Sovereign Immunity in Botswana: The Case for a Sovereign Immunities Act

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ABSTRACT

This article makes the case for the promulgation of a Sovereign Immunities Act in Botswana. State or sovereign immunity in Botswana is governed by the common law, whereas diplomatic immunity is governed by the Diplomatic Immunities and Privileges Act, 1968. Several court decisions in Botswana on questions of sovereign and diplomatic immunity have revealed that there exists some confusion and conflation in the application of sovereign immunity and diplomatic immunity laws. The conflation has sometimes led to unfortunate decisions which incorrectly apply rules of diplomatic immunity to cases that are concerned with the immunity of States. The purpose of this article is, first, to analyse recent decisions in the area of state and diplomatic immunity in Botswana; second, to identify common areas of confusion; and, third, to take a comparative look at the United Nations Convention on Jurisdictional Immunities of States and their property, which though not yet in force, provides a succinct codification of customary international law rules of state immunity. The article then considers the benefits that could be gained through the promulgation of a Sovereign Immunities Act for Botswana. The paper concludes with a recommendation that Botswana should accede to and domesticate the Convention on Jurisdictional Immunities of States and their Property in the form of a Sovereign Immunities Act for Botswana.

1 INTRODUCTION

The Diplomatic Immunities and Privileges Act[1] was enacted in 1969. The long title of the Act reveals its purpose as follows: ‘to make provision concerning diplomatic privileges and immunities by giving effect to the Vienna Convention on Diplomatic Relations.’[2] The Act domesticates international treaty rules on diplomatic immunities and privileges making it part of Botswana Law. These rules on diplomatic immunity generally govern the treatment of

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[1] Cap 39:01
[2] The Act was adopted on 14 April 1961 and came into force on 18 April 1961. Botswana acceded to the Vienna Convention on Diplomatic Immunities on 11 April 1969.

diplomats and their property and the inviolability of diplomatic missions in Botswana. Interestingly though, Botswana has no Sovereign Immunities Act that governs the sovereign immunities of State. This means that Botswana is entirely reliant on customary international law as the source of rules on State immunity. It may be observed from recent judgements of Botswana courts on the question of State and diplomatic immunity that lawyers and judges alike often conflate the rules of state and diplomatic immunity. This article will examine several such cases to illustrate how the failure to properly distinguish between sovereign immunity and diplomatic immunity has resulted in jurisprudence that is unreliable and tenuous. This article then makes the case that the promulgation of a state immunity act, drafted along the lines of the United Nations Convention on Jurisdictional Immunities of States and their Properties, would be helpful to practitioners and judges alike by making rules of state immunity more readily and easily ascertainable. The next section will situate the reader by explaining the place of customary international law in the law of Botswana.

2. THE PLACE OF CUSTOMARY INTERNATIONAL LAW IN THE LAW OF BOTSWANA

As mentioned above, Botswana derives her rules of state immunity from customary international law and not from an act of parliament. The absence of a statute on state immunity in Botswana should not, on the face of it, present much difficulty. After all, common law rules form a vast portion of Botswana's laws. Further, common law rules are, more often than not, robust and sufficient, provided the practitioner engaging with such rules is aware of two things: first, where to find the rules within the large body of jurisprudence that is our common law; and, second, in the case of rules emanating from customary international law, how these rules are incorporated into Botswana law.

The place of customary international law in the law of Botswana has been clearly stated by Botswana courts. The *locus classicus*, *Republic of Angola v Springbok Investments (Pty) Ltd*[3] set the stage for the incorporation of rules of customary international law into the common law of Botswana. In this case, the respondent, Springbok Investments, had obtained a default judgement against the state of Angola. The judgement arose from a dispute between the parties over the purchase and sale of an immovable property for use as a diplomatic residence in Botswana. Angola did not dispute the underlying judgement but wished to resolve the dispute

[3] 2005 (2) BLR 159 (HC).

using diplomatic channels. Springbok, for its part, wished to execute its judgement and recover monies owed to it by the Republic of Angola.

The sole issue before the court was whether it was lawful for the Springbok Investments to attach funds held by the State of Angola in a bank account at a commercial bank in order to satisfy the default judgement obtained against the Angola.

In considering the place of customary international law in the law of Botswana, the court held that the doctrine of transformation, which required that all aspects of international law should be introduced into the law of a nation by statute, or by specific decision of judges, or by long standing custom, has been replaced by the doctrine of incorporation. The doctrine of incorporation holds that customary international law forms part of the common law of a nation unless it is in conflict with existing statues or the common law.[4] In stating the position of the law with respect to Botswana, Kirby J., as he then was, observed:

> 'The doctrine of incorporation was expressed thus by Lord Atkin in *Chung Chi Cheung v R* [1938] 4 All ER 786 (PC) at p 790: "The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue, they seek to ascertain the relevant rule and, having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals." Similarly, I have no doubt that the rules of international law form part of the law of Botswana, as a member of the wider family of nations, save in so far as they conflict with Botswana legislation or the common law, and it is the duty of the court to apply them.'

This positon regarding the incorporation of customary international law into the law of Botswana has been restated and affirmed in several decisions of the Botswana Court of Appeal.[5] It is opportune to note at this moment that Kirby J. in the *Springbok* case lamented the lack of a State Immunities Act in Botswana, stating as follows:

> 'Many countries have codified both the international law of sovereign immunity and that of diplomatic immunity in their own acts of parliament. Thus South Africa has enacted the Foreign States Immunity Act (No. 87/81) to deal with sovereign immunity, and in the United Kingdom the State Immunity Act, 1978, was passed for this purpose. In Botswana only a Diplomatic Immunities and Privileges Act has

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[4] 2005 (2) BLR 159 (HC) at 162. This principle is reiterated in *Trendtext Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 881 at p 888 (per Lord Denning); *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mozambique* 1980 (2) SA 124 (T) (per Margo J) and *Barker* C McCormac *(Pvt) Ltd v Government of Kenya* 1983 (4) SA 817 (ZS) at p 819 (per Georges JA).

[5] *Majid Properties v Republic of France* 2012 (2) BLR 482 (HC).

been enacted. There is no statute as yet covering the sovereign immunity of foreign states.'[6]

It is argued in this article that the continued absence of an Act clearly codifying rules of State immunity leads to undesirable results arising out of unsound and rickety interpretation of rules concerning State and diplomatic immunity in Botswana. The next section will illustrate the most common difficulties encountered by the courts.

3. CONFLATION OF STATE AND DIPLOMATIC IMMUNITY THROUGH CASES

There is a good number of decisions on the question of State and diplomatic immunity handed down by the Botswana High Court and the Industrial Court. A great majority of these decisions cannot be faulted for arriving at incorrect conclusions. In fact, the outcomes are often correct. What is worrisome is that in some of these decisions, the courts apply incorrect rules of State and diplomatic immunity to arrive at the judgment. The rules applied typically conflate principles of State and diplomatic immunity into a single concept. The decisions appear not to draw a clear distinction between the rules governing these two types of immunity, resulting in judgments that are clumsy in reasoning. This section will consider six of these judgments and highlight problematic areas which will interest scholars, legal practitioners and students alike, who may wish to avoid similar pitfalls.

The first of the ungainly decisions is *Republic of Angola* v *Springbok Investments (Pty) Ltd* referred to above. The difficulties complained of in this article can be found in the Applicant's arguments. The Applicant argued that its bank account was immune from attachment based on the doctrine of sovereign immunity. In the alternative, the applicant contended that the bank account was immune from attachment because it was operated by diplomatic agents. The Applicant placed reliance on Article 22 (3) of the Schedule to the Diplomatic Immunities and Privileges Act, which provides that the premises of a diplomatic mission, the furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Kirby J. was quick to state that he was not willing to attach a widened interpretation to Article 22 (3). In his view, the bank account was not part of the property protected from

[6] 2005 (2) BLR 159 (HC) at 161.

execution under the Diplomatic Immunities and Privileges Act.[7] Having eliminated the possibility of relying on the Diplomatic Immunities and Privileges Act, the judge turned his mind to whether any protection could be found under rules of State immunity. The Court noted that it did not follow that any property of a State not protected from attachment under the Diplomatic Immunities and Privileges Act was open to attachment and execution. The Court took the view that if a thing was used for diplomatic functions of state then it would be immune from execution. The court also noted the decision in *Alcom Ltd v Republic of Columbia (Barclays Bank Plc and Another, Garnishees)*,[8] where a garnishee order was refused against an account held by the Republic of Columbia because the applicant had been unable to prove that the account was used wholly for commercial purposes.[9]

Relying on the evidence of the *charge de affaires* of the Republic of Angola, the Court in *Springbok* took the view that it was not clear that the attached back account was used solely for commercial purposes. The Court accepted that the funds in the account were proceeds of diplomatic and consular activity and were used for diplomatic and consular functions. The Court found that the bank account was therefore immune from attachment under customary international law rules of sovereign or State immunity, and that this rule of international law formed part of the law of Botswana.

In this particular case, the judge was invited by counsel for the Applicant to rely on the Diplomatic Immunities and Privileges Act to make a determination regarding the immunity or otherwise of a State owned bank account. The learned judge skilfully sidestepped this hornet's nest and, through a proper examination of the laws of State immunity, arrived at the conclusion that an account used for consular diplomatic functions enjoyed protection of the law under rules of State immunity found in customary international law. The court also declared that the rule providing immunity to a bank account owned by a State and not used exclusively for commercial purposes to be a rule that forms part of the common law of Botswana.

Whilst the approach in the *Springbok* decision was correct, not all judges are able to escape the allure of the Diplomatic Immunities and Privileges Act in solving problems of State immunity. In the second case under examination, *Majid Properties v Republic of France,*[10] the Republic of France had encroached on private land adjacent to the French diplomatic mission

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[7] 2005 (2) BLR 159 (HC) at 161.

[8] [1984] 1 AC 580 (HL).

[9] 2005 (2) BLR 159 (HC) at 162 – 163. See also *Re: The Republic of the Philippines* 73 AJIL 306 (1979) in a similar vein and *Birch Shipping Corporation v Embassy of Tanzania* 75 AJIL 373 (1981) a contrasting decision where a garnishee order was allowed upon proof that the embassy account was used, at least in part, for commercial purposes.

[10] 2012 2 BLR 482 (HC).

in Gaborone by erecting a bill board on the land. The Applicant, who was the owner of the land encroached upon, sought cessation of the encroachment or a transfer of ownership of the portion of land encroached upon by France. As in the *Springbok* decision, the respondent State, France, sought to rely on rules of both State immunity and diplomatic immunity.

The Respondent argued that it was immune from suit as a sovereign State under rules of State immunity. The Court gave short shrift to the claims of State immunity, holding that the act of encroachment was not in any way an act of State. The encroachment, the Court noted, had nothing to do with the policies, executive or legislative functions of the State of France. Further, since the encroachment was not an act of State or *acta jure imperii*, the Court could exercise its jurisdiction over the encroachment dispute.

An alternative argument by the respondent was that it was protected from suit under Article 31(1) (a) of the Diplomatic Immunities and Privileges Act.[11] This article provides that a diplomatic agent shall enjoy immunity from the civil jurisdiction of a State in respect of any real action with respect to immovable property which he holds on behalf of the sending State for purposes of the mission. The court held that the respondent could not rely on Article 31 (1) (a) because the billboard had been on private land outside the mission premises and not land belonging to the mission. In excluding the applicability of Article 31(1) (a) the judge stated:

> 'A diplomatic agent was insulated from lawsuits in respect of the mission - meaning the territory of the mission. However, where the foreign diplomat erected advertising billboards on private land outside the mission premises, he or she could not plead immunity when the owner of the private land sued for their removal. The immunity attaches to the premises of the mission and not to private property. Similarly, where, as in the present case, the diplomat steps out of the mission premises and annexes adjacent private property, he or she could not plead immunity because in such a case the lawsuit was not about the territorial integrity of the foreign sovereign or about entering the foreign mission, it was about the foreign diplomat entering private property and being ejected from land not held on behalf of the mission. Article 31(1) (a) was accordingly of no assistance to the defendant and the special defence on diplomatic immunity had to fail.'

This is where reasoning of the learned judge is flawed. The judge is correct when he states that Article 31(1) (a) does not apply in this case. But the reasons he offers are incorrect. The learned judge argued that Article 31(1) (a) is not of assistance to the respondent because

[11] See the schedule to the Act.

the suit was not concerned with immovable property of the mission but with private land encroached upon.[12] This is not correct because Article 31 is concerned with immunities of a diplomatic agent and not immunities of a State. The suggestion in the judgement that the State of France could avail itself of the protections of Article 31, which are intended for diplomatic agents, is erroneous. The correct approach would have been to state that Article 31(1) (a) would not have applied to this case because the respondent was a State and not a diplomatic agent. To apply this rule to a sovereign State was simply incorrect. It is submitted that the judgment was complete after the discussion on State immunity and the judge's foray into diplomatic immunity simply conflated and confused these two similar, but distinct, legal principles.

The third case under scrutiny is *Bah v The Libyan Embassy*.[13] The Applicant sought payment of severance pay, payment *in lieu* of notice, unpaid wages and a certificate of employment from the respondent after the termination of his employment at the Libyan Embassy. There was no appearance for the respondent in this case. The judge, *mero motu*, raised the question of immunity. The judge couched the question as follows:

> 'When this matter came before me for hearing on 4 November 2005, I raised the question whether the respondent, being an Embassy of a foreign State, is capable of being sued having regard to the provisions of the Diplomatic Immunities and Privileges Act (Cap 39:01)… The question that in my view falls for determination is whether the Respondent is immune in terms of the Diplomatic Immunities and Privileges Act from being sued for breach of the provisions of the Employment Act (Cap 47:01) and or terms and or conditions of employment signed by the parties. To answer the above question it is important to interrogate closely the Diplomatic Immunities and Privileges Act that incorporates some key aspects of the Vienna Convention on Diplomatic Relations of 1961 and the jurisprudence on diplomatic immunity generally."[14]

Two problems are immediately apparent in this case. First, the applicant incorrectly cited the respondent as the Libyan Embassy. The correct respondent, as in the cases preceding this one, should have been the State of Libya. This is because in a law suit against the State, it is the sovereign State that is a person at international law and not its diplomatic mission. A mission has no legal personality separate and independent from the sending State and merely

[12] Available at http://www.elaws.gov.bw/rep_export.php?id=4869&type=pdf accessed on 25 October 2018 at p. 2.
[13] 2006 (1) BLR 22 (IC).
[14] 2006 (1) BLR 22 (IC).

acts as the representative of the sending state.[15] The judge in this case completely missed this point.

The second difficulty is about the applicable law. Is the relevant law the Diplomatic Immunities and Privileges Act or common law rules on State immunity? The learned judge states that the issue of immunity of the respondent should be resolved with reference to the Diplomatic Immunities and Privileges Act. This is patently incorrect. The question before the Court was one of State immunity and not diplomatic immunity. The second problem appears to flow directly from the first. Had the learned judge spotted the incorrect citation of the respondent as an Embassy and not as a State, he may have been able to put things right and apply the law of State immunity. But having missed the incorrect citation, the judge then referred to the incorrect rules as the source of law for the legal question at hand. This was another unfortunate decision conflating State and diplomatic immunity.

The judge did eventually correct his course and make a finding based on rules of State immunity. He found, correctly, that the restrictive doctrine of immunity applied in all cases where the State engaged in commercial or private activity. He also held that the contract of employment was one of a purely commercial nature. The outcome for the applicant was the desired one, but arrived at through reasoning lacking in clarity on the all-important distinction between State and diplomatic immunity.

The fourth case to consider is *Dube and Another v The American Embassy.*[16] In this case, two applicants sued their erstwhile employer for damages following retrenchment. In this matter, the respondent was again incorrectly cited as the Embassy or mission. Although the presiding judge did note in her judgement that the two applicants were in the employ of BOTUSA, an agency of the United States Department of State although no order was made amending the citation to the name of the State. The confusion about the applicable law seemed to affect the Botswana Ministry of Foreign Affairs and International Cooperation which had intervened in the matter at the mediation stage. The Ministry is quoted as stating in a written communication that the Department of Labour 'seemed to be in violation of the Vienna Convention on Diplomatic Relations 1961.' This is an interesting section of the judgment because it suggests that the Minister of Foreign Affairs was also under the impression that the applicable law in disputes between foreign states and their employees is the Vienna Convention on Diplomatic Relations and not customary international law rules on State immunity.

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[15] E Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 4ed (Oxford University Press 2016) at 235.

[16] 2010 (2) BLR 98 IC

In her judgment, after pointing out that out that the United Kingdom and South Africa have statues regulating the immunities of states from suit, Ebrahim Carstens J. stated:

> 'Sovereign immunity enjoyed by a foreign state is therefore distinguishable from diplomatic immunity enjoyed by the diplomatic agents of that State. In my view, the immunity attaching to a sovereign State is not rooted in our Diplomatic Immunities and Privileges Act and there is a lacuna in our domestic law in that there is no Sovereign Immunities Act in this jurisdiction.'

This statement, whist partially correct, overshoots the mark. There is no *lacuna* in the law as suggested by the learned judge. The absence of a State Immunities Act in Botswana is regrettable, however, our law on state immunity is found in customary international law as incorporated in our common law. Despite having made the statement above, the learned judge then restated the restrictive doctrine of state immunity and found that the court had jurisdiction to deal with the dispute as it was one of a private nature and not of a public nature. Again, the correct conclusion was arrived at, but through a reasoning process revealing some confusion as to the limits of State and diplomatic immunity in Botswana.

In the fifth case, *Sebina v South African High Commission*[17] the same conflation of the principles of State and diplomatic immunities is observed. The judge in the case stated:

> 'In terms of our domestic legislation the Diplomatic Immunities and Privileges Act (Cap 39:01) ("the Act") is the only piece of legislation we have pronouncing on matters of immunity attaching to the diplomatic community in Botswana. Before examining the provisions of the Act as they relate to the issue in this matter, **it is proper to mention our law on diplomatic immunity. [My emphasis]**The cases of *Dube and Another v American Embassy and Another* [2010] 2 B.L.R. 98, IC, *Bah v Libyan Embassy* (2006) 1 BLR 22 (IC) and *Republic of Angola v Springbok Investments (Pty) Ltd* [2005] 2 B.L.R. 159 and *Kobe and Others v United States Government* (IC 1305/06)… are singular in their pronouncements that the doctrine of sovereign immunity applicable in our jurisdiction is one that is restrictive and not absolute.'

[17] 2010 (3) BLR 723 (IC).

This statement[18] promises the reader an elucidation of the law on diplomatic immunity. The statement then cites cases several cases on sovereign immunity in Botswana. As seen in this excerpt, the Court in *Sebina* discusses sovereign immunity and diplomatic immunity as if the two concepts were similar and interchangeable.

Another problematic statement in the *Sebina* case is the following attempted definition of restrictive immunity:

> 'It is restrictive in the sense that those transactions which are of a private law nature, as opposed to commercial nature, are not covered by diplomatic immunity. That having been said, it is agreed that a contract of employment is a transaction of a private law nature and therefore enforceable even though one of the contracting parties is a diplomatic mission.'

The statement that one of the contracting parties to an employment contract is a diplomatic mission is regrettable and not correct. As already stated above, a diplomatic mission is a representative of the sending State in the host State. It has no separate legal personality. A diplomatic mission has no legal capacity. Although the practise of citing diplomatic missions as parties to contracts and suits is rife, the contracting party is the State, not the mission. The High Commission in this case was therefore incorrectly cited and the court did not notice the discrepancy.

In the sixth and final case, *Mantimane and Others v United States of America,*[19] a similar conflation of the concepts of state and diplomatic immunities occurs. This case involved a labour dispute between 12 former employees and their employer, The Unites States of America. In his judgment, the judge stated as follows:

> 'From the founding affidavit it is evident that this is a labour dispute arising out of contracts of employment. The affidavit contains no averment to show that particular contracts are matters which are of a private law character and their breach may be contractual and prima facie fall under the category of activities which are not sovereign in nature. If this has been proved it would then be for the United States to show at the relevant time that the labour issues on which the cause of action is based do not fall under the category of commercial or private law activities and are within the category of sovereign acts. The Applicants had to show that this matter falls under a category of cases which are exceptions to art 31(1)of the Vienna Convention,

[18] See the portion emphasised.
[19] 2011 (1) BLR 305 (HC).

which has been incorporated into our law under the Diplomatic Immunities and Privileges Act (Cap 39:01) is implicit from the wording of the convention.'

The reference to Article 31 (1) of the Vienna Convention on Diplomatic Relations as the basis for restrictive immunity under Botswana law is erroneous. The court should have referred to customary international law rules on State immunity which have been incorporated into our common law.[20]

The cases discussed above illustrate the problems created in judgments which conflate concepts of State immunity and diplomatic immunity. The difficulties in these judgments are not easily identifiable. The risk is that such judgements may be cited as precedent for others and perpetuate a 'hit and miss' approach to the law. Judgments should be succinct in establishing which concept is relied upon. This clarity is necessary for parties concerned, legal practitioners, academics and students of law, who all have an interest in the judgments. It is also suggested that the absence of a State Immunities Act, existing side by side with the Diplomatic Immunities and Privileges Act, contributes the confusion apparent in these decisions. A State Immunities Act would bring much needed clarity to cases involving private citizens and States.

4. THE QUESTION OF SERVICE OF PROCESS ON A DIPLOMATIC MISSION

The challenges of the absence of a State Immunities Act in Botswana are not only evident in judgments of the courts. They also play out in pre-trial activities like service of process. Potential claimants sometimes find themselves unable to easily identify the procedure for service of process on sovereign foreign States.

The *Sebina* case illustrates the challenges of the absence of clarity on the modalities of service of process on a foreign State in Botswana. The Applicant's statement of case and power of attorney in this matter had been served at the reception of the South African High Commission in Gaborone. The documents were received and acknowledged. However, the Court took the view that the service of these documents at the High Commission was invalid because Article 22 of the Diplomatic Immunity and Privileges Act provides that the premises of the mission shall be inviolable.[21]

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[20] Refer to the *Springbok* decision.

[21] For a discussing on the meaning of inviolability of the mission premises see J Dugard *International Law: A South African Perspective* 3ed (Juta, Cape Town, 2006) at 262-263; I Roberts (ed) Satow's *Diplomatic Practice* 6ed (Oxford University Press, 2011) at 107; and *Santos v Santos* 1987 (4) SA 150 (W) at 152C-H).

Inviolability, in the context of Article 22, is 'a status accorded to premises, persons or property physically present in the territory of the receiving state, albeit not subject to its jurisdiction in an ordinary way. The receiving state is under a duty to abstain from exercising any enforcement rights in respect of inviolable premises, persons or property and under a positive duty to protect inviolable premises, persons or property from physical invasion or interference with their functioning and from impairment of their dignity.'[22]

Article 22 therefore enjoins the Government of Botswana to prevent its agents from entering or performing any act within the mission premises without the consent of the head of mission. Service of process, as happened in *Sebina,* whether at the door or within the premises of the mission is prohibited.[23] The service would be ineffective.

The judge in *Sebina* stated that there is a *lacuna* in Botswana law because it provides no way of effecting service of legal process on foreign States in order to commence an action.[24] The Applicant's claim was dismissed on the basis of improper service. It is difficult not to sympathise with the Applicant in *Sebina* who had no guiding statute to inform him how to effect service on a foreign sovereign in Botswana.

Just a year later, in *Mantimane and Others v United States of America*,[25] the applicant brought an application to Court seeking leave to serve process on the respondent, the United States of America, through edictal citation. The Court, addressing the issue of service of process on foreign States observed: 'the court rules that the inviolability of mission premises under Article 22 of the Diplomatic Immunities Act should not be used so as to frustrate the service of legal process where the acts complained of were proved to be acts *jure gestionis* or acts of a private law nature.' The court then went on to state that service by edictal citation under order 10 of the High Court Rules was not necessary, and that service could have been effected through the Ministry of Foreign Affairs and International Cooperation.

The court made no attempt to elucidate the modalities of service through the Ministry. This is regrettable. Potential litigants remain in the dark as to how this process may be effected. Further, the summary disposal of the question of service through edictal citation is frustrating. The court ought to have fleshed out the possibility of and processes involved in serving a

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[22] Riaan de Jager, *De Rebus* in 2017 (Dec) *DR* 34. Available at http://www.derebus.org.za/diplomatic-law-service-process-foreign-defendants/ accessed 27 December 2017.
[23] E Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 4ed (Oxford University Press 2016) at 110 and 124 - 125. See also I Roberts (ed) Satow's *Diplomatic Practice* 6ed (Oxford University Press 2011) at 102.
[24] 2010 (3) BLR 723 (IC).
[25] 2011 (1) BLR 305 (HC).

foreign state by edictal citation, if it is at all allowable. A State Immunities Act, outlining the process of service on States, could obviously bring much needed clarity to this area of the law.

5 THE CASE FOR RATIFICATION OF THE UNITED NATIONS CONVENTION ON THE JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

This article argues that it is time for Botswana to ratify the United Nations Convention on the Jurisdictional Immunities of States and their Property. It is clear from the preamble of the Convention it is intended to codify existing customary international law rules, and by so doing, enhance legal certainty particularly in dealings of States with natural or juridical persons.[26] It cannot be gainsaid that legal certainty is exactly what is lacking in the judgements discussed above. Some of the benefits of ratification and domestication of the convention for Botswana are discussed below.

5.1 Clear Rules on State Immunity

The Convention makes a clear distinction between State immunity, diplomatic immunity and head of State immunity.[27] The Convention applies to immunity of States alone and not those of their diplomatic missions, diplomatic agents or heads of State.[28] Clarity in this distinction would be important for Botswana. As the cases have shown, State immunity is often confused with diplomatic immunity. The Convention will provide much needed clarity as to which entities enjoy sovereign immunity. This clarity will have the effect of 'levelling of the playing field' so that persons desirous of suing States in Botswana do not find themselves on the back foot, unable to establish what rules are applicable for citation, service and eventual prosecution of a suit. Reliance on customary international law may, as evident from the cases discussed above, result in errors of citation.

5.2 Clarity on Limits of State Jurisdiction

Another example of the clarity that can be achieved by domestication of the Convention is that the limits of jurisdiction against states would be clear. The rules limiting State immunity are

[26] Preamble to the Convention on Jurisdictional immunities of States.
[27] See Article 2 and Article 5 of the Convention.
[28] See Article 1 thereof.

expounded in the Convention to exclude instances where the state has consented to jurisdiction by contractual agreement or treaty, or by some declaration or written statement placed before the court.[29] Immunity is also excluded where the State itself has instituted or intervened in the proceedings, save to plead immunity. The Convention also states that the failure to enter appearance to defend is not consent to jurisdiction.[30] In contrast, however, bringing a counter claim against a complainant would result in a State losing immunity from the Court's jurisdiction.[31].

Part III of the Convention lists commercial transactions,[32] contracts of employment,[33] cases of personal injury and damage to property[34] and cases involving ownership, possession and use of property[35] as suits for which a State cannot invoke immunity.[36]

The bulk of cases decided in Botswana courts against foreign States concern commercial transactions and employment matters. In the *Springbok* case, the amenability of a bank account to attachment following a commercial transaction was at issue. In *Bah, Dube* and several others, the Court had to determine if a foreign State could be sued in relation to employment contracts. The Convention could have been of assistance in these instances.

If domesticated, the Convention would provide clarity on which commercial transactions do not attract immunity from jurisdiction.[37] Further, as regards employment contracts, the Convention provides that a State cannot invoke immunity from jurisdiction where a proceeding against it relates to a contract of employment unless the employee is engaged in functions in the exercise of governmental authority, commonly known as acts *jure imperii*.[38] According to the Convention, the State can also successfully plead immunity where the employee is a diplomat enjoying diplomatic immunity.[39] The state would also enjoy immunity where the suit was related to recruitment, renewal of employment or reinstatement of an individual.[40] Lastly, the state could plead immunity where the proceedings would impede the

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[29] See Article 7.
[30] See Article 8.
[31] See Article 9.
[32] See Article 10.
[33] See Article 11.
[34] See article 12.
[35] See Article 13.
[36] This list is not exhaustive. See Articles 14 for other matters where a State would be precluded from invoking immunity.
[37] See Article 10.
[38] See Article 11(2) a.
[39] See Article 11(2) b.
[40] See Article 11(2) c.

security interest of the employer State,[41] or the employee is a national of the employer State[42] or the employee concerned has agreed in writing to exclude the jurisdiction of the host State.[43] The Convention also protects the primacy of arbitration clauses ousting the jurisdiction of the Courts where enforceable arbitration clauses exist between the State and its counterpart in an agreement.[44]

5.3 Guidance on Attachment of Property

The Convention prohibits the attachment of the property of a foreign state to found jurisdiction.[45] Attachment of property was at issue in the *Springbok* case. Further, attachment of property following a judgment is also not possible, unless it can be shown that the property is not in use by the State for a government non-commercial purposes.[46] The Convention declares that the following shall not be considered as property for use by the State for other than Government non-commercial purposes: property, including bank accounts, used for the performance of the diplomatic functions of the state; property of a military character; property of the central bank or other monetary authority of the State; property forming part of the cultural heritage of a State, or objects of scientific or historical significance.[47] These are all protected from attachment measures. It is important to note that consent to jurisdiction for a suit is not consent to attachment.[48] Each is treated separately.

5.4 Service of Process

As discussed above, service of process was an issue in the *Sebina* and *Matimane* decisions. If applicable, the Convention would have provided a solution to the difficulties experienced by the plaintiffs in both cases. The convention provides that service of process against a state should be effected in two ways: first, in accordance with any international agreement concluded by the foreign State with the host State; or second, in accordance with any special arrangement agreed between the claimant in the suit and the foreign State subject to the suit.[49]

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[41] Article 11(2) d.
[42] See Article 11(2) e.
[43] See Article 11(2) f.
[44] See Article 17.
[45] See Article 18.
[46] See Article 19.
[47] See article 21.
[48] See Article 20.
[49] See Article 22

A third method of service, available in the absence of an agreement or a treaty, is service by transmission of the pleadings through diplomatic channels to the Ministry of Foreign Affairs of the State concerned.[50] According to the Convention, service is deemed to have been effected when the documents are received by the Ministry of Foreign Affairs.

This knowledge would have been helpful in both *Mantimane* and *Sebina* had the law been more easily discoverable. In *Mantimane*, the applicant attempted service thought edictal citation and in *Sebina* the applicant served process at the reception of the foreign mission. Both of these methods of service which were deemed to be ineffective.

5.5 Default Judgments Against Foreign States

The Convention provides that a court is precluded from granting a default judgment against a State unless proper service has been effected, four months have elapsed from the date of service, and there is no valid claim to immunity from jurisdiction in terms of the Convention. The court is therefore enjoined, on its own motion, to consider if the claim would be one that does, or does not, attract sovereign immunity. The convention also makes it clear that service of any default judgment obtained against a sovereign State would have to be effected using the same channels elucidated in Article 22.

6 CONCLUSION

Accession and domestication of the United Nation Convention on Jurisdictional Immunities of States and their Properties would be a welcome addition to the laws of Botswana. From the foregoing discussion the benefits of ratification and domestication of the Convention should be palpably obvious. It will also be an advantage that Botswana Diplomatic Immunities and Privileges Act would finally have its counterpart, providing rules on the sovereign immunities of states.

The absence of codified detailed rules on state immunity in Botswana regarding immunities, service of documents and the possibility of obtaining default judgements means that natural and juristic persons seeking redress from the Courts against foreign States find themselves pitted against a powerful adversary, and with hardly any guidance as to rules to be applied and procedures to be followed. A litigant without an attorney to assist in the discovery

[50] See Article 22(1) c.

of applicable rules of customary international law is not likely to succeed. Even with the assistance of an attorney, the successful prosecution of a claim inordinately depends on the lawyer's familiarity with customary international law rules in order to successfully bring a claim. In Botswana, the cases referred to above suggest that the applicable rules are unclear to attorneys and Courts alike.

This lack of a statute and confusion in the case law makes the courts inaccessible to litigants attempting to sue States. It further entrenches the perception that States participating in the commercial sphere enjoy greater protection under the law than other natural and juristic persons. Errors in the judgments referred to above are also likely to be perpetuated through the application of the doctrine of precedent. Thus, domestication of the Convention would provide for greater clarity of rules and procedures to be followed when individuals seek to vindicate their rights in the courts against sovereign States, and also provide for greater accessibility of the Courts to such individuals.