

THE CASE OF *GOVERNMENT OF THE REPUBLIC OF ZIMBABWE v LOUIS KAREL FICK*: A FIRST STEP TOWARDS DEVELOPING A DOCTRINE ON THE STATUS OF INTERNATIONAL JUDGEMENTS WITHIN THE DOMESTIC LEGAL ORDER

E de Wet*

SUMMARY

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

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

* Erika de Wet. BJur. LLB LLD (Free State) LLM (Harvard) *Habilitationsschrift* (Zurich). Co-Director of the Institute for International and Comparative Law in Africa and Professor of International Law at the University of Pretoria. The research for this contribution was made possible by a fellowship from the Stellenbosch Institute for Advanced Study in South Africa (STIAS). Email: Erika.DeWet@up.ac.za.

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

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

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