Road Transportation Act No. 4 of 1998 in order to prohibit transport operators registered in other SACU Member States operating in RSA. The applicant accordingly contends that the actions of RSA enumerated immediately above, have caused it financial loss. It claims its mother State, Botswana has failed to intervene on its behalf.

[10] From a bird's eye view, it would seem that at the heart of the applicant's matter is its inability to cause the summons it has issued to be served on SACU. Seen as an impediment to the service and prosecution of its claim against SACU is the "absolute immunity" Namibia granted to SACU, in

the absence of which it could easily have served the summons and the matter progressing in the courts of this country. It is for the reasons appearing above that it seeks to have the decision according SACU the so-called absolute immunity set aside.

[11] The applicant contends further that the conferment of immunity on SACU violates its constitutional right to have its dispute determined by a court of law, as enshrined in Art 12 of the Namibian Constitution. The applicant further states that it disputes the right of the 1st respondent, if it did so, to confer the aforesaid immunity to SACU. This immunity, further charges the applicant, being 'absolute and unlimited' is overbroad and not properly confined to enabling SACU to properly exercise its functions in terms of its mandate. As a result, it concludes, it is unable to carry on its business in the SACU territory, as SACU 'fails to act against its most powerful Member State, i.e., South Africa'¹

[12] The respondents, as indicated earlier, take issue with all the allegations raised by the applicant and claim that the applicant is not entitled to the relief sought. In this regard, they deny that SACU was granted absolute immunity but rather that SACU was conferred with what they refer to as functional immunity, to enable the latter to carry out its activities and functions in this Republic with minimal difficulty.

[13] It was the respondents' case also that the applicant is not entitled to review as the decision to confer immunity on SACU is not ordinarily reviewable by the courts as it is an executive act, which may be assailed only on the basis of irrationality, which the applicant does not rely on for the relief it seeks.

[14] The respondents further claim that the applicant has not applied itself fully to the relevant constituent documents of SACU. Primarily, in this regard, the respondents contend that the applicant has not requested SACU to waive its immunity, which it is able to do. They further state that the applicant has a

¹ Para 35 of the applicant's founding affidavit.

remedy within SACU's own internal processes which may require the SACU *ad hoc* Tribunal to deal with the disputes *inter partes*.

[15] Regarding the question of service of the summons to be authorised by the court, as the applicant in its later argument sought, the respondents vigorously opposed this relief, which they argue is contrary to the Diplomatic Privileges Act² and is a violation of the relevant laws conferring diplomatic immunity on any organisation or entity.

Crossing of wires

[16] I must mention that at some stage, it would appear that the parties operated at cross-purposes. I say so for the reason that at the early stages of the proceedings, the only answering affidavit filed was that of the 1st respondent, who it was then understood, also filed same on behalf of the 2nd respondent.

[17] When time was due for the applicant to file its replying affidavit, it then filed a new affidavit styled "The Supplementary Founding Affidavit", which evoked a response by the 2nd respondent, who then decided to file her answering affidavit as well. This, the applicant contests, alleging that the affidavit was improperly filed and without leave of court. Its stance is that the affidavit was erroneously termed a supplementary affidavit, when it should have been headed, replying affidavit.

[18] There is a to and fro on this issue but which I think should not be allowed to cloud the real issues as will be evident from what I say below. The applicant did, however, ultimately file a replying affidavit to the 2nd respondent's answering affidavit. The issue of the additional affidavits is, for that reason, neither here nor there in the final analysis.

[19] Whatever else may have been said above in delineating the issues for determination, the applicant appeared to take a new and previously uncharted

² Act No. 21 of 1971.

path in that it seemed to abandon the relief initially sought, which is recorded in early parts of this judgment. The applicant, in its *volte-face*, then sought an order by this court authorising the Sheriff or his/her lawful deputy, to serve the summons it intends to serve on the 3rd respondent, SACU.

[20] In the light of the direction the applicant chose to pursue during the course of argument, and which necessitated even an amendment of its notice of motion, I incline to the view that most of the issues that were previously in contention appear to have become irrelevant, for the most part. I say so because the relief of review appears to have been abandoned altogether and the necessity to closely consider the constitutive documents of SACU and their bearing on the diplomatic immunity accorded to SACU, may seem at first blush, to have fallen by the wayside.

[21] Mr. Bokaba, who appeared for the applicant in argument, forcefully submitted that dealing with the issue of immunity is premature at this stage. It was his submission that the issue of immunity may be treated like the issue of jurisdiction, namely, the party sued, may raise the issue of immunity as a defence to the claim but not before even service of the process initiating the claim has been effected. In this regard, he submitted that it would be premature for this court to declare the immunity invalid at this stage when service has not been effected on SACU.

[22] In the light of the latest approach by the applicant, I am no longer called upon to deal with the relief sought by the applicant in its notice of motion and in the one that was later amended. The sole question that the court is being required to decide is whether it is proper to order the Sheriff of this court to serve the process in question on SACU? This question will have to be dealt with in the light of the Headquarters agreement and the other constitutive documents of SACU, namely, whether there is any prohibition on this court issuing an order authorising service on SACU.

[23] I should mention that this case did not proceed in the most orderly manner. I say so for the reason that the order sought in the papers was one

for review and later, an amended version was served. During the proceedings, the direction of the case, during the applicant's oral submission, changed further in the direction of not questioning the immunity conferred on SACU "yet".

[24] I sympathise with Mr. Bokaba, who apparently was drafted into the proceedings at a very late stage and who seems to have parted company with those who drafted the papers and the subsequent notice of motion. That said, it places the respondents and the court in a very untenable position to read and prepare for the presentation of one case but be confronted by a new case that has not been previously hazarded to either the court or the other party.

[25] This will not only affect the court in properly dealing with the matter, but will also detrimentally affect the ability of the parties to assist in unpacking the issues at play, particularly the respondents who were, like the court, taken by complete surprise at the trajectory the case took in the course of argument. Most of the preparation they engaged in went down the drain, as they were, like the court, sent on a wild goose chase. This should not be repeated, as it does not auger well with justice and fairness to the court and the respondents at all.

[26] In the premises, the only question, as hazarded above, that this court is now called upon to pronounce itself on is this: Is this court at large to authorise the Sheriff or his/her lawful deputy, to cause the summons issued by the applicant, to be served on SACU, which is an organisation that has been conferred with diplomatic immunity by the Government of the Republic of Namibia?

The argument

[27] The applicant importuned this court to grant the order sought, arguing that if it did not, then the applicant would be left remediless, and consigned to an entity denuded of the protection it should have as enshrined in the

Constitution of Namibia. In this regard, the applicant made reference to Art. 12, of the Constitution.

[28] I hasten to mention that the respondents questioned the propriety of the applicant bringing this matter to this jurisdiction, as it is an entity floated in accordance with the laws of Botswana. There was, as I read the papers, an argument benignly contesting the propriety of submitting the case to this court but this was not persisted in argument and I will therefore not dedicate any time or effort in dealing with same.

[29] Mr. Bokaba, in his incisive address, submitted that all process requires to be served and that there is nothing untoward with this court making an appropriate order regarding service of the documents on SACU. He argued further that according to its constitutive documents, SACU is an entity that can sue and be sued in its own name. He accordingly submitted that the respondents were self-imposed gatekeepers, who set out to frustrate an act that was recognised by SACU's constitutive documents.

[30] Lastly, he argued that the respondents should not fall into the trap of confusing, as they seemed to, launching of proceedings and the service thereof. According to him, there is nothing that prohibits the launching of legal proceedings against SACU, as it is an entity capable of suing and being sued according to its own birth certificate as it were. Service is a separate issue that needs to be authorised by the court as a Deputy Sheriff who attempted to serve the process failed and entered a return of non-service, he finally submitted.

[31] The respondents came out guns blazing. Leading the assault for the respondents was Mr. Phatela. He took the position that the issuance of a summons against an entity such as SACU, which is, and since the court is not called upon to deal with this issue, properly conferred with immunity, amounts to a void act. In this regard, the respondents laid store on the provisions of s. 2 of the Diplomatic Privileges Act.³

³ Act No. 21 of 1971.

[32] The respondents further sought to rely on the provisions of s.4 (4) of the same Act, which pronounce that any certificate or notice, published in terms of that Act, constitutes conclusive proof that a person named therein has been conferred with immunity. In this regard, the respondents contended that the affidavit of the 2nd respondent, filed of record, meets the requirement.

[33] It was the respondents' further submission that SACU, which enjoys diplomatic immunity, has power, in terms of s. 3(2)(b) of the SACU Agreement, to waive the immunity otherwise conferred on it. The respondents charged that the applicant did not, as it could properly do, request SACU to waive this immunity and as such has not exhausted available and viable options, which could have yielded fruit, possibly obviating the need for this matter having to serve before this court.

[34] The last argument advanced by the respondents relates to an internal mechanism that is set up under what is referred to as the 2002 SACU Agreement. Art. 12 of that agreement establishes an *ad hoc* Tribunal, with power to interpret, apply the Agreement or deal with any dispute arising in terms of the said Agreement. It is the respondents' firm position that this is the mechanism that the applicant ought to have explored in view of its complaint about the conduct of RSA, which it is common cause is a Member State, subject to the SACU Agreement and other constitutive documents of SACU.

Discussion

[35] I am of the considered view that the issue of immunity, which the applicant decided should not be determined on the grounds it submitted, is not entirely irrelevant. I say so for the reason that from the argument advanced by the respondents, there is some protection granted to a diplomatic mission or entity in terms of the issuance of a summons and this does not even extend to the question of service or the question of jurisdiction, once service has been effected.

[36] I am of the view that Mr. Bokaba's approach to the issue is, with respect, not correct. The party sought to be sued, i.e. SACU, cannot be sued at all. For that reason, the applicant's contention that the issue of immunity may be treated like that of jurisdiction, namely that the party sued may raise the issue of immunity as defence in the plea, is simply incorrect in the circumstances. As will be evident as the judgment unfolds, SACU is not subject to the court's jurisdiction at all. Therefore, the argument that it can raise the defence of immunity on the merits – a time that may never come, as SACU is an entity that cannot, in law be sued at all.

[37] Before proceeding any further on the issue, I think it is imperative to consider, albeit briefly, the subject of our discourse, namely, immunity. It should be recalled that, 'immunity means immunity from the exercise of jurisdiction', according to Francis Deak.⁴ The pre-eminent lawyer, Professor Ian Brownlie, put it succinctly thus in his work *Principles of International Law*,⁵ 'Diplomatic agents enjoy an immunity from the jurisdiction of the local courts . . .'. Furthermore, Professor John Dugard SC, the leading authority on international law in South Africa, writes in his work entitled, *International Law: A South African Perspective*,⁶ that diplomats, which I hold, include international organisations having diplomatic immunity, are immune from being prosecuted or sued. It has also been held that diplomatic agents are not subject to the jurisdiction of any court in South Africa (See I. Isaacs, *Becks Theory of Pleadings in Civil Actions* (1982), para 5.

[38] In the light of the applicant's stance on this issue, I will proceed on the assumption that there is diplomatic immunity accorded by the GRN on SACU as an entity domiciled within Namibia. The question that requires an answer is the effect of the immunity regarding the question of issue of summons or other court document. What is the law? Is it permissible in terms of the current legislative framework, to do so?

⁴ Organs of States in Their external Relations: Immunities and Privileges of State Organs and of the State, in Max Sorenesen (ed) *Manual of Public International Law* (1968), p347.

⁵ 4th ed (1990) at 356.

⁶ 4th ed (2011), p264.

[39] The starting point, in my view, is the consideration of the provisions of s. 3 of the Diplomatic Immunities Act, which has the following rendering:

‘Save as provided in section three, the following persons shall be immune from civil and criminal jurisdiction of the courts of the Territory –

...(d) any organisation or institution recognised by the Minister for the purpose of this paragraph, the members, agents or officers of and delegates to such organisations or institutions, and the permanent representatives of other Governments to such organisations or institutions, together with their wives and minor children, to the extent prescribed in any convention or agreement to which the Government of the Republic is a party . . .

and all legal process sued out against the persons or property of such person shall be void.’

[40] I did not understand the applicant to deny that the legislation cited above is not applicable nor that it does not apply to Namibia. What is the import of the above provisions on this matter? Before I tackle that question, it would, in my considered view, be preferable to refer to the other provisions made reference to in the subsection quoted above.

[41] In its heads of argument, the applicant contended that the above provision is not applicable to this case because certain mandatory provisions of the Act were not followed by the 2nd respondent. In particular, it was the applicant’s case that there was no certificate or notice issued in terms of s. 4 (4) of the Act. For that reason, it was contended that any immunity that may have been conferred on SACU was not properly conferred because the certificate was not produced and that although the Minister, in her affidavit referred to a Government Gazette, same was never produced to date, meaning that it never saw the light of day.

[42] Section 4 of the Act, is headed, “Register of persons entitled to immunity”. I proceed to quote the subsections that have a bearing on the issues at hand. s 4(1)(a) provides as follows:

'(a) The Minister shall cause a register to be kept in which there shall be registered the names of all persons who shall be immune under section 2 or the recognized principles of international law or an agreement contemplated in section 2A or a proclamation contemplated in section 2B from the civil or criminal jurisdiction of the court of the Territory, and every such registration shall be cancelled upon the person concerned ceasing to be so immune.

(2) The Minister shall cause every registration or cancellation made under subsection (1) to be published in the *Gazette*.

(3) At least once in each calendar year, the Minister shall cause to be published in the *Gazette*, a complete list of all persons on the register.

(4) A notice published in terms of this section or a certificate under the head of the Director-General: Foreign Affairs stating that any person mentioned in such certificate is covered by the provisions of any particular paragraph of subsection (1) of section 2 specified in such certificate or of section 2A or 2B, and accordingly recognized by the Government of the Republic to be entitled to the immunity concerned, or stating that the immunity previously attaching to any such person no longer subsists, or has been cancelled or withdrawn from any particular date, shall be conclusive proof of the facts stated in any court of law.'

[43] As indicated above, the applicant contended that because there was no certificate or notice published by the Minister in terms of the Act, then there is no diplomatic immunity enjoyed by SACU in the premises. Is that contention sustainable and correct?

[44] I am of the considered view that we should not confuse or conflate the act of granting immunity with the proof thereof. There is unchallenged evidence that Namibia granted diplomatic immunity to SACU. The Minister says so on affidavit and her assertion in that regard is not gainsaid by the applicant with any admissible evidence to the contrary, save the respondent alleging that there is no proof thereof in line with the provisions of the Act.

[45] It must be mentioned that objectively viewed, the entry or publication of the fact of the granting of immunity in a *Gazette* or other publication, is merely to make the fact of the granting of immunity known to the public. As a result, the fact that the entry is not made, does not, without more, lead to the conclusion that that fact does not exist.

[46] At para 1.7 of her so-called supplementary answering affidavit, the Minister deposes as follows:

'I hereby confirm and certify that SACU enjoys diplomatic immunity and privileges in Namibia as contemplated in section 2 (1) (d) of (*sic*) Diplomatic Privileges Act 71 of 1951 (The Act) and SACU has enjoyed such immunities since the date when the second respondent acting on behalf of the Republic of Namibia deposited Namibia's instrument of ratification with the SACU Secretariat.'

[47] The applicant, in its heads of argument, punches holes in the versions deposed to by the Government respondents and claims that they are inconsistent as to when immunity would have been conferred on SACU. It may be justified in doing so. I do not, however, wish to enmesh myself in trying to resolve the inconsistencies alleged. What is clear, from all accounts is that SACU was granted immunity by the Government of the Republic of Namibia in terms of the Act and this is the story deposed to by both the Ministers cited. I will deal with the immunity in terms of the Headquarters Agreement later in the judgment.

[48] The applicant has, in argument, sought to perforate the case of the respondents in this regard by claiming that there is no evidence of the conferment of immunity as required by the Act, namely a certificate of notice in terms of s. 4(4). I agree that the Ministers have not provided evidence in the terms required in terms of the Act. The question that follows is whether that failure to produce the evidence in terms of the Act necessarily shows and should indubitably lead to the conclusion that there was no immunity conferred on SACU because the evidence required in terms of the Act is not filed by the 2nd respondent?

[49] I think not. Although a certificate has not been issued, nor a notice in terms of s. 4.4, it is clear that the 2nd respondent has deposed to the conferment of immunity on SACU in terms of the Act on affidavit, namely, under oath. An affidavit is a document that binds on her conscience and is issued with more serious consequences on her person, including her liberty than would a certificate as required in the Act, for instance would have.

[50] It behoves the court to state in imperative terms that it would appear that the Minister may not have strictly followed the provisions of the Act in s. 4(4). The reasons therefor or the difficulties if any, are not provided. I would urge that an exercise is carried out without any delay, to comply fully with the requirements of the section. I say so for the reason that it may cause embarrassment to a conferee of diplomatic immunity to have his or her status questioned and as here, the doubt cast, playing out in open court, merely because of an administrative lapse on the part of the 2nd respondent's Ministry. This may serve to strain diplomatic relations.

[51] The yearly publication of the list of conferees and those removed from the list of immunity, should be strictly adhered to in order to avoid embarrassing spectacles like the one that is playing itself out in this case, where a person or entity, which has unquestionably enjoyed immunity over a number of years is suddenly confronted with allegations that the immunity was not properly conferred, when it had enjoyed the said immunity in fact, knowing and believing that all the internal requirements of the law had been adhered to by the host State in conferring the immunity.

[52] In the premises, I am of the view that the call by the respondents for the invocation of s. 2(1) of the Act is appropriate in the circumstances. I accordingly come to the conclusion that in terms of the said provision, ' . . . all legal process sued out against the persons or property mentioned in sub-section (1) shall be void.'

[53] In my considered view, that is the fate the lawgiver has determined for the summons that the applicant seeks to have served on SACU. The fact of

the matter is that the court may not, in the circumstances authorise the issue of process that is declared to be void by the Legislature. We must not forget that the heading of the section reads, in part, that it excludes heads of state, diplomatic agents and other persons from jurisdiction of courts. The summons sought to be served in this case is just ill fated and the court cannot lend its processes to give effect and validity to legal documents otherwise declared void by law.

[54] There is an additional reason why I am of the view that the court may not properly authorise service of the summons in any manner. It would appear that a Headquarters Agreement was entered into between the Government of Namibia and SACU on the hosting of the SACU Headquarters. It is dated 17 May 2006.

[55] Clause 4 (1) of the Headquarters Agreement is pertinent. It provides the following:

‘SACU, its property and assets shall enjoy immunity from legal process, except to the extent that SACU expressly waives this immunity in a particular case. No waiver of immunity shall subject SACU, its property or assets to any measure of execution.’

[56] Two issues arise from this clause. The first deals with the issue under consideration, namely, the conferment of immunity on SACU and the second deals with waiver of immunity, an issue that shall be adverted to later in this judgment. I venture to state that it appears that SACU was granted immunity at two levels. First, it, as an entity, its property and assets enjoy immunity from legal process. Second, SACU, its property and assets shall not be liable to execution.

[57] The two strands of immunity, it would seem, have been conferred on SACU in terms of a private Treaty entered into by the host State Namibia and SACU. No reference is made in this Agreement to the provisions of the Act regarding the conferment of immunity. I am accordingly fortified in stating that

the immunity conferred on SACU in the Headquarters agreement is separate from that conferred in terms of the Act.

[58] It accordingly appears to me that in view of that immunity, especially the first one referred to in clause 4(1) above, SACU, as an entity cannot be subjected to legal process and this, in my considered view, includes the issue of process and service of a summons on SACU. In this regard, the respondents argued that the option open to the applicant would have been to approach SACU and request it to waive the immunity, which, if the request was granted, would enable the applicant to cause the summons issued to be served on SACU. I did not hear any convincing reaction from the applicant on this argument. The respondents may well be correct.

[59] In view of the authorities quoted earlier, considered *in tandem* with the relevant parts of the 2nd respondent's affidavit and the Headquarters Agreement, I conclude that SACU enjoys diplomatic immunity in Namibia and is thus immune from all legal proceedings in Namibia, including this court. To ask this court to order process issued out of its registry, to be served on SACU, is to ask the court to do what it has no power, in law to do. This is because service of the court's process is part of legal proceedings and, indubitably, the applicant has evinced the settled desire to sue SACU in the courts of Namibia, much against the status granted SACU by the Government of Namibia.

[60] I need to state that the fact that SACU can sue and be sued, as contained in its constitutive documents, means that if SACU decides to sue in courts of this country, it will have waived its immunity and would have voluntarily submitted itself to the jurisdiction of the courts of this country. This, it has power to do, as an international organisation conferred with diplomatic immunity. Conversely, if SACU is sued, it can decide to waive its immunity and submit itself to the court's jurisdiction.

[61] In view of the foregoing, I have come to the conclusion that the court cannot, in the circumstances come to the aid of the applicant in its quest to

prosecute its claim in Namibia, against SACU. During argument, I asked Mr. Bokaba to identify the rule in terms of which the process would be authorised by the court for purposes of service on SACU. He suggested that service could be authorised in terms of rule 8(9) of this court's rules.

[62] The said rule reads as follows:

‘Where it is not possible to effect service in any manner described in this rule, the court may, on application of the person wishing to cause service to be effected, give directions in regard thereto and where such directions are sought in regard to service on a person known or believed to be within Namibia, but whose whereabouts therein cannot be ascertained, rule 13(2) applies with necessary modifications required by the context.’

[63] There is a patent flaw in this argument. It is clear when one has regard to the opening sentence in the said subrule. What becomes manifest is that this rule, which may be of an omnibus nature, from the context, clearly applies in cases where service in the other manners prescribed in the previous subrules has proved futile. The court is then requested to authorise another mode to fit the circumstances.

[64] I suggested in argument to Mr. Bokaba that it may well be that the absence of a mode of service on diplomatic missions and other such entities in the rules may not have been an oversight but recognition that these persons are treated differently in terms of the law. In my experience, the rules in most jurisdictions of which I am aware, do not have a specific mode of service for diplomatic missions and entities. This is the case in Botswana, South Africa, eSwatini, and of course Namibia. This, it would appear, is by design and not an omission, particularly in view of the provision rendering such process void in the Act, which I should add, appears to be a codification of international law.

[65] By saying this, I must not be misunderstood to mean in absolute terms that there are no instances in which a diplomatic entity may be sued, and in

which case, process may be served in acceptable and legal ways. In *Bah v Libyan Embassy*,⁷ the Industrial Court of Botswana allowed a former employee of the Libyan Embassy to sue its former employer in the courts of Botswana for severance pay and other dues. I should mention that the issue of service never featured in that judgment as a matter for determination.

[66] The court, per the luminary Dingake J, acknowledged that there are two classes of activities, namely the *acta jure imperii* (acts done in conducting sovereign activities) and the *acta jure gestionis*, (acts done in conduct of private acts), which determine whether the nature of conduct, acts or transactions of a given State confer jurisdictional immunity. The enquiry in these cases is to determine whether or not the State has acted as in relation to its sovereign status or in a private capacity. In the latter case, the immunity does not avail it.⁸

[67] I am acutely aware that the relief sought by the applicant is not constitutional in nature. It does not require the court to declare any provisions of the Act unconstitutional. It seeks a review of the act of conferment of diplomatic status. Though the case is not constitutional in nature, the court cannot, in good conscience, close its eyes to a possibility of doing an injustice to the applicant by effectively denying it access to the courts or other tribunal where its complaints can be addressed.

[68] I should, however, state that although mention is made of the provisions of Art. 12 (1) of the Constitution in the applicant's argument, it must not be forgotten that the onus of proof in such cases, lies on the party alleging the infringement of the fundamental right in issue.⁹ In that regard, it would have behoved the applicant, had it pursued its initial argument, to show in what manner the granting of "absolute immunity" to SACU, as alleged, in terms of the Act and the Agreement, offends Art. 12, in relation to it.

⁷ 2006 (1) BLR (IC)

⁸ S v India 82 ILR 14 at p.17, a judgment of the Swiss Federal Tribunal.

⁹ Kauesa v The Minister of Home Affairs and Others 1994 NR 102 (HC).

[69] This would inevitably have had to include the applicant having to discharge the onus that the Act, the relevant provisions of the Headquarters Agreement and the public international law principle of diplomatic immunity are not necessary in a democratic society, a tall order indeed. I say this merely in passing, as the applicant no longer relied for the relief it eventually sought, on this argument.

[70] Mr. Phatela referred the court to Art. 7 of the SACU Agreement of 2002, which creates institutions of SACU. At (g) thereof, it creates an *ad hoc* Tribunal. The jurisdiction of the Tribunal is provided for in Art. 13 and it is couched in the following terms:

‘1. Any dispute regarding the interpretation or application of this Agreement, or any dispute arising thereunder at the request of the Council, shall be settled by an *ad hoc* Tribunal.

[71] A misleading impression may be created from a reading of the above article that it is the Council that is entitled to bring the matter to the Tribunal and that it therefor must be a party thereto. This impression is swiftly removed by the provisions of Art 13 (5), which provide that, ‘In any matter referred to the Tribunal, the parties to the dispute shall choose members of the Tribunal from amongst a pool of names, approved by the Council, and kept by the Secretariat.’ (Emphasis supplied).

[72] This provision puts paid to any doubt or argument that the Council is the one to bring the matter to the Tribunal. It would therefor appear that a prospective plaintiff or complainant, in the shoes of the applicant, may bring its matter to the attention of Council, with a request that the Council places its dispute before the Tribunal. In this regard, it is clear that there would be parties to the dispute other than Council and this is plain from the words, ‘the parties to the dispute . . .’ occurring in Art 5.

[73] In the circumstances, I am of the considered view that notwithstanding the prohibition in the face of the applicant, it is not entirely without a remedy.

It can approach the Council and request it to place the dispute it has with SACU before the *ad hoc* Tribunal of SACU for determination.

Application for condonation

[74] At the commencement of the hearing, I granted an application by the respondents for the late filing of the heads of argument and I reserved the question of costs to the stage of judgment. I formed the view that the failure to timeously file the heads of argument was well explained by the applicant, hence the granting of the application.

[75] In making the explanation, Mr. Chibwana made a clean breast and stated that the matter fell through the cracks, as it were, as he was engaged in other matters and ultimately was out of time by 7 days. He took the court into his confidence and avoided to beat about the bush, do as some practitioners are wont to. I am of the view that the applicant was not severely prejudiced by the delay and it is in my view not a proper case in which to mulct the respondents in for the delay.

[76] I say so also considering the manner in which the applicant conducted this case, where midstream, it changed tack and argued a totally different matter, yielding unfairness to the respondents and the court. In the circumstances, although this is not a tit-for-tat case, I am of the view that both parties were *in pari delicto* (in equal guilt), albeit in respect of different aspects of the prosecution of this matter.

[77] In the circumstances, I will accordingly not award costs to the applicant for the delay by the respondents in filing heads of argument. Likewise, I will not grant costs to the respondents, on an attorney and client scale that Mr. Phatela requested. It is a matter of note, in respect of the latter, that there was no need to postpone the matter as a result of the change of tack by the applicant. The case was still argued on the same papers for the most part.

Order

[78] In the premises, and for the reasons advanced the above in this judgment, I have come to the considered view that the applicant has failed to make out a case for relief either as sought in the notice of motion, nor for the authority of this court to serve the summons on the 3rd respondent, SACU.

[79] I accordingly issue the following order:

1. The application is dismissed.
2. The Applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed Counsel.
3. There is no order as to costs in relation to the application for condonation moved by the Respondents.
4. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: Mr. T.J.B. Bokaba SC, with him Mr. R. Mastenbroek
Instructed by Dr. Weder, Kauta & Hoveka

RESPONDENTS: Mr. T.C Phatela, with him Mr. T. Chibwana
Instructed by The Government Attorney