

## **FOREIGN STATES IMMUNITIES ACT 87 OF 1981**

[ASSENTED TO 6 OCTOBER 1981]

[DATE OF COMMENCEMENT: 20 NOVEMBER 1981]

*(Afrikaans text signed by the State President)*

**as amended by**

Foreign States Immunities Amendment Act 48 of 1985

**also amended by**

Foreign States Immunities Amendment Act 5 of 1988

[with effect from a date to be proclaimed - see PENDLEX]

**ACT**

**To determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic; and to provide for matters connected therewith.**

### **1 Definitions**

(1) In this Act, unless the context otherwise indicates-

'**commercial purposes**' means purposes of any commercial transaction as defined in section 4 (3);

'**consular post**' means a consulate-general, consulate, consular agency, trade office or labour office;

'**Republic**' includes the territorial waters of the Republic, as defined in section 2 of the Territorial Waters Act, 1963 (Act 87 of 1963);

'**separate entity**' means an entity referred to in subsection (2) (i).

(2) Any reference in this Act to a foreign state shall in relation to any particular foreign state be construed as including a reference to-

- (a) the head of state of that foreign state, in his capacity as such head of state;
- (b) the government of that foreign state; and
- (c) any department of that government,

but not as including a reference to-

- (i) any entity which is distinct from the executive organs of the government of that foreign state and capable of suing or being sued; or
- (ii) any territory forming a constituent part of a federal foreign state.

### **2 General immunity from jurisdiction**

(1) A foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder.

(2) A court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question.

(3) The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic.

[NB: A sub-s. (4) has been added by s. 1 of the Foreign States Immunities Amendment Act 5 of 1988, a provision which will be put into operation by proclamation. See PENDLEX.]

### **3 Waiver of immunity**

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings in respect of which the foreign state has expressly waived its immunity or is in terms of subsection (3) deemed to have waived its immunity.

(2) Waiver of immunity may be effected after the dispute which gave rise to the proceedings has arisen or by prior written agreement, but a provision in an agreement that it is to be governed by the law of the Republic shall not be regarded as a waiver.

(3) A foreign state shall be deemed to have waived its immunity-

- (a) if it has instituted the proceedings; or

(b) subject to the provisions of subsection (4), if it has intervened or taken any step in the proceedings.

(4) Subsection (3) (b) shall not apply to intervention or any step taken for the purpose only of-

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the foreign state would have been entitled to immunity if the proceedings had been brought against it.

(5) A waiver in respect of any proceedings shall apply to any appeal and to any counter-claim arising out of the same legal relationship or facts as the claim.

(6) The head of a foreign state's diplomatic mission in the Republic, or the person for the time being performing his functions, shall be deemed to have authority to waive on behalf of the foreign state its immunity in respect of any proceedings, and any person who has entered into a contract on behalf of and with the authority of a foreign state shall be deemed to have authority to waive on behalf of the foreign state its immunity in respect of proceedings arising out of the contract.

#### **4 Commercial transactions**

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to-

(a) a commercial transaction entered into by the foreign state; or

(b) an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.

(2) Subsection (1) shall not apply if the parties to the dispute are foreign states or have agreed in writing that the dispute shall be justiciable by the courts of a foreign state.

(3) In subsection (1) '**commercial transaction**' means-

(a) any contract for the supply of services or goods;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and

(c) any other transaction or activity or a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority,

but does not include a contract of employment between a foreign state and an individual.

#### **5 Contracts of employment**

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to a contract of employment between the foreign state and an individual if-

(a) the contract was entered into in the Republic or the work is to be performed wholly or partly in the Republic; and

(b) at the time when the contract was entered into the individual was a South African citizen or was ordinarily resident in the Republic; and

(c) at the time when the proceedings are brought the individual is not a citizen of the foreign state.

(2) Subsection (1) shall not apply if-

(a) the parties to the contract have agreed in writing that the dispute or any dispute relating to the contract shall be justiciable by the courts of a foreign state; or

- (b) the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade, administrative, technical or service staff of the post.

## **6 Personal injuries and damage to property**

A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to-

- (a) the death or injury of any person; or
- (b) damage to or loss of tangible property, caused by an act or omission [sic] in the Republic.

## **7 Ownership, possession and use of property**

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to-

- (a) any interest of the foreign state in, or its possession or use of, immovable property in the Republic;
- (b) any obligation of the foreign state arising out of its interest in, or its possession or use of, such property; or
- (c) any interest of the foreign state in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*.

(2) Subsection (1) shall not apply to proceedings relating to a foreign state's title to, or its use or possession of, property used for a diplomatic mission or a consular post.

## **8 Patents, trade-marks, etc**

A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to-

- (a) any patent, trade-mark, design or plant breeder's right belonging to the foreign state and registered or protected in the Republic or for which the foreign state has applied in the Republic; or
- (b) an alleged infringement by the foreign state in the Republic of any patent, trade-mark, design, plant breeder's right or copyright; or
- (c) the right to use a trade or business name in the Republic.

## **9 Membership of associations and other bodies**

(1) A foreign state which is a member of an association or other body (whether a juristic person or not), or a partnership, which-

- (a) has members that are not foreign states; and

[NB: Para. (a) has been substituted by s. 2 of the Foreign States Immunities Amendment Act 5 of 1988, a provision which will be put into operation by proclamation. See PENDLEX.]

- (b) is incorporated or constituted under the law of the Republic or is controlled from the Republic or has its principal place of business in the Republic,

shall not be immune from the jurisdiction of the courts of the Republic in proceedings which-

- (i) relate to the foreign state's membership of the association, other body or partnership; and
- (ii) arise between the foreign state and the association or other body or its other members, or as the case may be, between the foreign state and the other partners.

(2) Subsection (1) shall not apply if-

- (a) in terms of an agreement in writing between the parties to the dispute; or

(b) in terms of the constitution or other instrument establishing or governing the association, other body or partnership in question, the dispute is justiciable by the courts of a foreign state.

## **10 Arbitration**

(1) A foreign state which has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, shall not be immune from the jurisdiction of the courts of the Republic in any proceedings which relate to the arbitration.

(2) Subsection (1) shall not apply if-

- (a) the arbitration agreement provides that the proceedings shall be brought in the courts of a foreign state; or
- (b) the parties to the arbitration agreement are foreign states.

[NB: Para. (b) has been substituted by s. 3 of the Foreign States Immunities Amendment Act 5 of 1988, a provision which will be put into operation by proclamation. See PENDLEX.]

## **11 Admiralty proceedings**

(1) A foreign state shall not be immune from the admiralty jurisdiction of any court of the Republic in-

- (a) an action *in rem* against a ship belonging to the foreign state; or
- (b) an action *in personam* for enforcing a claim in connection with such a ship,

if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

(2) A foreign state shall not be immune from the admiralty jurisdiction of any court of the Republic in-

- (a) an action *in rem* against any cargo belonging to the foreign state if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or
- (b) an action *in personam* for enforcing a claim in connection with any such cargo if the ship carrying it was, at the time when the cause of action arose, in use or intended for use for commercial purposes.

(3) Any reference in this section to a ship or cargo belonging to a foreign state shall be construed as including a reference to a ship or cargo in the possession or control of a foreign state or in which a foreign state claims an interest, and, subject to the provisions of subsection (2), subsection (1) shall apply to property other than a ship as it applies to a ship.

## **12 Taxes and duties**

A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to the foreign state's liability for-

- (a) sales tax or any customs or excise duty; or
- (b) rates in respect of premises used by it for commercial purposes.

## **13 Service of process and default judgments**

(1) Any process or other document required to be served for instituting proceedings against a foreign state shall be served by being transmitted through the Department of Foreign Affairs and Information of the Republic to the ministry of foreign affairs of the foreign state, and service shall be deemed to have been effected when the process or other document is received at that ministry.

[NB: Sub-s. (1) has been substituted by s. 4 (a) of the Foreign States Immunities Act 5 of 1988, a provision which will be put into operation by proclamation. See PENDLEX.]

(2) Any time prescribed by rules of court or otherwise for notice of intention to defend or

oppose or entering an appearance shall begin to run two months after the date on which the process or document is received as aforesaid.

[NB: Sub-s. (2) has been substituted by s. 4 (b) of the Foreign States Immunities Act 5 of 1988, a provision which will be put into operation by proclamation. See PENDLEX.]

(3) A foreign state which appears in proceedings cannot thereafter object that subsection (1) has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a foreign state except on proof that subsection (1) has been complied with and that the time for notice of intention to defend or oppose or entering an appearance as extended by subsection (2) has expired.

(5) A copy of any default judgment against a foreign state shall be transmitted through the Department of Foreign Affairs and Information of the Republic to the ministry of foreign affairs of the foreign state, and any time prescribed by rules of court or otherwise for applying to have the judgment set aside shall begin to run two months after the date on which the copy of the judgment is received at that ministry.

[NB: Sub-s. (5) has been substituted by s. 4 (c) of the Foreign States Immunities Act 5 of 1988, a provision which will be put into operation by proclamation. See PENDLEX.]

(6) Subsection (1) shall not prevent the service of any process or other document in any manner to which the foreign state has agreed, and subsections (2) and (4) shall not apply where service is effected in any such manner.

(7) The preceding provisions of this section shall not be construed as applying to proceedings against a foreign state by way of counter-claim or to an action *in rem*, and subsection (1) shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction of the court.

#### **14 Other procedural privileges**

(1) Subject to the provisions of subsections (2) and (3)-

- (a) relief shall not be given against a foreign state by way of interdict or order for specific performance or for the recovery of any movable or immovable property; and
- (b) the property of a foreign state shall not be subject to any process-
  - (i) for its attachment in order to found jurisdiction;
  - (ii) for the enforcement of a judgment or an arbitration award; or
  - (iii) in an action *in rem*, for its attachment or sale.

[Para. (b) substituted by s. 1 of Act 48 of 1985.]

[NB: Para. (b) has been substituted by s. 4 (c) of the Foreign States Immunities Act 5 of 1988, a provision which will be put into operation by proclamation. See PENDLEX.]

(2) Subsection (1) shall not prevent the giving of any relief or the issue of any process with the written consent of the foreign state concerned, and any such consent, which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally, but a mere waiver of a foreign state's immunity from the jurisdiction of the courts of the Republic shall not be regarded as a consent for the purposes of this subsection.

(3) Subsection (1) (b) shall not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.

#### **15 Immunity of separate entities**

(1) A separate entity shall be immune from the jurisdiction of the courts of the Republic only if-

- (a) the proceedings relate to anything done by the separate entity in the exercise of

sovereign authority; and

(b) the circumstances are such that a foreign state would have been so immune.

(2) If a separate entity, not being the central bank or other monetary authority of a foreign state, waives the immunity to which it is entitled by virtue of subsection (1) in respect of any proceedings, the provisions of section 14 shall apply to those proceedings as if references in those provisions to a foreign state were references to that separate entity.

(3) Property of the central bank or other monetary authority of a foreign state shall not be regarded for the purposes of subsection (3) of section 14 as in use or intended for use for commercial purposes, and where any such bank or authority is a separate entity the provisions of subsections (1) and (2) of that section shall apply to it as if references in those provisions to a foreign state were references to that bank or authority.

## **16 Restriction and extension of immunities and privileges**

If it appears to the State President that the immunities and privileges conferred by this Act in relation to a particular foreign state-

(a) exceed or are less than those accorded by the law of that foreign state in relation to the Republic; or

(b) are less than those required by any treaty, convention or other international agreement to which that foreign state and the Republic are parties,

he may by proclamation in the *Gazette* restrict or, as the case may be, extend those immunities and privileges to such extent as appears to him to be appropriate.

## **17 Evidence by certificate**

A certificate by or on behalf of the Minister of Foreign Affairs and Information shall be conclusive evidence on any question-

[NB: The words preceding para. (a) have been substituted by s. 6 (a) of the Foreign States Immunities Act 5 of 1988, a provision which will be put into operation by proclamation. See PENDLEX.]

(a) whether any foreign country is a state for the purposes of this Act;

(b) whether any territory is a constituent part of a federal foreign state for the said purposes;

(c) as to the person or persons to be regarded for the said purposes as the head of state or government of a foreign state;

(d) whether, and if so when, any document has been served or received as contemplated in section 13 (1) or (5).

[NB: Para. (d) has been substituted by s. 6 (b) of the Foreign States Immunities Act 5 of 1988, a provision which will be put into operation by proclamation. See PENDLEX.]

## **18 Short title and commencement**

This Act shall be called the Foreign States Immunities Act, 1981, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.