South African Constitutional Court does it again

On 27 June 2013 South Africa's constitutional court has ruled on two matters of interest for specialists of private international law, specifically international civil procedure.

In the first judgment, *Government of Zimbabwe v. Fick and Others*, the Court ruled on the enforcement of a costs order granted by the Tribunal of the Southern African Development Community (SADC). At the basis of the dispute was the expropriation of the land of Zimbabwean farmers without compensation. The Tribunal, with its seat in Windhoek, Namibia, has in the meantime been suspended due to the political row that followed this and other judgments.

When Zimbabwe refused to comply with the costs order, the farmers approached the South African courts for registration and enforcement. Property belonging to Zimbabwe, and situated in South Africa, was attached.

On the matter of immunity the Constitutional Court found:

"*Zimbabwe's agreement to be bound by the Tribunal Protocol, including article 32*[on enforcement and execution]*, constitutes an express waiver in terms of section 3(1) of the Immunities Act. It is a waiver by Zimbabwe of its right to rely on its sovereign immunity from the jurisdiction of South African courts to register and enforce decisions of the Tribunal made against it.*"

The Constitutional Court ruled that the common law rules on enforcement, applicable to the judgments of foreign states, had to be extended to the judgments granted by international tribunals.

The second judgment, *Mukaddam v. Pioneer Foods (Pty) Ltd and Others*, concerned a class action against a number of producers of bread, based on anti-competitive conduct. Mr Mukaddam was one of a number of bread distributors. The Competition Tribunal had already found the producers guilty of anti-competitive conduct and imposed fines. The High Court of the Western Cape and

the refused certification, since many of the applicants were corporate entities and since the courts found that the issues raised against the various respondents were different.

In its judgment, *Children's Resource Centre Trust v Pioneer Food* (delivered on 29 November 2012), the Supreme Court of Appeal grappled with the issue that the South African Constitution allows class actions (in s. 38c), but that there is no legislation on the matter. The Court stated: "*We are thus confronted with a situation where the class action is given express constitutional recognition, but nothing has been done to regulate it. The courts must therefore address the issue in the exercise of their inherent power to protect and regulate their own process and to develop the common law in the interests of justice.*"

It has long been disputed whether class actions are only permitted in constitutional matters or also in civil matters. Therefore the claimants invoked their right to access to food (s. 27,1b of the Constitution). The Court, however, found that their right to access to the courts (s. 34) was sufficient to allow a class action, as they would not be able to bring their claims as individual plaintiffs. Moreover, the Court recognised the general possibility of civil class actions and set down requirements for such actions, including certification. The Court set down the elements that a court should use in the assessment of certification:

- the existence of a class identifiable by objective criteria;
- a cause of action raising a triable issue;
- that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
- that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- that the proposed representative is suitable to be permitted to conduct the action and represent the class;
- whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.

The Court subsequently allowed certification of one of the classes and refused certification for the other in this particular case (the different classes related to

different geographical areas of the country and different dates).

The standard set by the Supreme Court of Appeal was accepted by all parties, and the Constitutional Court proceeded on that basis. The Court then found that the factors laid down by the Supreme Court of Appeal had to be assessed in view of the interests of justice and that the absence of one factor must not oblige a court to refuse certification. The appeal was allowed on this basis. The South African Courts are thus again developing the law of civil procedure.