

SOUTH AFRICA / JUDGMENT

Agboraw N.O and Another v Minister of International Relations and Co-operation and Others (Leave to Appeal) (2024-096838) [2024] ZAGPPHC 1123 (1 November 2024)

[2024] ZAGPPHC 1123

COURT

North Gauteng High Court, Pretoria

BEFORE

Mooki

CASE / FILE NUMBER

2024-096838

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 2024-096838

Reportable: No

Of interest to other Judges: No

Revised: No

SIGNATURE

Date: 1 November 2024

In the matter between:

ENOBOT AGBORAW N.O.

1st Applicant

THE AFRICAN COMMISSION OF NUCLEAR ENERGY

2nd Applicant

and

THE MINISTER OF INTERNATIONAL RELATIONS 1st Respondent

AND CO-OPERATION

THE DEPARTMENT OF INTERNATIONAL RELATIONS

2nd Respondent

THE DIRECTOR-GENERAL, THE DEPARTMENT 3rd Respondent

OF INTERNATIONAL AND CO-OPERATION

THE CHAIRPERSON, THE AFRICAN UNION COMMISSION

4th Respondent

THE AFRICAN UNION COMMISSION

5th Respondent

JUDGEMENT – APPLICATION FOR LEAVE TO APPEAL

MOOKI J

1

The applicants seek leave to appeal. They raise the following grounds:

1.1 The court erred in interpreting the Host Agreement to mean that AFCONE has no standing in the dispute resolution process in the Host Agreement.

1.2 The court improperly limited its judicial discretion in deciding that the court has no power to issue an order subject to proceedings by a body over which the court has no control.

1.3 No legal basis to the finding that the court has no power to grant interim relief pending proceedings before the AU Administrative Tribunal.

1.4 The court misdirected its analysis. The court incorrectly framed the challenge as a contestation of the AU's decision. The applicants challenged DIRCO's implementation of the AU's decision.

1.5 The court did not have proper consideration of the irreparable harm to the to the first applicant and the balance of convenience in relation to the first applicant.

1.6 The first applicant has no adequate remedy in relation to reference to the AU Administrative Tribunal.

1.7 The court failed to recognise that the relief sought in the review is not contingent on a finding of the lawfulness of dismissal of the first applicant. The review is in relation to DIRCO's violation of section 8 of the Diplomatic Immunities and Privileges Act and of Article 12 of the Host Agreement.

1.8 The court erred in finding that the court is not competent to adjudicate whether DIRCO's decision to issue the Notes Verbales revoking the first applicant's diplomatic immunities comply with the process set out in the Diplomatic Immunities and Privileges Act 2001 and in Article 12(2) of the Host Agreement

2

Disputes under the Host Agreement are disputes in relation to 'parties' to that agreement. AFCONE, as found in the main judgement, is not a 'party' to that agreement.

3

The court is not persuaded that it erred in its finding regarding the making of an order that is subject to proceedings by a body over which the court has no control.

4

The authorities referenced by the applicants, in relation to the grant or otherwise of interim relief pending proceedings in another forum, are not applicable. Those authorities deal with proceedings within the Republic. The applicants seek interim relief in relation to a decision by the Conference of State Parties, over which South African courts have no say.

5

The decision by DIRCO is manifestly in consequence to events over which the court has no control. Those events include the lawfulness or otherwise of the dismissal of the first applicant as AFCONE's executive secretary, and the advice to DIRCO by the chairman of the AU Commission that the first applicant was no longer AFCONE's executive secretary. A finding as to DIRCO's conduct is inextricably linked to a finding in relation to events leading to DIRCO issuing the Notes Verbales. The court has no control over those preceding events.

6

The applicants' contentions regarding DIRCO and the country's international obligations are over-egged. There is no suggestion that DIRCO acted in bad faith when it issued the Notes Verbales. I am not persuaded that DIRCO can be said to have failed to meet its and South Africa's obligations in terms of their respective international obligations.

7

I am not persuaded that the appeal has reasonable prospects of success. I am equally not persuaded that there are compelling reasons for granting leave to appeal as contemplated in section 17 (1)(a)(ii) of Act 10 of 2013. The application does not raise the question of South Africa's obligations to uphold international agreements, as claimed in the application.

8

The immunities and privileges, as found in the main application, attach to whoever is the Executive Secretary of AFCONE. DIRCO's withdrawal of those immunities and privileges following advice to DIRCO that the first applicant had been removed as Executive Secretary, cannot be said to set a precedent that could negatively impact South Africa's international standing and diplomatic obligations.

9

The effect of the relief sought by the applicants is this: the first applicant will be a bearer of diplomatic immunities and privileges, whilst his standing as Executive Secretary of AFCONE is in dispute; with South African courts being unable to have any say in the resolution of that dispute.

10 The fundamental issue in this matter is the lawfulness or otherwise of the first applicant being advised that he had been dismissed as Executive Secretary of AFCONE. South African courts, as found in the main judgement, cannot resolve this question.

11 I order as follows:

- (1) The application is dismissed.
- (2) The first applicant is ordered to pay costs.

O MOOKI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

Counsel for the applicants: A Katz SC N Loopoo Instructed by: Cliffe Dekker Hofmeyr Attorneys
Counsel for the first to third respondents: DT Skosana SC MG Mamabolo Instructed by: The State Attorney
Date heard: 17 October 2024 Date of judgment: 1 November 2024

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