REPORTABLE (59)

MINISTER OF FOREIGN AFFAIRS

v

(1) MICHAEL JENRICH

(2) STANDARD CHARTERED BANK ZIMBABWE

(3) SHERIFF OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
MALABA CJ, GARWE JA, GOWORA JA, GUVAVA JA & MAVANGIRA JA
HARARE, MARCH 19, 2018 & OCTOBER 31, 2018

L Uriri, with him *K Warinda,* for the appellant

D Drury, for the first respondent

No appearance for the second and third respondents

MALABA CJ: This is an appeal against the judgment of the High Court holding that the Food and Agriculture Organisation ("the FAO"), an international organisation, did not enjoy absolute immunity from every form of legal process and execution in Zimbabwe.

The issue on appeal is whether or not the court *a quo* was correct in holding, on the authority of the decision in *International Committee of the Red Cross* v *Sibanda and Anor* 2004 (1) ZLR 27 (S) (hereinafter referred to as "the *ICRC* case"), that an international

organisation such as the FAO enjoys restrictive immunity in the same manner as sovereign states and can be sued in local courts for breach of contracts of employment.

The Court holds that the FAO, like any other international organisation, enjoys functional immunity which protects it from any legal process and execution under the local legal system.

The Court holds further that the decision of the Supreme Court in the *ICRC* case *supra*, to the extent that it held that an international organisation does not enjoy functional immunity, is wrong. It must not be followed.

The reasons for the decision now follow.

Factual background

In 2004 the first respondent was employed by the FAO as an Emergency Programme Officer. The FAO renewed the fixed term contracts for six consecutive years. In January 2012 the FAO did not renew his contract of employment, following the abolition of the post of Emergency Programme Officer. There had also been allegations that he had committed acts of misconduct. The first respondent challenged the termination of employment, alleging that -

a. he had a legitimate expectation that the contract would be renewed;

b. the allegations of misconduct against him were false;

c. the abolishment of his post was unilateral; and

d. the termination without a severance package was unilateral and unlawful.

In November 2012 the dispute was taken for conciliation. The parties failed to agree and, as a result, the conciliator issued a certificate of no settlement. The first respondent sued the FAO in the local courts. He made an application to the Labour Court, claiming an order for payment of terminal benefits, and damages for loss of future earnings and for emotional and psychological stress resulting from untimely loss of employment. The total sum claimed from the FAO was USD623 400.00. The first respondent also sought an order to the effect that all references to the misconduct he was alleged to have committed be expunged from his personal file held by the FAO.

The FAO took the view that it enjoyed absolute immunity from any legal process instituted in the local courts. It did not respond to the application or attend the proceedings before the Labour Court. The court did not, *mero motu*, inquire into the question whether it had jurisdiction to hear and determine a labour matter between an international organisation, such as the FAO, and its erstwhile employee. Consequently, the Labour Court issued a default judgment on 13 February 2014. The Labour Court ordered the FAO to reinstate the first respondent in employment without loss of salary and benefits from the date of termination of employment. If reinstatement was no longer tenable, the FAO was ordered to pay damages in lieu of reinstatement amounting to USD623 400.00. The court also ordered that all references to the misconduct the first respondent was alleged to have committed be expunged from his personal file held by the FAO.

On 28 April 2014 the first respondent filed an application at the High Court for the registration of the order granted by the Labour Court for the purposes of execution. On

23 June 2014, whilst the application for registration of the order was pending hearing by the High Court, the FAO's legal adviser addressed a letter from Rome, Italy, the headquarters of the organisation, to the Registrar of the High Court. The letter advised that the FAO enjoyed absolute immunity from the jurisdiction of Zimbabwean courts. He explained that the absolute immunity enjoyed by the FAO was in terms of a number of international treaties to which Zimbabwe is a party. He made reference to the Constitution of the FAO accepted by Zimbabwe in 1981, the Convention on Privileges and Immunities of Specialised Agencies of the United Nations (1991) ("the Convention") acceded to by Zimbabwe in 1991, and the FAO Headquarters Agreement establishing the Sub-Regional Office for Southern and Eastern Africa ("the Headquarters Agreement") signed between the FAO and Zimbabwe in 1995.

The FAO's legal adviser indicated that the FAO had not waived its immunity under the treaties and the agreement. As a result, it was not going to participate in proceedings before local courts or respond to the allegations made by the first respondent. He explained that the basis of the FAO's immunity under the treaties and the agreement is that, as a big international organisation with a membership of 194 member states, it must be able to function independently and impartially without being subjected to the legal system of each country. If that were to be the case, the FAO would not effectively discharge its mandate for the benefit of all its members.

On 28 May 2014 the High Court granted the order for the registration of the Labour Court's order for the purposes of execution. Pursuant to the registration of the order, the first respondent caused two writs of execution to be issued against the FAO's movable and immovable property.

The third respondent duly executed the first writ against the movables, but stated in the return of service that the attached property did not satisfy the debt. He proceeded to attempt to execute the second writ against the FAO's bank account held with the second respondent. The Head Legal Adviser for the second respondent refused to have the funds transferred without a garnishee order.

Meanwhile the appellant sought legal ways to protect the FAO's property from execution. He issued a Ministerial Certificate in terms of s 14 of the Privileges and Immunities Act [*Chapter 3:03*] ("the Act"), on 9 June 2014, attesting and certifying that the property of the FAO enjoyed absolute immunity from any local legal process. The section provides:

> "If in any proceedings any question arises whether any person is entitled to any privilege or immunity in terms of customary international law and usage, this Act or any other enactment, a certificate issued by or under the hand of the Minister stating any fact relating to that question shall be conclusive evidence of that fact."

On 12 June 2014 the appellant wrote to the third respondent, requesting him to stop execution of the writ. The third respondent responded to the letter on 16 June 2014, advising that, in the absence of a court order instructing him to stop execution, he was under an obligation to execute the writ.

The appellant made an application to the High Court for a provisional order interdicting execution of the writ against the FAO's bank account pending determination of the question whether or not the FAO enjoyed absolute immunity from execution in Zimbabwe. The application was granted on 27 June 2014.

Having failed to execute the writ against the FAO's bank account due to the absence of a garnishee order, the first respondent sought to circumvent the effect of the provisional order of 27 June 2014. On 07 November 2014 he filed with the Registrar of the High Court a chamber application for a garnishee order against the FAO, under case No. HC 9895/14. On 28 November 2014 the appellant filed a chamber application for an order joining him as a party to the application in case No. HC 9895/14. The appellant sought to be joined in the application for the garnishee order on the basis that he had a legal interest as the Minister in charge of the administration of matters relating to foreign affairs, including questions of immunity from legal process and execution granted to international organisations and sovereign states residing and operating in the country.

Notwithstanding the fact that the appellant's application to be joined as a party to the garnishee application was still pending hearing and determination, the High Court granted the garnishee order on 31 December 2014. The order read as follows:

> "1. The application for a garnishee order is hereby granted.
>
> 2. The second respondent is hereby ordered to garnish the first respondent's bank account No. 8700223009400 held at Africa Unity Square Branch, Cnr Nelson Mandela Avenue/Sam Nujoma Street, Harare and or other accounts which may be held with any other of the second respondent's branches in Zimbabwe in the amount of US$623 400.00 (Six hundred and twenty-three thousand, four hundred United States Dollars) together with the Sheriff of the High Court's costs in the amount of US$31 310.00 (Thirty-one thousand, three hundred and ten dollars) and *to forthwith transfer the moneys to the designated bank account of the Sheriff of the High Court.*
>
> 3. The first respondent to pay costs of suit." (My emphasis.)

The granting of the garnishee order prompted the filing of an urgent chamber application by the appellant in the court *a quo* on 13 January 2015. The appellant sought an

interim order directing that, pending the hearing and determination of the application in case No. HC 5213/14, the third respondent be interdicted from enforcing the garnishee order.

On 23 January 2015 the President of Zimbabwe published a notice in the *Government Gazette*, conferring on the FAO absolute immunity from suit, legal process and execution.

Section 7 of the Act provides that:

> "(1) The President may, by notice in the *Gazette*, confer upon any international or regional organisation or agency (hereinafter called the organisation) specified in such notice all or any of the privileges and immunities set out in Part I of the Third Schedule."

Part I of the Third Schedule to the Act lists the privileges and immunities which may be conferred on an international organisation. The list includes:

> "1. Immunity from suit and legal process."

The proceedings relating to the questions whether the appellant should be joined as a party in the application for the order of execution against the FAO's property and whether the FAO enjoyed absolute immunity from suit, legal process and execution were nonetheless entertained by the court *a quo.*

The appellant argued that both the Convention and the Headquarters Agreement granted the FAO absolute immunity. That gave the FAO the right not to be sued by anyone, including erstwhile employees, in the courts in Zimbabwe.

The first respondent raised two points *in limine*. Firstly, he argued that the appellant had no *locus standi* to represent the FAO. He said that the FAO should have appeared in court on its own to establish its immunity and oust the court's jurisdiction. The point was

dismissed by the court *a quo* on the basis that the FAO did not need to participate in the proceedings to enforce its immunity. The court could *mero motu* have raised the issue of immunity. The court also found that the appellant had *locus standi* because the issue of the FAO's immunity involved the exercise of the power of the State to grant immunity to foreign Governments and international organisations.

Secondly, the first respondent argued that the agreement between Zimbabwe and the FAO was not binding on Zimbabwe, as it had not yet been domesticated. The point was also dismissed, on the basis that the Headquarters Agreement became binding on Zimbabwe on 23 July 1996.

The first respondent's argument on the merits was that the FAO, as an international organisation, enjoyed restrictive immunity. The proposition advanced was that the courts of host nations have jurisdiction to hear and determine disputes arising from commercial activities (acts *jure gestionis*) in which the organisation would be involved. The case of *Barker McCormac (Pvt) Ltd* v *Government of Kenya* 1983 (2) ZLR 72 (SC) was invoked as the authority for the proposition. At p 79G GEORGES JA (as he then was) said:

> "I am completely satisfied therefore that the doctrine of sovereign immunity generally applied in international law is that of restrictive immunity. There are no decisions of courts of this country and no legislation inconsistent with that doctrine and it should be incorporated as part of our law."

The court *a quo* decided that the FAO enjoyed restrictive immunity, which meant that the labour dispute between it and its erstwhile employee could be heard and determined by the local courts. In making the finding the Judge said that he was bound by the decision of the Supreme Court in the *ICRC* case *supra*. Whilst writing for a three-member Bench of the Supreme Court in the *ICRC* case *supra,* SANDURA JA at 31H-32A said:

> "In my view, an international organisation, such as the ICRC, enjoys immunity from suit and legal process subject to the provisions of international law, and the doctrine of restrictive immunity applies to it. It could hardly have been the intention of the Legislature to grant absolute immunity from suit and legal process to such an organisation when a foreign sovereign did not enjoy such immunity."

The scope of the doctrine of sovereign immunity had been set out at 31D-E in these words:

> "… the doctrine of sovereign immunity applicable in this country is that of restrictive immunity as opposed to absolute immunity. In other words, a foreign sovereign would enjoy immunity from suit and legal process where the relevant act which forms the basis of the claim is an act '*jure imperii'*, i.e. a sovereign or public act. On the other hand, he would not enjoy such immunity if the act which forms the basis of the claim is an act '*jure gestionis'*, i.e. an act of 'a private law character such as a private citizen might have entered into'."

The court *a quo* found that the facts in the *ICRC* case *supra* were similar to those of the case before it. It said:

> "The *ICRC* case *supra* involved a labour dispute between an international organisation and its employees. This case also involves a labour dispute between an international organisation and its employee. It is therefore on all fours with the *ICRC* case *supra*. The Supreme Court held that an international organisation only enjoys restrictive immunity, and therefore does not have immunity in cases of a labour nature such as the one before me. The Supreme Court's decision in [the] *ICRC* case *supra*, is therefore binding on this Court and must be followed."

The court *a quo* dismissed the appellant's application for a provisional order, on the reasoning that it was based on an erroneous view that the FAO enjoyed absolute immunity from legal process and execution. The effect of the ruling was that the first respondent could execute the garnishee order.

The appellant was aggrieved by the court *a quo's* decision. He appealed to the Supreme Court on the following grounds:

> "**Grounds of appeal**
>
> 1. The court *a quo* erred in law in failing to find that under customary international law the FAO enjoys absolute immunity from every form of legal process and also from execution within the territory of the Republic of Zimbabwe, in terms of the two agreements establishing its immunity.

2. The court *a quo* erred in law in failing to find that immunity from legal suit and process is distinguishable from execution.

3. The court *a quo* erred in law in failing to find that the granting of immunities to the FAO on 25 January 2015 in terms of the provisions of the Privileges and Immunities Act [*Chapter 3:03*] intervened to prevent any form of execution taking place against the property and assets of the FAO."

The appellant's argument

In motivating the appellant's grounds of appeal, *Mr Uriri* argued that, unlike sovereign states which enjoy restrictive immunity in terms of customary international law, the FAO enjoys functional immunity as an international organisation. He argued that functional immunity is necessary if an international organisation such as the FAO is to achieve its mandate. Functional immunity is derived from the international instruments in terms of which such organisations are established. The terms on the nature and scope of the immunity to be enjoyed by the international organisations are invariably adopted and reproduced in the agreements between the international organisations and the host nations. Mr *Uriri* argued that the agreements governing the immunity enjoyed by the FAO in Zimbabwe are the Convention, acceded to by Zimbabwe in 1991, and the 1995 Headquarters Agreement, approved by Parliament in 1996.

In addition, Mr *Uriri* contended that the *ICRC* case *supra*, on which the court *a quo* relied to reach its decision, is wrong to the extent that it extended the immunity applicable to sovereign states to international organisations. The rationale for the decision was that the Legislature could not have intended to bestow greater immunity on international organisations than that enjoyed by sovereign states. He submitted that the justification for the

decision overlooked the purpose for which absolute immunity is granted to international organisations such as the FAO.

The first respondent's argument

Mr *Drury*, for the first respondent, argued that the issue for determination was whether the international treaties and the agreement under which the FAO claimed immunity from suit, legal process and execution under the local legal system are binding on Zimbabwe. He said the relevant law is s 327 of the Constitution, which in relevant part provides:

> "**327 International conventions, treaties and agreements**
>
> (2) An international treaty which has been concluded or executed by the President or under the President's authority –
>
> (a) does not bind Zimbabwe until it has been approved by Parliament; and
>
> (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament. …
>
> (6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement."

He argued that the 1995 Headquarters Agreement between the FAO and Zimbabwe was not domesticated through the enactment of an Act of Parliament, as required by s 327 of the Constitution. He contended that approval of the agreement by Parliament was not enough. The agreement was therefore not binding and enforceable on the first respondent because an agreement or treaty that has not been given the force of law cannot bind the parties.

Mr *Drury* further argued that the FAO could not have been granted immunity before 25 January 2015, when the Government published a *Gazette* conferring on it immunity in terms of s 7 of the Act.

Mr *Drury* also argued that the doctrine of restrictive immunity applicable to foreign sovereign states was correctly extended to international organisations by the court *a quo*. Consequently, the dispute which gave rise to the execution of the FAO's property was a labour dispute which does not fall within the category of acts *jure imperii*. The FAO was therefore not immune from the legal processes instituted against it.

Issue for determination

The issue for determination is whether international organisations such as the FAO enjoy restrictive immunity or functional immunity.

Before addressing the issue, it is necessary to comment on the effect of the decision by the FAO not to take part in the court proceedings to raise the immunity it claims as a shield against the jurisdiction of the local courts. It is a recognised principle of procedural law that matters of jurisdiction must be raised and determined expeditiously as preliminary issues at the commencement of court proceedings. Local courts are under the obligation to respect this principle, which is part of international law of financial remedies.

Had the FAO participated in the proceedings, the issue of its immunity would probably have been resolved by the lower courts. Despite such convenience, the FAO was not obliged to take part in the proceedings. The courts that were seized with the matter ought to

have raised the issue of the FAO's immunity *mero motu*. In the *Barker McCormac (Pvt) Ltd* case *supra* at 92 G-H GEORGES JA (as he then was) said:

> "It can be argued that a municipal court has jurisdiction over a claim by reason of the nature of the claim and that such jurisdiction is barred only when the defendant raises the issue of sovereign immunity. On the other hand, it can be argued that the jurisdiction is barred once it appears on the record that the defendant can raise the issue of sovereign immunity and that the court should not proceed unless satisfied that the defendant consents or that the claim does not fall within the category of claims in regard to which sovereign immunity can be raised."

It is desirable for an international organisation that enjoys immunity to participate in proceedings instituted against it, if only to draw the attention of the court to the bar against its jurisdiction arising from the immunity enjoyed. That would not only show respect for the local courts, but also prevent at an early stage the consequences of a situation where the court is not mindful of acting *mero motu* to decide the question of jurisdiction. Unnecessary and costly proceedings would be averted if the plea against jurisdiction is upheld at the beginning of court proceedings.

In the *Barker McCormac (Pvt) Ltd* case *supra*, the Government of Kenya did not participate and was not criticised for that conduct. The court raised the issue of its immunity *mero motu* and decided it. Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court acts without jurisdiction, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. It is for the court to satisfy itself that it has the authority to decide the matter litigated before it.

Inasmuch as the FAO was not obliged to participate, the appellant should have intervened earlier, to inform the courts that it had accorded the FAO absolute immunity against legal process and execution in terms of the Convention and the Headquarters

Agreement. This would have ensured that the issue of the FAO's immunity was dealt with *in limine litis* as required by law.

According to the Advisory Opinion by the International Court of Justice in the case of *Curamaswamy* ICJ Reports, 1999, para 63 at p 88, the court said:

> "By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognised principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysia courts did not rule *in limine litis* on the immunity of the Special Rapporteur … . As indicated above, the conduct of an organ of a State - even an organ independent of the executive power - must be regarded as an act of the State. Consequently, Malaysia did not act in accordance with its obligations under international law."

The FAO ought to have informed the State of the processes which had been instituted by its former employee in the Labour Court. In turn, the State, through the appellant, would have joined the Labour Court proceedings and brought to the attention of the court the fact that the FAO enjoyed immunity, to ensure that the court determined *initio litis* the nature and scope of the immunity enjoyed by the FAO.

Whether international organisations enjoy sovereign immunity or functional immunity

It is a principle of public international law that international organisations enjoy functional immunity from suit, process and execution issued under the laws of the host countries where they operate. Originally, the doctrine of sovereign immunity under public international law guaranteed absolute immunity to foreign states and their property against the jurisdiction of the courts of a host nation. However, due to the fact that states began to involve themselves in many private commercial transactions, sovereign immunity became restricted to acts of the sovereign that were properly sovereign. This was done to prevent a

situation where a state would rely on sovereign immunity to avoid commercial obligations to the host nation, its citizens or companies.

The evolution of the doctrine of sovereign immunity from absolute to restrictive immunity is explained by C.F. Forsyth in *Private International Law* at p 180 as follows:

> "Foreign sovereigns and diplomatic representatives are accorded a special status in terms of public international law and that status serves to exclude the jurisdiction of local courts. At common law it was clear that, in principle, foreign sovereigns and their property were immune from suit in South African courts. This flowed from the public international law principle of the equality of sovereign states: *par in parem non habet imperium*. As sovereign states in the second half of the twentieth century began to involve themselves in many commercial activities pressure grew to restrict this immunity to the acts of the sovereign that were properly sovereign (acts *iure imperii*) but not to non-sovereign or commercial activities (acts *iure gestionis*). In the late 1970s the southern African courts followed the lead of English courts and began to recognise this distinction and to deny states sovereign immunity in commercial cases. States could no longer avoid their ordinary commercial obligations by relying on the doctrine of sovereign immunity."

In *International Law, A South African Perspective*, J. Dugard at p 241 writes to the effect that the doctrine of restricted immunity in respect of the commercial activities of sovereign states has probably acquired the status of customary international law. The learned author says:

> "This appears from the adoption by the General Assembly of the United Nations in 2004 of a United Nations Convention on Jurisdictional Immunities of States and their Property prepared by the International Law Commission. It approves restricted immunity in respect of commercial activities and asserts in its preamble 'that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law'."

The doctrine of restrictive sovereign immunity has become accepted worldwide as a principle of customary international law. In the *Barker McCormac (Pvt) Ltd* case *supra* the court accepted the doctrine as being part of our law. In so holding, the court recognised the incorporation of this principle of customary international law into municipal law. Where therefore any sovereign state is sued in our courts for public governmental acts, it can

successfully plead immunity. However, where a sovereign state is sued for private commercial activities it cannot successfully plead or raise the defence of sovereign immunity to avoid the fulfilment of its obligations.

International organisations also enjoy immunity from suit, process and execution under the laws of their host countries. The immunity is, however, different in scope from that enjoyed by foreign sovereign states. According to Cedric Ryngaert, an Assistant Professor of International Law, Leuven University; Institute for International Law, in Working Paper No 143 - December 2009 titled *The Immunity of International Organisations before Domestic Courts*, the immunity enjoyed by international organisations in terms of the customary international law is generally absolute immunity covering their functions or limited to their functions.

In the case of *Spaans* v *Iran-US Claims Tribunal* 94 ILR 321, a dispute arose between the Tribunal and an interpreter in its employment at a point before negotiations for a host State Agreement between the Tribunal and the Netherlands had been concluded. The Dutch Supreme Court found that an international organisation enjoyed immunity from the jurisdiction of the courts of its host State for acts within the scope of the performance of its tasks by virtue of customary international law.

The grounds for granting immunity from suit, process and execution under municipal law to foreign sovereign states have always been different from those on the basis of which immunity has been granted to international organisations. Unlike sovereign states whose immunity arises from the principle of equality with the host nation, international organisations enjoy immunity for the crucial purpose of carrying out their functions. The

restriction that has been put on sovereign immunity cannot be extended to the immunity of international organisations, because the purpose of the immunity they enjoy has always been defined in terms of the nature and scope of their functions as described in the instruments by which they are established. The functional immunity of international organisations thus remains absolute.

In *Eastern African Development Bank v Blueline Enterprises Limited*, 2011 TZCA 1, the Tanzanian Court of Appeal explained in detail the reasons why the immunity applicable to international organisations is different from the restrictive immunity from local courts' jurisdiction applied to foreign sovereign states. The court said:

> "All in all, Prof. Fimbo's argument, in our considered opinion, can only hold water when viewed in relation to state immunity from jurisdiction. It cannot be correct when it comes to international organisations which have been granted immunity from legal processes under their constitutive instruments. This is all because these are two 'different legal institutions distinguishable with respect to the fundamental grounds on which they are built and in regard to the extent to which the immunity is recognised.'
>
> See, for instance, Felice Moreenstern, in his '*Legal Problems of International Organisations*' pp 5-10 and '*Immunity of International Organisations and Alternative Remedies against the United Nations*', by Dr Reinsich, at a Seminar on State Immunity held at the University of Vienna in 2006.
>
> There is no gainsaying that the traditional grounds for state immunity are not always unqualifiedly valid for granting immunity to international organisations. Sovereign immunity has always been premised on the now historic view of *par in parem non habet imperium* or *par in parem non habet jurisdictionem*, that is 'an equal power has no power over an equal'. The same cannot be said of international organisations. This is because they are creatures of sovereign states themselves. It is these states which determine their legal status, capacities, privileges and immunities as shown at the outset of this judgment … ."

Explaining the same concept, the Supreme Court of Uganda, in *Concorp International Ltd v East and Southern Africa Trade and Development Bank*, [2013] UGSC 18, also highlighted the rationale behind the difference between the absolute immunity enjoyed by international organisations and the restrictive immunity of sovereign states. It held that:

> "Sovereign states derive their immunity from the principle of reciprocity. Under this principle, the immunity is restricted to *jure imperii* (sovereign acts) but does not extend to *jure gestionis* (non-sovereign acts).
>
> On the other hand, the immunity of international organisations, like the respondent, is based on the principle of functionality. In other words, the immunity encompasses all acts needed for the execution of the functions and activities with which the relevant international organisation is entrusted. Concrete determination of the scope of the immunity is based on the respective treaties or charters establishing each international organisation."

The origins of sovereign immunity are clearly different from those of functional immunity. A state has immunity in another state for the simple reason that it is also a state. An international organisation, on the other hand, enjoys immunity in a host state in respect of acts related to its functions to carry out its mandate without limitations by the laws of different host states where it operates. Complying with the laws of all the Member States where the international organisation operates to discharge an otherwise universal mandate would be impossible.

The functional immunity of international organisations is read from the treaties and agreements signed by the host nation and the organisation. Brownlie's *Principles on Public International Law* 8 Ed, p 171, articulates this point as follows:

> "The privileges and immunities of international organisations derive from multiple sources. In the first place the constituent instrument of the organisation will ordinarily contain at least a general provision stating that the organisation and its personnel are to be accorded immunity …. A further source of privileges and immunities are separate multilateral agreements. The Convention on the Privileges and Immunities of the United Nations is the example most frequently identified as such, having inspired other similar instruments, notably the Convention on the Privileges and Immunities of Specialised Agencies. These may be further cemented by headquarters agreements between the organisation and the host state … . "

Article III of the Convention, acceded to by Zimbabwe in 1991, contains the following provisions:

> "SECTION 4

> The specialised agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.
>
> SECTION 5
>
> The premises of the specialised agencies shall be inviolable. The property and the assets of the specialised agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

The provisions unequivocally guarantee absolute immunity to the FAO, its property and assets from any form of legal process and execution. By acceding to the Convention, Zimbabwe bestowed on the FAO absolute immunity from the date of accession by virtue of customary international law.

Further to the Convention, the FAO signed the Headquarters Agreement with Zimbabwe in 1995. Article VIII of that Agreement provides:

> "Section 12
>
> The FAO, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case the Director General shall have expressly waived its immunity. It is however, understood that no waiver of immunity shall extend to any measure of execution.
>
> Section 13
>
> The property and assets of the FAO, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

The agreement also guaranteed immunity to the FAO, its property and assets. By signing it, Zimbabwe conferred such immunity upon the FAO.

It is the latter agreement which the first respondent argues was not domesticated and is therefore not enforceable. This argument by the first respondent was misplaced. The judgment of the court *a quo* was not based on the determination of the question whether the

Headquarters Agreement was domesticated or not. The judgment determined the question whether sovereign immunity applied to international organisations such as the FAO.

The Headquarters Agreement was approved by Parliament in 1996. The former Constitution of Zimbabwe in s 111B required all international treaties, conventions and agreements entered into on behalf of Zimbabwe to be approved by Parliament. Once the agreement was approved by Parliament, it became binding on Zimbabwe. The argument advanced on behalf of the first respondent based on s 327 of the Constitution is misplaced because the section came into effect in August 2013.

Functional immunity is a principle of customary international law. Section 326 of the Constitution incorporates customary international law into our law. It provides that:

> "(1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.
>
> (2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law."

The provision is clear. Customary international law need not be incorporated into our law by or under an Act of Parliament. It is part of our law by virtue of it being customary international law. The only exception to the applicability of customary international law is where its application is inconsistent with the provisions of the Constitution of Zimbabwe or an Act of Parliament.

In casu, the first respondent did not bring to the attention of the court any provision of the Constitution or Act of Parliament which is inconsistent with the functional immunity granted to the FAO in terms of the Headquarters Agreement.

For the reason that international organisations can only carry out their functions through employees, labour disputes have been held to lie at the core of an international organisation's immunity from suits in local courts by former or current employees in actions arising from employment relationships. In *Cynthia Brzak and Nasr Ishak* v *The United Nations, Kofi Annan, Wendy Chamberline, Ruud Lubbers*, 551 F.Supp.2d 313 (2008), the court stated that:

> "The courts have consistently held that employment related issues lie at the core of an international organisation's immunity. For example, in *Mendaro* v *World Bank*, 717 F.2d 610 (D.C.Cir.1983), the D.C. Circuit held that, notwithstanding a broad waiver in the World Bank's founding treaty, IOIA immunity protected the Bank from a Title VII suit by a former employee who alleged that she had been the victim of sexual discrimination and physical and verbal sexual harassment by her coworkers. The Court excluded employment suits from the waiver, observing that compliance with the employment policies of over 100 Member States would be 'nearly impossible', *id.* at 618-19, and noting that 'one of the most important protections granted to international organisations is immunity from suits by employees of the organisation in actions arising out of the employment relationship'. *Id.* at 615. See also *Broadbent* v *Org. of Am. States*, 628 F.2d 27, 35 (D.C.Cir.1980) (holding that [the] international organisation's employment of plaintiff could not constitute 'commercial activity' under [the] restrictive theory of immunity); *Morgan* v *Int'l Bank for Reconstr. and Dev.*, 752 F.Supp. 492, 493 (D.D.C.1990) (holding that international organisations are immune under IOIA and international law from suits 'arising out [of] their internal operations').
>
> For similar reasons, the courts have consistently found that functional immunity applies to employment-related suits against officials of international organisations. See, *e.g.*, *De Luca*, 841 F.Supp. at 536 (holding officials immune against claims that they, among other things, initiated a retaliatory tax audit and forged plaintiff's pay statement); *Broadbent*, 628 F.2d at 34 ('International officials should be as free as possible, within the mandate granted by the member states, to perform their duties free from the peculiarities of national politics.'); *D'Cruz* v *Annan*, 2005 WL 3527153 (S.D.N.Y. December 22, 2005) (holding that current and former U.N. officials are immune under the General Convention and IOIA from employment discrimination and retaliation claims)."

The FAO has its own internal mechanisms for dealing with employment related disputes. Article IX of the Convention provides that:

> "Section 31
>
> Each specialised agency shall make provision for appropriate modes of settlement of:
>
> Disputes arising out of contracts or other disputes of private character to which the specialised agency is a party."

The reason why these mechanisms were created was to enable the organisation to deal with disputes arising out of contracts to which it is a party to ensure that justice could be done to aggrieved parties, who would otherwise be without remedies due to the immunity enjoyed by the organisation. The dispute between the FAO and the first respondent arising from the termination of employment should have been dealt with according to the mechanisms established by the organisation in terms of the Convention and its Constitution.

Disposition

The *ICRC* case *supra* was wrongly decided to the extent that it held that the principle of restrictive immunity is applicable to international organisations. The decision is overruled. The judgment of the court *a quo* is wrong because it relied on the *ICRC case supra*.

Accordingly, the following order is made -

1. The appeal is allowed with costs.

2. The judgment of the court *a quo* is set aside and substituted with the following:

   "a. The application is granted with costs.

   b. It is hereby declared that the FAO enjoys absolute immunity from every form of legal process and execution in Zimbabwe.

   c. The garnishee order issued by this court on 31 December 2014 be and is hereby declared invalid and set aside.

d. Consequently, the writs of execution issued against the FAO's property be and are hereby declared invalid and set aside."

3. The decision in the case of *International Committee of the Red Cross v Sibanda & Anor* 2004 (1) ZLR 27 (SC), extending the principle of restrictive immunity applicable to sovereign states to international organisations, is hereby overruled for the reason that it is wrong at law.

GARWE JA: I agree

GOWORA JA: I agree

GUVAVA JA: I agree

MAVANGIRA JA: I agree

Civil Division of the Attorney-General's Office, appellant's legal practitioners

Honey and Blackenberg, first respondent's legal practitioners