IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 67/18
ZAGPPHC CASE NO.: 20382/2015

In the matter between:

LAW SOCIETY OF SOUTH AFRICA	**First Applicant**
LUKE MUNYANDU TEMBANI	**Second Applicant**
BENJAMIN JOHN FREETH	**Third Applicant**
RICHARD THOMAS ETHEREDGE	**Fourth Applicant**
CHRISTOPHER MELLISH JARRET	**Fifth Applicant**
TENGWE ESTATE (PVT) LIMITED	**Sixth Applicant**
FRANCE FARM (PVT) LIMITED	**Seventh Applicant**

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Second Respondent**
MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	**Third Respondent**

FIRST APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1 This confirmation application concerns an order of constitutional invalidity made by the High Court of South Africa, Provincial Division, Pretoria concerning two decisions taken by former President Jacob Zuma, in his official capacity:

1.1 **First**, his decision to participate in the suspension of the SADC (Southern African Development Community) Tribunal; and

1.2 **Second**, his decision to sign the 2014 SADC Protocol that seeks to amend the jurisdiction of the SADC Tribunal.

2 The Second to Seventh Applicants (the Tembani applicants), support the order of the High Court. In addition, they seek an order directing the President to withdraw the signature of former President Zuma from the 2014 Protocol.[1]

3 The President, Minister of Justice and Constitutional Development and the Minister of International Relations and Cooperation (collectively, "The State") only appeal part of the High Court's judgment related to its finding that the President's signature of the 2014 Protocol was irrational, unlawful and unconstitutional.[2]

[1] Second to the Seventh Applicant's Notice of Conditional Appeal, Record vol 2, p. 137-139.

[2] Notice of Appeal, Record vol. 2, p. 140 – 155.

4 The First Applicant (the 'Law Society') submits that the judgment of the High Court was correct because:

4.1 The President's participation in the suspension of the SADC Tribunal was irrational, unlawful and unconstitutional because he acted in violation of South Africa's binding treaty obligations under international law and the Constitution; and

4.2 The President's decision to sign the 2014 Protocol was unlawful and unconstitutional as he acted in breach of section 231 of the Constitution.

5 Before dealing with the Law Society's submissions, we will first set out the facts of this matter, as well as the Full Court's finding, and then deal with each submission in turn.

TREATY OBLIGATIONS IN A NUTSHELL

6 On 17 August 1992, Heads of States or Government of ten Southern African states signed the Southern African Development Community Treaty (SADC Treaty). The Treaty came into force on 30 September 1993 and South Africa acceded to it on 29 August 2014, and our then Senate (now National Council of Provinces) and National Assembly approved the Treaty on 13 and 14 September 1994 respectively.[3]

[3] *Government of the Republic of Zimbabwe v Fick and Others* (*Fick*) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 5.

7 Article 16 of the Treaty mandates the establishment of the Tribunal "*to ensure adherence to and the proper interpretation of the provisions of [the] treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it*".

8 Article 16(2) states that the composition, powers, functions, procedures and other related matters governing the Tribunal must be prescribed in a protocol which shall form an integral part of the Treaty. Members of the Tribunal are to be appointed for a specified period. The Tribunal is entitled to give advisory opinions on any matter which may be referred to by the *"Summit"* or the Council of the SADC. Decisions of the Tribunal are "*final and binding*".

9 *"Summit*" refers to the Summit of the Heads of State or Government established by Article 9 of the Treaty. "*Council*" also refers to the Council of Ministers of SADC established by Article 9 of the Treaty. Article 9(1) establishes the various organs of the SADC. They include in Article 9(1)(a) the Summit of Heads of State or Government; in Article 9(1)(c) the Council of Ministers; and in Article 9(1)(g) the Tribunal.

10 Therefore, the establishment of the Tribunal is not voluntary, but compulsory. Heads of State cannot choose whether or not to establish the Tribunal. It is established by the Treaty itself. The primary function of the Tribunal is to ensure the adherence to and the proper interpretation of the Treaty. It has the power to adjudicate disputes that may be referred to it. No limitation is apparent from the Treaty concerning the jurisdiction of the Tribunal. Nor is

there any limitation in relation to the nature of the disputes that may be referred to the Tribunal for adjudication.

11 While no limitation is discernible from the text of the Treaty, it is submitted that a broader understanding of the powers and functions of the Tribunal is to be preferred. Article 16(1) is the key to understanding this broad nature of the powers of the Tribunal. According to Article 16, the Tribunal shall be constituted "*to ensure adherence to and the proper interpretation of the provisions of this Treaty*". Further, the Tribunal shall "*adjudicate upon such disputes as may be referred to it*".

12 It is submitted that in order to ensure adherence to and the proper interpretation of the Treaty it is necessary to construe the terms of the Treaty broadly. The very purpose of the Treaty, as embodied in Articles 4 and 5 is to uphold *"human rights"*, *"democracy"* and *"the rule of law"*. If the function of the Tribunal is to ensure compliance with the provisions of the Treaty, it stands to reason that it must be mandated to ensure compliance with norms of human rights, democracy and the rule of law. That can only be achieved if the mandate of the Tribunal is interpreted to guarantee access to its remedies to any person.

13 The principles which underlie the establishment of the Tribunal are underscored by Article 6. In terms of this Article, States have committed to certain general undertakings. They have undertaken not to take steps that would infringe human rights, democracy and the principle of the rule of law. The Tribunal – the judicial organ of SADC – is charged with ensuring that these

undertakings are maintained. In Article 6(2), States undertake not to discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill-health, disability, or such other ground as may be determined. Where any person is discriminated against on the grounds listed in Article 6(2), they must have recourse to the sole institution created for the enforcement of the provisions of the Treaty, namely the Tribunal.

14 Therefore, South Africa as a Member State, must ensure that the Tribunal can perform the following functions:

14.1 Adherence to human rights norms, democratic standards and the principle of the rule of law;

14.2 Accountability by the individual member states in reference to the compliance with the standards mentioned;

14.3 Member states should not be allowed to discriminate against any person by law or conduct in their individual territories; and

14.4 Individuals and other actors should be entitled to access to the sole legal remedy created by the Treaty, namely the Tribunal.

MATERIAL FACTS

15 The facts giving rise to this dispute can be traced to the constitutionality of the land and agrarian reform programme in Zimbabwe. In 2005, the Government of Zimbabwe took sweeping steps in pursuance of its programme of land and

agrarian reform. These included an amendment of that country's constitution to provide for expropriate of land without compensation.

16 Numerous farmers were dispossessed of land in terms of this new policy. They challenged the decisions of the government before the Tribunal in series of cases,[4] but the most notable amongst them is *Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe*.[5]

17 The Tribunal handed down a judgment which found that the policy of the Zimbabwean government was unlawful as it violated the SADC Treaty.[6] It ordered the Government of Zimbabwe to protect the farms that had not been repossessed, and to pay compensation for the farms that had already been repossessed.[7]

18 The Government of Zimbabwe did not comply with this decision.[8]

19 In September 2009, a meeting of the Heads of State and Government (the Summit) was held in Kinshasa, Democratic Republic of Congo.[9] The Summit discussed Zimbabwe's failure to comply with the decisions of the Tribunal.

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[4] Record, vol. 4, pp. 422 – 472.

[5] *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008] SADCT 2. Record, vol. 5 and 6, pp. 473 – 533.

[6] Id at p. 526.

[7] Id at pp. 530-1.

[8] *Fick and Another v Republic of Zimbabwe* [2010] SADCT 8.

[9] Record, vol. 8, p. 804 at 9.1.1.

20 That meeting resolved to ask the Committee of Ministers of Justice and Attorney-Generals to hold a meeting on the legal issue regarding Zimbabwe's non-compliance with the Tribunal's decision, and to advise the Summit.[10]

21 At a subsequent meeting of the Summit, held in Windhoek, Namibia on 16 and 17 August 2010, an item was presented concerning the non-compliance, by Zimbabwe, with the decisions of the Tribunal.[11]

22 It was at that meeting that the Summit took the decision to suspend the operation of the Tribunal.[12] South Africa, represented by President Zuma, agreed with Summit's decision to suspend the Tribunal—by way of a consensus vote.

23 That meeting also decided that a review of the Tribunal's "*roles, responsibilities and terms of reference*" would be conducted by the Ministers of Justice and Attorneys-General.[13]

24 The review conducted by the Ministers of Justice and Attorneys-General confirmed the validity of the Protocol and that the Tribunal was properly constituted.[14]

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[10] Id.

[11] Id at para 9.

[12] Id at 805 at paras 9.3 and 9.4.

[13] Id.

[14] Record, vol. 9, p. 824 at para 3.2.1.3.

25 At a subsequent meeting of the Summit in May 2011, two decisions were taken:

25.1 first, it was decided that the members of the Tribunal whose term of office expired on 31 August 2010 would not be reappointed;[15] and

25.2 second, that Tribunal members whose term of office would expire on 31 October 2011 would not be replaced.[16]

26 These decisions led to the Tribunal being effectively defunct as it could not be quorate in the absence of a sufficient number of its members.

27 This same meeting also gave the committee of Ministers of Justice and Attorneys General the task of beginning the process aimed at amending the legal instruments that constituted and regulated the Tribunal.[17]

28 On 18 August 2014, following a review of the Tribunal by Ministers of Justice and Attorneys General, a new protocol was adopted by Summit ("the 2014 Protocol").[18] Article 33 of the 2014 Protocol provided that "*[t]he Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States*".[19]

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[15] Record, vol. 9, p. 827, para 3.2.2.6 (i).

[16] Id at para 3.2.2.6 (ii).

[17] Id at p. 826, para 3.2.1.7(i).

[18] Record, vol. 9, pp. 887 – 909..

[19] Id at p. 903.

29 The effect of the 2014 Protocol was to preclude individuals from lodging complaints with the Tribunal. It limited the jurisdiction of the Tribunal to interstate disputes.

30 The President, on behalf of the Republic, signed the 2014 Protocol.[20]

[20] Id at p. 909.

THE FULL COURT'S FINDING

31 The Law Society and the Tembani applicants (collectively, "The Applicants") challenged the decision of the President in the High Court.

32 The Full Court found, following this Court's decision in *Fick*, that the proper functioning of the Tribunal lies at the heart of the Treaty and its mandate.[21] Furthermore, the Court held that the jurisdiction of the Tribunal was essential to the achievement of the SADC's objectives, namely: compliance with the rule of law and human rights.[22]

33 It held that any decision of the President in relation to the SADC must be measured against the purpose of the SADC Treaty and the Constitution—which, taken together are: the promotion of human rights and democracy and the maintenance of the Rule of Law.[23] It also held that any decision or conduct inconsistent with these objectives is self-evidently irrational, unlawful and unconstitutional.[24]

34 In the High Court, the President made two arguments that are of relevance in this matter:

34.1 First, the President argued that the Applicants' challenge to his decision to sign the 2014 Protocol was premature; as the signature

[21] High Court judgment. Record vol. 1, p. 100 at para 67.

[22] Id p.97 at para 64.

[23] Id p. 100 at para 68.

[24] Id pp. 99 – 100 at paras 67-8.

was non-binding, so the argument went, it did not bring the Protocol into effect, and that the parliamentary process in terms of section 231 was yet to unfold;

34.2 Second, the President argued that his decisions were not irrational nor in contravention of section 231 of the Constitution as he had signed the 2014 Protocol out of comity and mutual respect for the SADC and its Member States. His signature was therefore rationally connected to the purpose of furthering South Africa's diplomatic relations.

35 The High Court rejected all the President's submissions. It found that both decisions by President were irrational, unlawful and unconstitutional in that:

35.1 The President's participation in the suspension of the Tribunal and his signature of the 2014 Protocol was inconsistent with the very purpose of the Treaty and Tribunal, not only on the express terms of the Treaty, but also its object and purpose;[25]

35.2 The President's signature of the 2014 Protocol could not be rationally connected to a legitimate government purpose mandated by section 231(1) of the Constitution and the SADC Treaty;[26]

35.3 The President signed the 2014 Protocol without the consultation and approval of Parliament, conduct which ignored the fact that the Treaty

[25] Id pp. 97 and 99 – 100 at paras 64 and 67.

[26] Id pp. 100 – 101 para 68.

and the earlier Protocol incorporated by way of the Amendment Agreement were binding on South Africa;[27] and

35.4 The President could not participate in a decision that conflicted with South Africa's binding obligations in the absence of an amendment to the Treaty and the Protocol (which amendment could only be made by Parliament).[28]

36 The Court recognised that the SADC Treaty had not been amended and that any resultant Protocols were subordinate to the Treaty. It held that the 2014 Protocol was an attempt, contrived illegally, to repeal and replace the 2000 Protocol on the Tribunal, without the necessary amendment to the Treaty.[29] It followed, so the Court held, that the President's signature of the 2014 Protocol, under these prevailing conditions, was self-evidently unlawful.

37 The High Court also rejected the President's argument that the 2014 Protocol was signed to further diplomatic relations. It held that the section 231 power could not be appropriated for diplomatic relations, and that section 84(2)(h) and (i), rather, were apposite for this purpose.[30] In any event, it was clear that the President's signature could not further diplomatic relations as it severely undermined a crucial SADC institution, the Tribunal.[31]

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[27] Id pp. 101 – 102 para 69.

[28] Id pp. 103 – 104 at para 71.

[29] Id p. 97 at para 64.

[30] Id pp. 102 – 103 at para 70.

[31] Id pp. 103 – 104 at para 71.

38 The High Court also rejected the President's argument that the signature under section 231 was insignificant or meaningless. It held that if the President's signature of the 2014 Protocol were insignificant, then there was no rationale for executing it. Further, so held the Court, if the signature was purposeless, then there was no purpose served by the act of signing the Protocol.[32]

39 It therefore declared that the President's participation in the suspension of the SADC Tribunal, and his subsequent signing of the 2014 Protocol, were unlawful, irrational and thus unconstitutional.[33]

[32] Id pp. 102 – 103 at para 70.

[33] Id pp. 104 – 105 at para 72.

RATIONALITY REVIEW OF EXECUTIVE ACTION

40 The review of executive action follows a two-pronged test. In *Masethla*, this Court held that:

> *"Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law."*[34] (Emphasis added.)

41 It will be argued that the President's decision to participate in the suspension of the Tribunal, and his subsequent signature of the 2014 Protocol, fall foul of the rationality standard as:

41.1 First, he was constitutionally incapable of exercising any power to amend or suspend our treaty obligations;

41.2 Second, even if it were to be found that he was constitutionally empowered to amend or suspend our treaty obligations, his decisions were not rationally connected to the purpose of his powers in terms of section 231(1) of the Constitution.

42 We first consider South Africa's international obligations. We then examine the delineation of power between Parliament and the National Executive in

[34] *Masetlha v President of the Republic of South Africa and Another* (*Masetlha*) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 at para 81.

terms of section 231, and finally, we will submit that the President's decision to participate in the suspension of the Tribunal, and his decision to append his signature to the 2014 Protocol were decisions that were irrational, unlawful and unconstitutional.

SOUTH AFRICA'S INTERNATIONAL LAW OBLIGATIONS

43 The Amendment Agreement mandated the establishment of the Tribunal. By incorporating the Protocol into the Treaty, itself, the Amendment Agreement also made the jurisdiction of the Tribunal, as stated in the Protocol, a provision of the Treaty itself. Thus, the primary source of the obligation to establish the Tribunal and its jurisdiction is the Treaty itself.

44 South Africa's accession to the SADC Treaty and the Amended Agreement establishing the Tribunal gave rise to international obligations to be bound to those agreements. In *Glenister II*, this Court, in relation to South Africa's duties when it has bound itself to an international agreement in terms of section 231(2), held that—

> "*An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved "binds the Republic".*
>
> *That important fact … has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights*."[35] (Emphasis added.)

[35] *Glenister v President of the Republic of South Africa and Others* (*Glenister II*) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) at para 182.

Furthermore, that—

"the fact that section 231(2) provides that an international agreement that Parliament ratifies "binds the Republic" is of prime significance."[36] (Emphasis added.)

45 The Treaty binds its members to the principles of *"human rights, democracy and the rule of law".*[37] It also provides that *"…Member States undertake to adopt measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measures likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty."*[38]

46 Article 9 establishes the Tribunal as an institution of the Treaty. Article 6(6) of the Treaty provides that Member States shall "*cooperate with and assist institutions of SADC in the performance of its duties".*[39] The Tribunal is such an institution. The Tribunal is the only body empowered to ensure "…*the adherence to and the proper interpretation of the provisions of this treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it*."[40]

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[36] Id at para 194.

[37] Article 4(c) of the SADC Treaty. Record vol. 10, p. 919.

[38] Article 6(1). Id at p. 920.

[39] Id.

[40] Article 16(1). Id at 925.

47 It follows that the conduct of the Executive is guided and constrained by the Constitution and the international agreements that have been approved by Parliament.

PARLIAMENT AS THE DECISION-MAKER

48 Section 231 of the Constitution outlines the treaty making processes. The Constitution envisages the involvement of two arms of government: the executive and the legislature.

49 Section 231(1) provides that the National Executive is empowered to negotiate and sign all international agreements.

50 Section 231(2) provides that an international agreement can only bind the Republic once it has been approved by a resolution of both Houses of Parliament. The effect of such a resolution would be to make the international agreement binding on the international plane.[41] However, such an agreement can only be transferrable into domestic rights once an Act of Parliament has been passed.[42]

51 Save for a few exceptions,[43] Parliament is the only constitutionally empowered arm of government to make treaties binding on the Republic. Parliament is the only body that can make international agreements binding, it is only

[41] Glenister *II* at para 181.

[42] Section 231(4) of the Constitution and *Glenister II* id.

[43] Self-executing treaties and treaties of a technical, administrative and executive nature become binding in the absence of parliamentary approval.

Parliament, as the decision-maker, that can amend or suspend binding obligations in terms of section 231 of the Constitution.[44]

52 It is clear from the Constitution that the two arms of government perform separate but interrelated functions. The Executive's role is to negotiate and sign international agreements, and the Legislature's role, as the representatives of our People, is to consider whether said agreements should be binding.[45]

53 In the *ICC Withdrawal Case*, the High Court held that:

"It should also be borne in mind that prior parliamentary approval is required before instruments of ratification may be deposited with the United Nations. From that perspective, there is a glaring difficulty in accepting that the reverse process of withdrawal should not be subject to the same parliamentary process. The necessary inference, on a proper construction of s 231, is that parliament retains the power to determine whether to remain bound to an international treaty. This is necessary to give expression to the clear separation of powers between the national executive and the legislature embodied in the section. If it is parliament which determines whether an international agreement binds the country, it is constitutionally untenable that the national executive can unilaterally terminate such an agreement."[46] (Emphasis added.)

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[44] *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (*ICC Withdrawal Case*) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP).

[45] Id at para 52.

[46] Id at para 51.

And that—

"the approval of an international agreement in terms of s 231(2) creates a social contract between the people of South Africa, through their elected representatives in the legislature, and the national executive. That social contract gives rise to the rights and obligations expressed in such international agreement. The anomaly that the national executive can, without first seeking the approval of the people of South Africa, terminate those rights and obligations, is self-evident and manifest."[47] (Emphasis added.)

Furthermore, that—

"It is trite that where a constitutional or statutory provision confers a power to do something, that provision necessarily confers the power to undo it as well. In the context of this case, the power to bind the country to the Rome Statute is expressly conferred on Parliament. It must therefore, perforce, be Parliament which has the power to decide whether an international agreement ceases to bind the country. The conclusion is therefore that, on a textual construction of s 231(2), South Africa can withdraw from the Rome Statute only on approval of Parliament and after the repeal of the Implementation Act. This interpretation of the section is the most constitutionally compliant, giving effect to the doctrine of separation of powers so clearly delineated in s 231."[48] (Emphasis added.)

54 Although the Court was referring to withdrawal, we submit that the same reasoning should extend to any amendment or suspension of an international

[47] Id at para 52.

[48] Id at para 53.

agreement. Parliament, as the repository of binding international powers, retains the power to amend or suspend the extent and terms of any international law agreement. This submission is the most constitutionally compliant for several reasons:

54.1 Section 231(2) expressly entrusts on Parliament the power to make international agreements binding on the Republic;

54.2 The only exception to Parliamentary approval is when a treaty is either self-executing or when it is of a technical, administrative or executive nature; even then, Parliamentary oversight remains ever-present, because the Constitution requires the tabling of a technical, administrative or executive treaty, on the one hand, and consistency with an Act of Parliament in the case of a self-executing treaty on the other hand;

54.3 Section 231 expressly limits the power of the National Executive to negotiating and signing of all international agreements: it gives it no more power than that;

54.4 It would undermine the role of Parliament if it was open to the National Executive to amend or suspend treaty obligations in the absence of their approval and oversight as mandated by section 231 of the Constitution;

54.5 Furthermore, there would be no rational basis for Parliament to retain the power to make international agreements binding whilst at the same

time it remains open for the National Executive to amend or suspend those agreements without parliamentary approval;

54.6 Nor would there be a rational basis for the National Executive to be disempowered from making binding international agreements, whilst it remained open for it to amend and suspend same; and

54.7 It is not a foregone conclusion that every agreement negotiated and signed by the National Executive will receive approval from Parliament. Even if that were the case, the Constitution still mandates a meaningful and legitimate parliamentary process of approval.

55 The power to create binding treaty obligations is concomitant with the power to amend those obligations.[49] The Constitution provides that Parliament is the only competent authority to make treaties binding on the Republic. It would follow that it is only Parliament that can amend or suspend those obligations.

56 If it is the legislature that holds the power to make international agreements binding on South Africa, the executive cannot amend or suspend treaty obligations that Parliament has made binding, in the absence of parliamentary approval.

57 Furthermore, the *ICC Withdrawal* case held that there is a reason why the Constitution provides for the powers of the National Executive to negotiate and sign international agreements but it is silent on its powers beyond that. This

[49] Id at para 53.

is because the National Executive, as the executing arm of the State, needs authority to act. That authority flows either from the Constitution or an Act of Parliament.[50]

57.1 It reiterated that trite principle of law that the "national executive can exercise only those powers and perform those functions conferred upon it by the Constitution, or by law which is consistent with the Constitution."[51]

57.2 Furthermore, that "the absence of a provision in the Constitution or any other legislation of a power for the executive to terminate international agreements is therefore confirmation of the fact that such power does not exist unless and until parliament legislates for it."

58 In the present case, the President acted in violation of the rule of law and the principle of legality as he does not have the power to amend or suspend international agreements in the absence of parliamentary approval.

59 There is no provision in the Constitution or an Act of Parliament that empowers the President to suspend and/or amend treaty obligations, therefore when he participated in the suspension of the Tribunal and signing the Protocol, he misconstrued his own powers and violated the principle of legality.

[50] Id at para 54.

[51] Id.

60 Even if it were to be found that he was constitutionally empowered to do so, the President's decision was not rationally connected to the purpose of his powers.

THE POWER TO SUSPEND

61 The first impugned decision made by the President was his participation in the suspension of the Tribunal.

62 The effect of the President's participation, and the absence of his objection to the decision, was to suspend South Africa's constitutional and international law obligations in terms of the Treaty and section 231(1).

63 The suspension of the Tribunal not only placed our binding obligations in terms of the Treaty in abeyance, but also resulted in the suspension of the effect of section 231(2) which provides that once Parliament approves an international agreement, South Africa is *bound*. The effect of section 231(2) ought to persist as the *status quo* until Parliament decides otherwise.

64 It is common cause on the facts that the Treaty and its binding effect on South Africa remained in force. Parliament had not amended the terms of the Treaty nor did Parliament authorise the President to suspend the effect of the Treaty.

65 The first leg of the rationality standard requires that the President must act within the law, and in a manner consistent with the Constitution.

66 On the facts, the President's decisions fail on the first prong of the test in that:

66.1 He was not empowered by the Constitution to suspend or amend our treaty obligations because his role is limited to negotiating and signing international agreements—not to suspend their legal effect; and

66.2 He acted in a manner inconsistent with the terms of an existing and binding international agreement in circumstances where Parliament had not approved an amendment or suspension of the SADC Treaty obligations.

67 The effect of the President's participation, and the absence of his objection to the decision, was to suspend South Africa's treaty obligations in terms of the SADC Treaty. He was not authorised to act in this manner, nor was he empowered to do so by the terms of his own limited powers in terms of section 231(1).

68 The President, by exercising a power he was constitutionally incapable of exercising, violated the principle of legality and the rule of law. The Full Court's finding in this respect, consequently, should be confirmed.

SIGNATURE OF THE 2014 PROTOCOL

69 In 2014, the President signed a Protocol that sought to amend the jurisdiction of the SADC Tribunal.

70 Initially, individuals could bring claims against a state and others before the SADC Tribunal. However, the 2014 Protocol limited/limits the jurisdiction of the Tribunal to interstate disputes.

71 The Full Court found that any act which detracted from the SADC Tribunal's exercise of its human rights jurisdiction, at the instance of individuals, would be inconsistent with the Treaty itself, and that that would be a violation of the rule of law.[52] It held that the President's signature of the 2014 Protocol was such an act.

72 It held further that any protocol was subordinate to the Treaty, and that in the absence of an amendment to the Treaty, the 2014 Protocol was incapable of amending the jurisdiction of the Tribunal.[53]

73 In this Court, the State challenges the High Court's findings in this respect. The basis of the State's appeal is that the President's signature is non-binding, exploratory and symbolic, and does not bring any international agreement into effect. Therefore, so goes the submission, the court's adjudication of the dispute was not only premature but also prejudged the matter.

Defence factually untenable

74 This explanation must be rejected first on the facts. According to the answering affidavit, the following justification is proffered:

> *"The view taken by the President after consultation with his advisors and all the relevant Departments at this stage was that a partial and temporary moratorium on receiving new cases was necessary in order to best address the challenges being faced in relation to the SADC Tribunal and its powers and the concerns raised by certain Member States, including in relation to the jurisdiction of the Tribunal."*[54]

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[52] High Court judgment, Record vol. 1, p. 97 at para 64.

[53] Id.

[54] Record, vol. 8, p. 753 at para 64.

75 Furthermore, the President argues that he did not oppose *"the consensus view taken by the Summit on the recommendation on the Council of Ministers, which in any event was only to put in place a partial moratorium for a limited duration"*.[55] In respect of the final decision, of May 2011, it is argued that that decision was made by consensus. Furthermore, it is pointed out that for *"the firm reason set out above in relation to the August 2010 meeting, the High Commissioner did not object to the consensus position on this issue".*[56]

76 The answering affidavit goes further to note that "*the consensus decision of the Summit took into account the interests of the majority of member states on this issue*".[57]

77 Nothing is said in the answering affidavit about the signature of the President being *"exploratory"*. *Au contraire* it is accepted that the President's view was that the decision was binding. And there were good reasons for it. As we know those reasons were found wanting. Now, on appeal, an apparently new tack is taken. It is suggested that the decision is not justiciable yet because it is not final.

Lack of authority

78 The State relies on *Earthlife*[58] and *Glenister I*.[59] Both decisions are authority for the proposition that the introduction of a bill or an international agreement

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[55] Id.

[56] Id, p. 754 at para 68.

[57] Id.

[58] Record vol. 2, p. 144 – 147. *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* (*Earthlife*) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC).

[59] Id. *Glenister v President of the Republic of South Africa and Others* (*Glenister I*) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC).

in Parliament is not justiciable unless there are exceptional circumstances. The essence of the argument in respect of both decisions is that judicial intervention is premature as the parliamentary processes have not unfolded. However, both decisions are distinguishable.

79 In *Earthlife*, the Western Cape High Court was not dealing with circumstances where there existed a binding international agreement that governed how the President was to conduct himself in relation to other nations. In this case, there *is* a binding international agreement. This agreement, approved by Parliament, provided that Member States could not act in a manner inconsistent with the terms of the Treaty.

80 Therefore, the conduct of the President, in signing the 2014 Protocol, and the Minister's signature of the Russian IGA are markedly different. In the former case, there exists a binding international agreement that regulates the present and future conduct of the President and the National Executive. In the latter case, that international agreement was non-existent and was in the process of being promulgated.

81 Similarly, the State's reliance on *Glenister I* is also misguided. *Glenister I* did not concern executive conduct which would be immediately applicable internationally. It concerned a decision of domestic application only. The problem here is that the signature of the President bears legal consequences under international law.

82 The general position under international law is that signature is not the equivalent of ratification. However, article 18 of the Vienna Convention on the Law of Treaties (the Vienna Convention) provides that once a state has signed an international agreement, it is obliged to refrain from acts which would defeat the objects and purpose of such a treaty until such time as it has made clear its intentions not to be bound by that treaty.

83 Article 26 of the Vienna Convention also embodies an elementary and universally agreed, fundamental principle of law that agreements which are binding must be performed (the principle of *pacta sunt servanda*).[60] Although South Africa is not a signatory of the Vienna Convention, it is binding in terms of section 232 as its provisions are customary international law.[61]

84 Thus, under international law a state party cannot —unless it has made clear its intentions to no longer be bound—bind itself to a treaty on one hand and sign another treaty that is contradictory with the earlier treaty, on the other hand. The President's signature of the 2014 Protocol is such an act that places South Africa in this irreconcilable position. The same cannot be said of the consequences of tabling a bill in Parliament as was the case in *Glenister I*.

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[60] *Gabčikovo-Nagymaros Project, Hungary v Slovakia*, Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88 at pp. 7, 78-9 and 116 and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226 at paras 102 and 110.

[61] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ GL No 53, [1971] ICJ Rep 16 at pp. 16, 47 and 49 and *Fisheries Jurisdiction, United Kingdom v Iceland, Judgment, Jurisdiction* [1973] ICJ Rep 3,at pp. 3, 18 and 55.

85 Thus, the mere suggestion that a signature to initiate a legislative process on the one hand, can be compared with one that effectively and consequentially violates a state's obligations under a binding treaty and the Constitution is risible.

86 Furthermore, as correctly held by the High Court in the *ICC Withdrawal Case*,

> "*… we are not concerned with what parliament might or might not do in future about the bill repealing the Implementation Act. The contention is that another arm of government, the executive, has already breached the separation of powers, and thus acted unconstitutionally, by deciding and giving notice of withdrawal in the manner it has. On that basis alone, this court is entitled, and indeed constitutionally enjoined, to enquire into the conduct of the executive to determine whether it is constitutionally compliant. We are therefore entitled to consider the application.*"[62]

87 For the same reasons advanced by the Full Court in the *ICC Withdrawal* case, the State's reliance on *Glenister I* ought to be rejected because the President has already breached the separation of powers and thus acted unconstitutionally by signing the 2014 Protocol that is in direct contravention of the express terms of a binding international agreement that Parliament has already approved. As South Africa has not withdrawn from the Treaty, *any* conduct by the National Executive inconsistent with its terms is unconstitutional. The President ought not have carried himself in a manner that is inconsistent with South Africa's international obligations unless he was empowered by Parliament to do so.

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[62] *ICC Withdrawal Case* at para 15.

88 The State's argument, in any event, is wrong for these further reasons:

88.1 First, although a signature does not bring an international agreement into effect, it is subject to the rationality standard because it is (i) a discharge of a constitutional power and (ii) it triggers the parliamentary process in section 231(1). The argument that any public power can be exonerated from a rationality review is untenable;

88.2 Second, the suspension decision, and, subsequently, the President's signature of the 2014 Protocol cannot be considered in isolation. Both decisions form part of an illegally contrived scheme to strip the Tribunal of its powers under circumstances where the Tribunal's powers are expressly provided in the Treaty. Both decisions are therefore tainted by illegality and stand to be set aside.

88.3 Third, whilst the jurisdiction of the Tribunal remains a provision of the Treaty, it is not open to the President to sign an international agreement that is directly at odds with the Treaty, unless he has prior Parliamentary approval;

88.4 Fourth, the President signed the 2014 Protocol for furthering our diplomatic relations and comity with other Southern African States. However, as correctly held by the Full Court, section 231 was not designed for this purpose. The President's section 83 powers provide him with ample opportunity to further diplomatic relations.[63]

[63] The Constitution empowers him to "[receive] and [recognise] foreign diplomatic and consular representatives" and to "[appoint] ambassadors, plenipotentiaries, and diplomatic and consular representatives"

89 The President's signature is not a mere formality nor is it simply symbolic. When he signs an international agreement, he does so under the auspices of our Constitution. It is the duty of courts to ensure that all exercises of public power conform with the Constitution and the rule of law. If the President's conduct affronts the Constitution, his conduct must be declared unconstitutional.

Irrationality

90 Even if it were to be held that the President had the power to amend or suspend our binding treaty obligations, the decision must nevertheless be rationally connected to the purpose for which the power was conferred.

91 The President's decision to participate in the suspension of the Tribunal and his subsequent decision to sign the 2014 Protocol are not rationally connected to, firstly, the scheme of our Constitution, and secondly, the purpose of section 231(1) of the Constitution.

92 The discharge of his section 231(1) powers and the way he engages with other nations must be in consistent with our constitutional scheme.[64]

93 The President is required to discharge his power in a manner consistent with the Constitution, the rule of law and the principle of legality.[65] His signature,

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[64] *Mohamed and Another v President of the Republic of South Africa and Others* (*Mohamed*) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) emphasized the importance of South Africa, through its representatives, carrying itself in relations with other nations in a manner consistent with our Constitution.

[65] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 148.

an exercise of executive powers as mandated by the Constitution, to an international agreement whose purpose it is to shut the door to individual access to a fair, impartial and independent tribunal, could never be consistent with our constitutional scheme.

94 The importance of the right of access to courts has been emphasised in *Barkhuizen v Napier*, in these terms—

"Section 34, the provision in the Constitution that guarantees the right to seek the assistance of courts, proclaims that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court ..." Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."[66]

And that—

"Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."[67]

95 In *Mahomed*, it was held that the State must carry itself, in relation to other nations, in a manner consistent with the Constitution and the Bill of Rights.[68]

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[66] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 31.

[67] Id at para 33.

[68] *Mahomed* at paras 48 – 55.

It would follow that if an individual's right of access to courts is protected under our law, the President cannot sign international agreements that would be inconsistent with that protection.

96 In addition, there are a number of international agreements which should inform the kind of international agreements South Africa is signatory to. South Africa is party to both the United Nations Charter (UN Charter) and the International Covenant on Civil and Political Rights of 1966 (ICCPR).

97 Article 14(1) of the ICCPR guarantees a *"fair and public hearing by a competent, independent and impartial tribunal".*

98 In its comment on art. 14(1), the United Nations Human Rights Committee held that *"equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice*."[69]

99 It is in the context of these decisions on access to courts and the rule of law, as well as South Africa's binding international law obligations in the form of the ICCPR and the UN Charter that the President's signature must be viewed.

100 The decision of the President threatened to infringe the rights protected by section 34 of the Constitution. As a consequence, the persons affected or

[69] United Nations Human Rights Committee 'General Comment No. 13: Equality Before The Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14)' (Twenty-first session, 1984) UN Doc. HRI/GEN/1/Rev.1 ('GC 13') at para 3.

likely to be affected were entitled to consultation. Without consultation, the decision could also not be rational.[70]

101 We submit that the President's signature stands to be set aside because (a) any international agreements that seeks to do away with an individual's right of access to courts cannot fit into our constitutional scheme, (b) the 2014 Protocol is an affront to our Constitution founded on the rule of law and (c) the basis of the decision itself is substantively and procedurally irrational.

[70] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).

CONCLUSION

102 We therefore submit that the order of the Full Court should be confirmed.

103 The State should be directed to pay the costs of this application, jointly and severally, including the costs of two counsel.

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TSHIDISO RAMOGALE

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19 July 2018

LIST OF AUTHORITIES

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- The Constitution of the Republic of South Africa.

2. CASE LAW

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- *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).
- *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC).
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3. INTERNATIONAL LAW

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- Protocol on the Tribunal in the Southern African Development Community, 2000
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4. FOREIGN LAW

- *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008] SADCT 2.
- *Fick and Another v Republic of Zimbabwe* [2010] SADCT 8.
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- *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ GL No 53, [1971] ICJ Rep 16
- *Fisheries Jurisdiction, United Kingdom v Iceland, Judgment, Jurisdiction* [1973] ICJ Rep 3

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO 67/18

In the matter of:

THE LAW SOCIETY OF SOUTH AFRICA	**First Applicant**
LUKE MUNYANDU TEMBANI	**Second Applicant**
BENJAMIN JOHN FREETH	**Third Applicant**
RICHARD THOMAS ETHERREDGE	**Fourth Applicant**
CHRISTOPHER MELLISH JARRET	**Fifth Applicant**
TENGWE ESTATE (PVT) LTD	**Sixth Applicant**
FRANCE FARM (PVT) LTD	**Seventh Applicant**

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES OF THE REPUBLIC OF SOUTH AFRICA	**Second Respondent**
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION OF THE REPUBLIC OF SOUTH AFRICA	**Third Respondent**

THE STATE'S WRITTEN SUBMISSIONS

Table of Contents

1. INTRODUCTION AND SYNOPSIS

1.1. This is an application to confirm the High Court's declarations of constitutional invalidity in relation to two distinct actions with very different legal effects:

1.1.1. First, President Zuma's participation in 2011 in the SADC Summit's[1] suspension of the SADC Tribunal (*the Tribunal*)[2]; and

1.1.2. Second, President Zuma's non-binding signature of the SADC Tribunal Protocol in 2014 (*the 2014 Protocol*).[3]

1.2. The central issue in the litigation concerns a change envisaged by the 2014 Protocol. That change, if accepted, would alter the jurisdiction of the Tribunal from one in which it would entertain disputes between citizens and their governments, to one in which it would only hear disputes between states.

1.3. The State[4] does not oppose the confirmation of the order declaring President Zuma's participation in the suspension of the Tribunal unconstitutional.

1.4. The State only appeals against the declaration of invalidity of President Zuma's

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1 The Summit of the Heads of State or Government (*the Summit*) of the Southern African Development Community (*SADC*) established by Article 9 of the Treaty of the Southern African Development Community, 1992 (*the SADC Treaty*).

2 The Tribunal is governed by the Protocol of the Tribunal in SADC, 2000 (*the 2000 Protocol*).

3 The Protocol on the Tribunal in SADC, 2014.

4 The President, the Minister of Justice, and the Minister of International Relations and Cooperation.

signature of the 2014 Protocol.[5]

1.5. The High Court's declaration of invalidity in relation to President Zuma's signature is predicated on a series of misunderstandings and misconstructions of fundamental constitutional and international law principles. If these misunderstandings and misconstructions are allowed to stand it would potentially damage the constitutionally mandated separation of powers in relation to the entering into of international agreements.

1.6. In this regard, the following key points need to be stressed:

1.6.1. In May 2011 the Summit, by consensus decision, suspended the Tribunal. That is why the Tribunal continues to be unable to hear and decide any cases.

1.6.2. President Zuma's participation in the Summit's suspension of the Tribunal was separately declared to be unconstitutional. The State does not oppose the confirmation of that declaration.

1.6.3. Article 16 of the SADC Treaty leaves all issues of how the Tribunal will function to be determined by a Protocol adopted by the Summit. The Tribunal's jurisdiction is currently governed by the 2000 Protocol which is still in force (which grants the Tribunal the jurisdiction to consider matters brought by individuals and member states).

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[5] In terms of section 172(2)(d) of the Constitution, read with Rule 16(2) of the Constitutional Court Rules, the State is entitled to appeal against the confirmation of an order declaring the President's conduct constitutionally invalid.

1.6.4. The 2014 Protocol, which President Zuma signed, expressly requires member states to ratify the Protocol in order to be bound by it, and it provides that the 2014 Protocol will only enter into force after two-thirds of the member states have deposited instruments of ratification with SADC, after complying with their own constitutional obligations. To date no state has ratified the 2014 Protocol.

1.6.5. The 2014 Protocol (which seeks to limit the Tribunal's jurisdiction to hear only inter-state disputes) expressly provides that it is only if and when it enters into force that it will replace the 2000 Protocol and thus change the Tribunal's jurisdiction so that it can exclusively hear inter-state complaints.

1.6.6. Therefore, President Zuma's signature did not bind South Africa to the 2014 Protocol (only ratification would do that) and it had no effect on whether the Protocol will ever enter into force (only the depositing of instruments of ratification can bring the Protocol into force). In short, President Zuma's signature had no legal effect on the jurisdiction of the Tribunal.

1.6.7. President Zuma's signature of the 2014 Protocol, as with all signatures of international agreements which are subject to ratification, allows the executive to then consider whether South Africa should become a party to the Protocol (which would require ratification). The signature does not obligate South Africa to ratify the Protocol.

1.6.8. As section 231 of the Constitution requires, and as the State accepts on

affidavit, even if the executive were to decide that South Africa should become a party to (and bound by) the 2014 Protocol, the executive would then still need to table the Protocol before Parliament to seek approval of the Protocol so that it can be ratified.

1.6.9. If Parliament, after complying with its constitutional obligations (including facilitating public participation) does not approve the 2014 Protocol, then South Africa cannot ratify the Protocol.

1.6.10. If Parliament were to approve the 2014 Protocol, the executive would only then deposit an instrument of ratification on behalf of South Africa with SADC.

1.6.11. It is only if South Africa ratifies the Protocol, which requires the depositing of an instrument of ratification with SADC, that (a) South Africa will be bound by the Protocol and (b) that it will add to the necessary tally of 10 ratifications to bring the Protocol into force.

1.7. Once these points are understood, it is clear that President Zuma's signature was not irrational or otherwise unconstitutional. Moreover, the challenge to the signature of the 2014 Protocol is evidently premature and should have been dismissed.

1.8. It appears that the High Court only declared President Zuma's signature to be unconstitutional because it confused, or failed to properly distinguish between,

the effects of the suspension of the Tribunal and the effects of President Zuma's signature of the 2014 Protocol.

1.9. The applicants (who we refer to as *the Law Society*[6] and *the Zimbabwean applicants*,[7] respectively) similarly conflate the distinction between, and the different legal effects of, the Summit's suspension of the Tribunal and President Zuma's (non-binding) signature of the 2014 Protocol.

1.10. In these submissions:

1.10.1. We begin by summarising the central facts;

1.10.2. We outline the applicable legal principles; and

1.10.3. We then thematically address why the declaration of invalidity in respect of the signature of the 2014 Protocol should not be confirmed.

2. A SUMMARY OF THE CENTRAL FACTS[8]

2.1. SADC is an international organisation. It was established on 17 August 1992 in terms of the SADC Treaty and has fifteen member states, including South Africa.[9]

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6 The first applicant.
7 The second to seventh applicants, who are Zimbabwean citizens and companies that intervened in the Law Society's application.
8 In approaching the facts, the Court must apply the trite principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) in relation to the resolution of factual disputes.
9 Law Society's Founding Affidavit (*FA*) para 22, Record v2 p 165.

2.2. The advancement of stability and sustainable development in the SADC region are important foreign policy objectives for South Africa, which it seeks to advance through its involvement in SADC, and by working to ensure increased political and economic integration of SADC.[10]

2.3. In view of the colonial history of the SADC region, the principle of sovereignty, irrespective of the economic size of a particular SADC member state, is a core consideration for all SADC member states.[11]

2.4. SADC has a number of institutions, including, the Summit of Heads of State or Government (*the Summit*),[12]the Council of Ministers (generally consisting of foreign ministers of member states),[13] and the sectoral and cluster ministerial committees (which consist of ministers from each member states who oversee the activities of core areas), including the Committee of Ministers of Justice and Attorneys General (*the Committee of Ministers of Justice*).[14]

2.5. The Summit is "*the supreme policy-making institution of SADC*" [15] and is "*responsible for the **overall policy** direction and **control of the functions** of SADC*".[16]

2.6. Unless the SADC Treaty otherwise provides, "*the decisions of the Summit shall*

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[10] State's Answering Affidavit (*AA*) para 5, Record v8 p 732.
[11] State's AA para 7, Record v8 p 732-3.
[12] Articles 9(1)(a) and 10(1) of the SADC Treaty.
[13] Article 9(1)(c) and 11 of the SADC Treaty.
[14] Article 9(1)(d) and 12 (2)(vi) of the SADC Treaty.
[15] Article 10(1) of the SADC Treaty.
[16] Article 10(2) of the SADC Treaty (emphasis added).

*be **taken by consensus** and **shall be binding**.*"[17]

2.7. The President, as the head of state of South Africa, is a member of the Summit.

2.8. The Summit is given the power to dissolve any SADC institution (which includes the Tribunal[18]), and SADC itself.[19]

2.9. The Tribunal is provided for in the Treaty, but its jurisdiction and other functions are not. Article 16(2) of the Treaty provides in relevant part that "*the composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol*" which is to be adopted by the Summit, and which Protocol will then form an integral part of Treaty. The current Protocol governing the Tribunal is the 2000 Protocol.

2.10. The Summit also has the power to amend the SADC Treaty.[20] In fact, as recognised by this Court,[21] the Tribunal was only brought into existence by a decision by the Summit. The Summit took a decision in 2002 to bring the 2000 Protocol (which currently provides for the functioning and jurisdiction of the Tribunal) into operation by amending the SADC Treaty and the 2000 Protocol. This is because there had been insufficient ratification to bring the 2000 Protocol into force, so the ratification requirement in the 2000 Protocol was removed in

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17 Article 10(9) of the SADC Treaty.
18 Article 9(g) of the SADC Treaty.
19 Article 35 of the SADC Treaty.
20 Article 36(1) of the SADC Treaty.
21 *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) (*Fick*) para 9.

terms of the Summit amendment.[22]

2.11. The Tribunal only became operational in November 2005 after its first members were appointed.[23] It only received its first case in 2007. It therefore only heard cases for a brief period of approximately four years, until its suspension in May 2011.[24] During this time, it only decided approximately nineteen cases.[25]

2.12. In May 2011, the Summit decided, by consensus, to suspend the Tribunal (after putting in place a temporary moratorium, in August 2010, on it hearing new cases).[26] The Summit put in place a "*moratorium on receiving any new cases or hearings of any cases by the Tribunal*".[27] In addition, since the Tribunal was suspended, the Summit decided not to reappoint members to the Tribunal whose term of office would be expiring.[28]

2.13. President Zuma did not attend the Summit meeting, but the South African High Commissioner to Namibia represented him.[29]

2.14. At the 2012 Summit meeting, the Summit (acting within its powers) decided that a new Protocol should be negotiated for the Tribunal, which would limit its jurisdiction to hearing inter-state complaints (complaints brought by states), and

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[22] DIRCO's Table of SADC Protocol, Record v12 p 1195, item 26, Protocol on the Tribunal, which indicates that the Agreement amending the Protocol on the Tribunal 2002 provided that the 2000 Protocol was amended to enter into force upon the adoption of the Agreement Amending the Treaty of the SADC on 14 August 2001 and *Fick* paras 9 and 10 and *Government of the Republic of Zimbabwe v Fick & others* (657/11) [2012] ZASCA 122 paras 35 and 36.
[23] State's AA para 93.1, Record v8 p 764.
[24] State's AA para 93.1, Record v8 p 764.
[25] State's AA para 93.1, Record v8 p 764.
[26] State's AA para 21, Record v8 p 738.
[27] State's AA para 17, Record v8 p 736-7.
[28] State's AA para 17, Record v8 p 736-7.
[29] State's AA para 20, Record v8 p 738.

not complaints from individuals.[30]

2.15. Thus began an extensive process of negotiation within SADC and its various institutions to prepare and adopt a new Protocol for the Tribunal, which provided for a more limited mandate for the Tribunal (given the concerns raised by the Council of Ministers and the Summit that the Tribunal's mandate was too broad).[31]

2.16. In 2014, this process culminated in a final draft being approved and recommended by the Committee of Ministers of Justice to the Council of Ministers and the Summit for their consideration.[32] In August 2014 the Council of Ministers considered and approved the new Protocol (approved by the Committee of Ministers of Justice), and recommended to the Summit that it adopt the new Protocol.[33]

2.17. Accordingly, at the August 2014 Summit meeting, on the recommendation of the Council of Ministers, the Summit adopted the 2014 Protocol, which limited the jurisdiction of the Tribunal to deal with inter-state complaints.[34]

2.18. The 2014 Protocol, which was adopted by the Summit, did not simply represent any one state's view as to the proposed role and jurisdiction of the Tribunal, but rather represented the consensus in SADC and its institutions, after much

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30 State's AA para 72, Record v8 p 756.
31 State's AA para 73, Record v8 p 756-7.
32 State's AA para 73, Record v8 p 756-7; Law Society's FA para 14, Record v1, p 169.
33 State's AA para 74, Record v8 p 756-7.
34 State's AA para 74, Record v8 p 757; Law Society's FA para 14, Record v1, p 169.

negotiation and consideration.[35]

2.19. However, importantly, the SADC member states and institutions, specifically drafted and adopted a Protocol that (a) would only bind a member state upon ratification, which ratification has to be in accordance with each member state's own constitutional procedures and (b) would only enter into force once the requisite number of ratifications had been deposited. The 2014 Protocol expressly provided that:

2.19.1. It required ratification to become binding, not a mere signature (which was simply a formality),[36]

2.19.2. It would only enter into force, if and when two-thirds of the member states (10 of the 15 member states) had ratified the Protocol, "*in accordance with their constitutional procedures*", by depositing instruments of ratification with SADC;[37] and

2.19.3. It would only replace the 2000 Protocol once it came into force.[38]

2.20. In other words, the 2014 Protocol that was negotiated, and which President Zuma signed, does not summarily change the jurisdiction of the Tribunal. Rather it intentionally and explicitly ensures that such a change could only occur if a super-majority of member states ratify the protocol after compliance with their

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[35] State's AA para 77, Record v8 p 758.
[36] Article 52 provides that "*This Protocol shall be ratified by Member States who have signed the Protocol* ***in accordance with their constitutional procedures*****."**
[37] Articles 53 and 55.
[38] Article 48.

own constitutional procedures. In countries like South Africa, this would require first obtaining parliamentary approval (which would include public participation).

2.21. The reason that the Tribunal cannot presently deal with any cases is that it has been suspended by the Summit. The position is unaffected legally or factually by the 2014 Protocol. The 2014 Protocol is not in force.[39]

2.22. President Zuma signed the 2014 Protocol in the knowledge that after signature he would have an opportunity, together with the executive, to consider whether South Africa should seek to ratify the 2014 Protocol. If the executive wished to ratify the Protocol this would require the executive to table the 2014 Protocol before both houses of Parliament for their approval.[40]

2.23. Thus, President Zuma signed a Protocol which clearly ensured that South Africa's constitutional requirements (including parliamentary approval, and the concomitant public participation process that this requires) would be fully respected before any change could be wrought to South Africa's international rights and obligations.

2.24. The 2014 Protocol has not come into operation, nor did President Zuma's signature have any effect on whether it will ever come into operation (that would require ratification by 10 member states, which may or may not include South Africa). Thus, President Zuma's signature cannot be said to affect any rights or interests of any of the parties.

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[39] State's Answering Affidavit in response to the Zimbabwe Applicants' Founding Affidavit (*State's Further AA*) para 20.7, Record v10 p 958.

[40] State's AA para 79.4, Record v8 p 759.

2.25. At the time this case was launched, the State made it clear that (a) it had not reached a decision as to whether it believed South Africa should ratify the 2014 Protocol, and (b) if the State decided that South Africa should ratify the 2014 Protocol it would need to obtain the approval of Parliament (which would include public participation), which approval may or may not be given. [41]

2.26. The State indicated that, rather than pre-empting this litigation and findings made by the courts, it would await the outcome before taking a final decision as to whether it believes South Africa should ratify the 2014 Protocol or not (which would then require the State to table the Protocol before Parliament to seek approval).[42]

3. THE APPLICABLE LEGAL PRINCIPLES

Section 231 and the entering into of international agreements

3.1. At the heart of this case is section 231 of the Constitution. The section prescribes how South Africa enters into and becomes bound by international agreements, and how those international agreements are domesticated.

3.2. Section 231 is "*deeply rooted in the separation of powers*".[43] It creates a careful balance of powers and responsibilities between the legislature and the executive. That careful constitutionally-ordained separation is vital to properly

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41 State's AA, para 79.5, Record v8 p 759.

42 State's FA, para 20.8, Record v10 p 959. This approach was perfectly permissible, see *Saamwerk Southwerke (Pty) Ltd v Minister of Mineral Resources and Another* [2017] ZASCA 56 (19 May 2017) para 66.

43 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (*Glenister II)* para 89.

consider the issues before this Court.

3.3. ***First***, section 231(1) makes "*[t]he negotiating and signature of international agreements… the responsibility of the national executive*". In doing so, it only gives the national executive a limited power to undertake the "*exploratory work*" of negotiating and signing international agreements, but this does not bind South Africa to such international agreements.[44]

3.4. As was held by a full bench of the North Gauteng High Court in the *ICC Withdrawal* case, the executive's signature of an international agreement "*has no direct legal consequences*".[45]

3.5. ***Second***, section 231 makes clear that there is a delineation of functions between the executive and legislature in relation to binding South Africa to international agreements. In particular, if after negotiating and signing an international agreement, the executive wishes South Africa to agree to be bound by an international agreement, the executive must first table the international agreement before both houses of Parliament for their consideration and approval (section 231(2)). As is made clear in the *ICC Withdrawal* case "*the executive does not have the power to bind South Africa to [an international] agreement.* ***The binding power comes only once parliament has approved the agreement on behalf of the people of South Africa as their elected representative. It appears that it is a deliberate constitutional scheme that***

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[44] *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP) (*ICC Withdrawal*) para 55.

[45] *ICC Withdrawal* para 47 (emphasis added).

the executive must ordinarily go to parliament (the representative of the people) to get authority to do that which the executive does not already have authority to do."[46]

3.6. As Ngcobo CJ held in *Glenister II*, "*[u]nder our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement* ***do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic***."[47]

3.7. ***Third***, since the Constitution obligates both houses of Parliament to facilitate public participation in its legislative and other activities,[48] the Constitution expressly envisages that Parliament would be obligated (subject to limited exceptions) to conduct appropriate public participation processes when considering whether to approve an international agreement.[49]

3.8. ***Fourth***, if and when both houses of Parliament approve an international agreement, as required by section 231(2), then South Africa can be bound to the agreement as a matter of international law.[50] Practically this then requires the executive (normally the Minister of International Relations) formally to give notice that South Africa agrees to be bound by the international agreement. This occurs by depositing an instrument of ratification with the relevant body designated in the international agreement.[51] The 2014 Protocol provides that "*all Instruments*

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46 *ICC Withdrawal* para 55.
47 *Glenister II*, para 95.
48 Sections 57(1)(b) and 72(1)(a) of the Constitution.
49 *Earthlife Africa* para 114.
50 *Glenister II* para 181.
51 *ICC Withdrawal* case para 51. Similarly, international agreements, in addition to allowing for ratification,

of Ratification and Accession shall be deposited with the Executive Secretary of SADC who shall transmit certified copies to all Member States."[52]

3.9. ***Fifth***, there is only one limited exception to the need for the executive to seek parliamentary approval. Section 231(3) permits the executive to bind South Africa to a very limited subset of international agreements "*without parliamentary approval or the public participation that often accompanies any such parliamentary approval process,* ***by tabling the agreement within a reasonable time***."[53] But the agreements that can be tabled under 231(3) are "***a limited subset of run of the mill agreements*** *(or as Professor Dugard puts it,* ***agreements 'of a routine nature, flowing from daily activities of government departments')*** *which* ***would not generally engage or warrant the focussed attention or interest of Parliament***."[54]

3.10. The Court in *ICC Withdrawal* accepted that where an international agreement requires ratification, then it must be tabled under section 231(2) (and not section 231(3)), since the Court held that "*ratification... requires prior parliamentary approval in terms of s 231(2*)."[55]

3.11. ***Sixth***, even when the executive is entitled to make use of section 231(3) to bind South Africa absent parliamentary approval, the section does not allow it to completely dispense with Parliament. Rather, if the executive wishes to make an

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may also allow for accession. This is the process of formally agreeing to be bound by a treaty (by depositing an instrument of accession) to which a state had not been party to the negotiation of and therefore had not signed. See Dugard *International Law: A South Africa Perspective* (4th ed) p 416.

52 Article 55(1).

53 *Earthlife Africa* para 114 (emphasis added)

54 *Earthlife Africa* para 114 (emphasis added)

55 *ICC Withdrawal* para 47, referring to Dugard *International Law* p 417.

international agreement that falls within section 231(3) binding on South Africa it must still table the international agreement before Parliament within a reasonable time.[56] The tabling before Parliament is a jurisdictional requirement for the executive to exercise the power under section 231(3).[57] There are sound practical and principled reasons for this. In accordance with the separation of powers, the tabling allows Parliament to scrutinise the relevant agreement to ensure that the executive has not mischaracterised an international agreement, in order to bypass the section 231(2) approval process. This gives due regard to the constitutional principles of openness and accountability.[58]

3.12. ***Seventh***, sections 231(2) and (3) only deal with the domestic constitutional obligations (for instance, the need for parliamentary approval) that must be complied with in order for international agreements to be made binding on South Africa on the international plane. These subsections do not then mean that international agreements create domestic rights or obligations merely because they bind South Africa on the international plane. Section 231(4) makes clear that to create domestic rights and obligations, an international agreement must be enacted domestically by the passing of legislation by Parliament.[59] As the Court held in the *ICC Withdrawal* case, "*once parliament approves the agreement, internationally the country becomes bound by that agreement.*

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[56] Section 231(3), and *Earthlife Africa* para 126.
[57] *Earthlife Africa* para 126.
[58] *Earthlife Africa* para 126, referring to section 41 of the Constitution.
[59] See *Glenister II* para 181. The only exception to the need for Parliament to pass domestic legislation to create domestic rights, is section 231(4) which indicates that "self-executing" provisions of international agreements that have been:
(a) approved by Parliament, and
(b) do not violate the Constitution or any legislation
will have domestic effect without domestic legislation. For the debate and uncertainty in relation to what would amount to a "*self-executing*" provision, see Dugard *International Law* p 56 – 60.

Domestically, the process is completed by parliament enacting such international agreement as national law in terms of s 231(4)."[60]

3.13. By way of practical example, the stages and decisions that must be taken before South Africa is bound by a treaty are well demonstrated by an instrument of ratification deposited by South Africa in relation to another SADC protocol, the Protocol on Culture, Information and Sport.[61]

3.14. This Instrument[62] makes clear that the Protocol was signed on behalf of the government on the day it was adopted. But since the Protocol provided for ratification, the government, after signature needed to consider whether South Africa wished to become party to the Protocol. Having thereafter decided that South Africa should become party to the Protocol, the government sought and

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[60] *ICC Withdrawal* para 35.

[61] Record v12 p 1199, Instrument of Ratification. See another example in relation to the Protocol on Finance and Investment at v12 p 1200.

[62] Record v12 p 1199, the Instrument of Ratification provides:

"WHEREAS the Southern African Development Community (SADC) Protocol on Culture, Information and Sport (hereinafter referred to as "the Protocol") was adopted at Blantyre, Malawi on 14 August 2001;

AND WHEREAS the Protocol was signed on behalf of the Government of the Republic of South Africa on 14 August 2001;

AND WHEREAS Article 38 of the Protocol provides for ratification thereof;

AND WHEREAS the Government of the Republic of South Africa desires to become a Party to the Protocol;

AND WHEREAS ratification of the Protocol was approved by the South African Parliament in accordance with the requirements of South African law;

NOW THEREFORE I, NKOSAZANA CLARICE DLAMINI ZUMA, MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA, declare that the Government of the Republic of South Africa, having considered the Protocol, hereby confirms and ratifies the same.

IN WITNESS WHEREOF I have signed this Instrument of Ratification at Pretoria on this the 30th day of March Two Thousand and [F]our."

received approval from Parliament for the ratification of the Protocol. Thereafter, the Instrument confirms that Government has now considered the Protocol and confirms and ratifies it (by depositing the signed Instrument of ratification), thereby binding South Africa to the Protocol almost three years after the Protocol was signed.

Ratifications of treaties in international law

3.15. The 2014 Protocol expressly provides that it must be ratified by SADC member states.

3.16. Ratification is the international act whereby a state establishes on the international plane its consent to be bound by a treaty.[63]

3.17. Multi-lateral international agreements generally require ratification (by states that have signed the agreements) to become binding on those states.

3.18. The requirement of ratification has now become standard in most multilateral treaties, precisely to allow for the states to comply with domestic obligations and in order to consider whether they wish to be bound.

3.19. As Shaw has pointed out, "*where the convention is subject to acceptance, approval or ratification,* ***signature will in principle be a formality and will mean no more than that state representatives have agreed upon an acceptable text, which will be forwarded to their particular governments for***

[63] Aust *Modern Treaty Law and Practice* (3rd ed, 2013) p 94; Article 2(1)(b) of the Vienna Convention on the Law of Treaties, 1969.

the necessary decision as to acceptance or rejection."[64]

3.20. As Crawford (currently a judge of the International Court of Justice) similarly points out in the current edition of *Brownlie's Principles of Public International Law*, "*[w]here the signature is subject to ratification, acceptance, or approval,* ***signature does not establish consent to be bound nor does it create an obligation to ratify***."[65]

3.21. International law recognises that allowing for consent by ratification serves important domestic and international law objectives. As Shaw opines, "*Although ratification (or approval) was originally a function of the sovereign, it has in modern times been made subject to constitutional control.* ***The advantages of waiting until a state ratifies a treaty before it becomes a binding document are basically twofold****: internal and external. In the latter case, the* ***delay***

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[64] Shaw *International Law* (8th ed, 2017) p 690-691 (emphasis added), and see also J. G. Starke QC, *Introduction to International Law*, Ninth edition (1984) 429. We note that in terms of Article 18(a) of the Vienna Convention on the Law of Treaties 1969, simple (non-binding) signature which is subject to ratification, creates a general good faith duty on the international plane, to refrain from seeking to defeat the objects of the agreement (i.e. taking steps to render the treaty inoperative) prior to a decision being taken whether or not to ratify the treaty. South Africa is not a party to the Vienna Convention and therefore this good faith duty, would only be of any relevance if it formed part of customary international law. As this Court has held that "*the extent to which the Vienna Convention reflects customary international law is by no means settled."* (*Harksen v the President* 2000 (2) SA 825 (CC) para 26). In the leading comprehensive commentary on the Vienna Convention, the authors note that "*[a]n examination of international jurisprudence on this issue also leaves one confused as to whether the obligation contained in Article 18(a) of the Vienna Convention has customary status*." (Corten and Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* 2011, p 374). But even assuming Article 18(a) is a customary rule, all it does is to create a good faith duty, on the international plane, after signature and before an express decision has been taken whether or not to ratify the treaty, to refrain from seeking to defeat the objects of the treaty (i.e. taking intentional steps to render the treaty inoperative). It does not create an obligation to ratify a treaty; it does not create an obligation to comply with the treaty; and it does not bring a treaty into force. See Report of the International Law Commission (Fifty-ninth session 2007), General Assembly Official Record, Sixty-second Session Supplement No.10 (A/62/10) at 67; *North Sea Continental Shelf*, Judgment, ICJ Reports 3, paras 25-36; Aust Modern Treaty Law and Practice (3rd ed, 2013) p 103. The Article 18 duty (to refrain from defeating the object of the treaty, until a decision is made whether to ratify) can have no practical consequences for signature of the 2014 Protocol which has as its object the defining of the jurisdiction of an international tribunal, if and when it comes into force.

[65] Crawford *Brownlie's Principles of Public International Law* (8th ed, 2012) p 372 (emphasis added).

between signature and ratification may often be advantageous in allowing extra time for consideration, once the negotiating process has been completed. *But it is the internal aspects that are the most important, for they reflect the change in political atmosphere that has occurred in the last 150 years and has led to a much greater participation by a state's population in public affairs.* ***By providing for ratification, the feelings of public opinion have an opportunity to be expressed with the possibility that a strong negative reaction may result in the state deciding not to ratify the treaty under consideration***."[66]

3.22. Similarly, Aust in this seminal work on the law of treaties opines that *"[t]he normal reason for requiring ratification is that,* ***after the adoption and signature of a treaty, one or more of the negotiating states will need time before it can give its consent to be bound. There can be various reasons for this****. First, the treaty may require legislation. …. Second, even if no legislation is needed, the* ***constitution may require parliamentary approval of the treaty, or some other procedure like publication, before the treaty can be ratified. Third, even if no legislative or other constitutional process has to be gone through, the state may need time to consider the implications of the treaty. That a state has taken part – even an active part – in the negotiations does not necessarily mean that it is enthusiastic about the subject, or the text that was finally agreed, or there may have been a change of government. The breathing space provided by the ratification process allows time for***

[66] Shaw *International Law* p 691 (emphasis added).

sober reflection before the instrument of ratification is lodged."[67]

The international relations competence of the national executive

3.23. The Court has made clear that the executive's conducting of international relations with foreign states (for instance engaging in diplomatic protection) is "*an aspect of foreign policy which is essentially the function of the Executive*."[68]This is an area in which the courts will give the executive significant deference.[69]

3.24. Thus, this Court held that "*Courts required to deal with such [international relations] matters will, however, give particular weight to the government's special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters*."[70]

3.25. In contextualising the need for the Court to give the executive a wide discretion, and give particular weight to the government's expertise, Chaskalson CJ referred approvingly to Germany's Constitutional Court's rationale for this: "*[t]he scope of discretion in the foreign policy sphere is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control*."[71]

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67 Aust *Modern Treaty Law and Practice* (3rd ed, 2013) p 94-95 (emphasis added).
68 *Kaunda* para 77.
69 See *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) (*Geuking*) para 26.
70 *Kaunda* para 144.
71 *Kaunda* para 74, referring to the *Hess* decision 55 BVerfGE 349 (90 ILR 386) at 396.

3.26. Thus, as this Court has made clear that international relations decisions, such as whether to agree to a foreign state's request for extradition, will often be based on issues of international comity between states and not necessarily on the underlying merits of the decision. In *Geuking*, which dealt with the exercise of the President's powers in relation to extradition, the Constitutional Court held that the decision whether to extradite a person was "*a policy decision which may be based on considerations of comity or reciprocity between the Republic and the requesting State.* ***The decision is based not on the merits of the application for extradition but on the relationship between this country and the requesting State***."[72] The Court went on to hold that *"****[t]he President*** *in deciding whether to consent to the surrender of a person under s 3(2)* ***must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs. It is not for the courts to determine what matters are appropriate or relevant for that purpose***."[73]

Rationality review of executive decisions

3.27. The declaration of invalidity in relation to the signature was based on a finding of irrationality. We briefly consider the nature of rationality review of executive decisions.

3.28. While legislation or conduct may be challenged on grounds of irrationality, this Court has emphasised the narrow scope of review of executive decision-

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[72] *Geuking* para 26 (emphasis added).
[73] *Geuking* para 27 (emphasis added).

making.[74] This Court has made clear that:

3.28.1. Rationality review is a very low standard of review. This Court noted in *Democratic Alliance v the President* that the rationality standard "*by its very nature prescribes the lowest possible threshold for the validity of executive decisions*".[75]

3.28.2. This Court has held that the rule is that "*executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair*". [76] This Court emphasised that the reason for limiting review of executive decisions to rationality, and not generally for procedural unfairness or unreasonableness, is "*precisely to ensure that the principle of the separation of powers is respected and given full effect*."[77]

3.28.3. The sole question that the Court must ask is whether, objectively viewed, the decision was rationally connected to the purpose for which the power was given.[78] Thus, it will rarely ever be the case that a decision is objectively irrational. [79]

3.28.4. The rationality review standard means that a "*Court cannot interfere with the*

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[74] See e.g. *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) (*Democratic Alliance v President*) para 41.
[75] *Democratic Alliance v the President* para 42.
[76] *Democratic Alliance v President* para 41; see also *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 77.
[77] *Democratic Alliance v the President* para 41.
[78] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufactures*) paras 85 – 86.
[79] *Pharmaceutical Manufacturers* para 90.

decision simply because it disagrees with it or considers that the power was exercised inappropriately".[80]

3.28.5. This Court has recently held that "*[t]he discretion to choose suitable means is that of the repository of public power. The exercise of that discretion is not susceptible to review on the ground of irrationality unless there is no rational link between the chosen means and the objective for which power was conferred*."[81]

3.28.6. Thus, the rationality review standard does not allow the courts to make policy choices which are the preserve of the elected branches of government.[82]

3.28.7. This Court recently emphasised that, at all times, rationality must be disciplined by the separation of powers.[83]

4. THE DECLARATION OF INVALIDITY SHOULD NOT BE CONFIRMED

4.1. The High Court declared that President Zuma's signature of the 2014 Protocol is *"unlawful, irrational and thus, unconstitutional"*.[84] We submit that, the High Court's declaration of invalidity is based on a number of material errors. An

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[80] *Pharmaceutical Manufacturers* para 90.

[81] *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20 para 56.

[82] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) para 59 and *Jooste v Score Supermarket Trading (Pty) Limited (Minister of Labour intervening)* 1999 (2) SA 1 (CC) para 17.

[83] *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) (*Electronic Media Network)* para 5, referring to *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) (*Albutt)* para 51.

[84] Judgment para 72, order 1, Record v1 p 104.

analysis of these errors demonstrates why this Court should not confirm the declaration of invalidity.

The signature did not bind South Africa and it had no effect on whether the Protocol would enter into force

4.2. The High Court appears to have based its decision and much of its reasoning on the assumption that the 2014 Protocol bound South Africa merely on President Zuma's signature. This appears, *inter alia*, from the fact that the Court held that "*the Tribunal's jurisdiction was simply signed away*" by President Zuma,[85] and that President Zuma's signature "*severely undermined the crucial SADC institution, the Tribunal*".[86]

4.3. This fundamental error formed the predicate for the declaration. It was plainly wrong.

4.4. The 2014 Protocol is an international agreement that requires ratification to become binding, not signature. Therefore, any signature of the Protocol was thus merely a formality, not a binding signature. Article 52 provides that, "*This Protocol shall be ratified by Member States who have signed the Protocol in accordance with their constitutional procedures*."

4.5. The 2014 Protocol would only enter into force if and when two-thirds of the member states had ratified the Protocol, in accordance with their own constitutional procedures, by depositing instruments of ratification with SADC.

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[85] Judgment para 69, Record v1 p 87.
[86] Judgment para 71, Record v1 p 89.

Article 53 provides that, "*This Protocol shall enter into force thirty (30) days after the deposit of the Instruments of Ratification by two-thirds of the Member States*." Article 55(1) specifies how an instrument of ratification is deposited: "*all Instruments of Ratification ... shall be deposited with the Executive Secretary of SADC who shall transmit certified copies to all Member States*." The 2014 Protocol, therefore, would only enter into force if 10 member states were to deposit instruments of ratification. To date none have.

4.6. It is only if the 2014 Protocol enters into force that it would change the Tribunal's jurisdiction by repealing and replacing the 2000 Protocol. This is so since the 2014 Protocol makes clear in Article 48, that "*[t]he 2000 Protocol on the Tribunal in the Southern African Development Community is repealed with effect from the date of entry into force of this Protocol*."

4.7. Section 231(1) of the Constitution only gives the executive a preliminary power to undertake the "*exploratory work*" of negotiating and signing international agreements, but this does not bind South Africa to such international agreements.[87] As was held by a full bench in *ICC Withdrawal*, the executive's signature of an international agreement "*has no direct legal consequences*".[88]

4.8. Moreover, the State confirmed on affidavit that:[89]

4.8.1. It has not as yet decided whether to seek to ratify the Protocol (the decision was pended given the application to challenge the constitutionality of the

[87] *ICC Withdrawal* para 55; *Glenister II* para 95.
[88] *ICC Withdrawal* para 47.
[89] State's AA, para 79.5, Record v8 p 759; State's Further AA para 20.8, Record v10 p 958-9.

signature);

4.8.2. If the State decides that South Africa should ratify the Protocol, then it will place the Protocol before Parliament for its approval in terms of section 231(2) (Parliament must then comply with its constitutional obligation to undertake public participation);

4.8.3. It would only be if Parliament approved the Protocol, that the State could then proceed to lodge an instrument of ratification with SADC.

4.9. All of this is separate from any question of whether, as a matter of domestic constitutional law, the Protocol is a section 231(2) or (3) agreement. Since, even if, for argument's sake, the Protocol was a section 231(3) agreement which does not require approval from Parliament to be made binding (as the Zimbabwean applicants still appear to suggest may be the case)[90] all this would mean is that if the executive wished to bind South Africa to the 2014 Protocol it would be at liberty, as a matter of domestic constitutional law, to deposit the instrument of ratification with SADC to bind South Africa, without first obtaining Parliament's approval. However, the State has not deposited an instrument of ratification. The State has said that if it decides that South Africa should ratify the Protocol, it would approach Parliament for approval to do so.[91]

4.10. The 2014 Protocol is, in any event, as the State expressly accepts, clearly a section 231(2) agreement, which requires Parliament's approval, after

[90] Zimbabwean applicants' written submissions footnote 200.
[91] State's AA, para 79.5, Record v8 p 759.

negotiation and signature to be made binding, because:

4.10.1. The 2014 Protocol expressly requires ratification, in accordance with each state's "*constitutional procedures*" (Article 52). The High Court in *ICC Withdrawal* accepted that where an international agreement requires ratification, it must be tabled under section 231(2) since the Court held that "*ratification... requires prior parliamentary approval in terms of s 231(2).*"[92] This is in accordance with this Court's determination in *Glenister II*.[93]

4.10.2. In any event, the 2014 Protocol is not an agreement of a "*technical, administrative or executive nature*" (as provided for in section 231(3)). As the High Court held in *Earthlife Africa* the agreements that can be tabled under 231(3) are "*a limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements 'of a routine nature, flowing from daily activities of government departments') which would not generally engage or warrant the focussed attention or interest of Parliament.*"[94] The 2014 Protocol, if it were to come into force, would repeal and replace the 2000 Protocol; it would govern the Tribunal, and in particular change the jurisdiction of the Tribunal, removing its ability to entertain individuals' complaints. Therefore, it is not a run of the mill agreement; it is not routine in nature; and it would warrant the focussed attention of Parliament. This is precisely why the State has indicated that if it decides that South Africa should ratify the Protocol it would first seek Parliament's approval.

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92 *ICC Withdrawal* para 47.
93 *Glenister II* para 95.
94 *Earthlife Africa* para 114.

4.10.3. Moreover, if there was any doubt on this score (which there is not), then, as the High Court in *Earthlife Africa* found, even if an agreement might in principle fall within the terms of section 231(3), and therefore not require Parliament's approval, the State would be entitled to make use of the more onerous procedure in section 231(2) to obtain parliamentary approval in order to make the agreement binding.[95] In this matter the State has been clear that it would not seek to bind South Africa to the Protocol, by depositing an instrument of ratification, without first approaching and obtaining the approval of Parliament.

The challenge to the signature was premature

4.11. Once one accepts that President Zuma's signature did not bind South Africa to the Protocol, nor did it have any effect on whether the Protocol would ever come into force, it is clear that the High Court ought to have held that the challenge to the constitutionality of the signature of the 2014 Protocol was premature.

4.12. Even if President Zuma's signature of the 2014 Protocol constitutes the exercise of public power, this is not determinative of whether a challenge to the particular exercise of public power is ripe for determination. As this Court has recently held "*rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is permissible only where it is necessary and unavoidable to do so*."[96]

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[95] *Earthlife Africa* para 137.
[96] *Electronic Media Network* para 85.

4.13. In *Earthlife Africa*[97] the Court held that it is premature and a violation of the separation of powers to allow a challenge to the rationality and constitutionality of the signature of an international agreement if the agreement would still need to be tabled before Parliament for approval to make it binding. As the Court held, "*[s]hould the executive* ***then choose to table the Agreement before Parliament in terms of sec 231(2),*** *a parliamentary/political process will follow in which the Agreement will be debated in both the NA and the NCOP with a view to its approval or disapproval by Parliament. It may very well also be the subject of a process of public participation conducted through Parliament.* ***The outcome of this process cannot be foreseen nor should it be anticipated****. In these circumstances* ***it would be invidious if the Court were, at this stage, to declare that certain of its provisions are inconsistent with the Constitution and, more specifically, sec 217 thereof. This is not to suggest, however, that the Court will lack jurisdiction to deal with such a question in future if the need should arise***."[98]

4.14. The same holds true in this matter. Whatever substantive arguments might be marshalled as to why the 2014 Protocol, if it were to come into force, might be found to violate any international obligations or constitutional provisions and whether any such violations might be justifiable, it would be invidious for this Court, at this stage, to make such determinations. The executive has not taken any decision as to whether or not South Africa should become a party to and bound by the 2014 Protocol, which would require ratification of the Protocol, pursuant to parliamentary approval. Even if the executive concludes that South

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97 *Earthlife Africa* supra.
98 *Earthlife Africa* para 120 (emphasis added).

Africa should become a party to the Protocol and therefore tables the Protocol before Parliament to seek its approval, Parliament would have to fulfil its constitutional obligation to consider whether or not to approve the 2014 Protocol. As was held in *Earthlife Africa*, the "***outcome of this process cannot be foreseen nor should it be anticipated***."[99]

4.15. Moreover, a challenge to the signature of an international agreement, which is subject to ratification, is analogous to a challenge brought to the introduction of a Bill before Parliament, where a Court is asked to intervene prematurely in the legislative process. In *Glenister I*, this Court dismissed an application, *inter alia*, seeking to declare that the Cabinet's initiation of legislation (by introducing a bill into Parliament) for the abolition of the Scorpions was unconstitutional and invalid.[100] The Court dismissed the application on the basis of prematurity. It held that it would only be in exceptional circumstances, where clear and immediate harm could be shown, that "*will be material and irreversible*", which could not be remedied in due course, that the Court would consider intervening at the preliminary stage, before Parliament had yet considered the Bill.[101]

4.16. This Court emphasised that it "*must proceed on the basis that Parliament will observe its constitutional duties rigorously. If it is correct that the draft legislation* ***does threaten structural harm to the Constitution or the institution of the NPA, something which I expressly refrain from deciding, then Parliament will be under a duty to prevent that harm. It would be institutionally***

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[99] Ibid.
[100] *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) (*Glenister I*).
[101] *Glenister I* paras 43 and 46.

inappropriate for this court to intervene in the process of lawmaking on the assumption that Parliament would not observe its constitutional obligations*. Again, should the legislation as enacted be unconstitutional for the reasons proffered by the CFCR, appropriate relief can be obtained thereafter."*[102]

4.17. We submit that the same holds true in relation to the approval of international agreements.

4.18. Therefore, mere signature of the 2014 Protocol creates no exceptional circumstances, nor is there imminent and irreversible harm in the present matter that requires a court to intervene, and thus violate the separation of powers:

4.18.1. The applicants' substantive concerns relate to a change to the jurisdiction of the Tribunal from being able to hear individual complaints to only being able to hear interstate complaints. However, it is only if the 2014 Protocol comes into force that it will replace the 2000 Protocol, and thus change the jurisdiction of the Tribunal, so that Tribunal can only hear inter-state complaints.

4.18.2. Signature of the 2014 Protocol does not bind South Africa and it does not obligate South Africa to ratify the Protocol. Only depositing an instrument of ratification (after obtaining parliamentary approval) can bind South Africa and add to the tally of ratifications required for the 2014 Protocol to enter into force. Therefore the signature of the 2014 Protocol had no legal effect on

[102] *Glenister I* para 56 (emphasis added).

whether the 2014 Protocol will ever come into force.

4.18.3. In order to bind South Africa, South Africa would need to ratify the Protocol. This would require the executive to first decide that South Africa should become a party to, and be bound by, the Protocol by ratifying it (which would then require the executive to table the Protocol before Parliament so that Parliament can consider whether to approve the Protocol). That decision has not yet been made. In making that decision the executive would need to carefully consider both its constitutional and international law obligations.

4.18.4. The Court should not intervene on the assumption that *the executive* will not observe its constitutional obligations.

4.18.5. Were the executive to decide that South Africa should become a party to the Protocol, it would need to table the Protocol before Parliament and set out substantive grounds for why Parliament should approve the Protocol (in terms of section 231(2)).

4.18.6. Thereafter, if and only if Parliament approves the Protocol, then the executive would need to lodge an instrument of ratification with SADC.

President Zuma's signature did not violate the SADC Treaty or the 2000 Protocol

4.19. The High Court, absent proper explanation, held that President Zuma's signature of the 2014 Protocol was unlawful, since it violated the terms of the SADC Treaty

and the 2000 Protocol.[103]

4.20. This is clearly incorrect, and it appears that the findings were based, once again, on eliding the distinction between the suspension and the signature, and misunderstanding their distinct legal effects.

4.21. ***First***, the SADC Treaty in Article 16 does not determine the jurisdiction of the Tribunal. The Treaty expressly leaves issues such as the Tribunal's jurisdiction to be determined by "*a Protocol… adopted by the Summit*".

4.22. Article 16 makes clear that the Summit is entitled to adopt the Protocol that sets out the jurisdiction of the Tribunal.

4.23. It is for this reason that the 2000 Protocol, which is currently in force, governs the Tribunal's jurisdiction.

4.24. While Article 16 makes clear that a Protocol in relation to the Tribunal forms an integral part of the Treaty, it is evident that the Summit can choose to adopt a new Protocol in relation to the Tribunal to replace the current 2000 Protocol.

4.25. It is only if the 2014 Protocol were to ever come into force that it would replace the 2000 Protocol, and thus alter the Tribunal's jurisdiction.

4.26. ***Second***, in this context it is also important to emphasise certain general points:

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[103] Judgment paras 66 and 67, Record v1 p 99-100.

4.26.1. There is no general international obligation which requires sovereign states to subject their sovereignty, and that of their own courts and constitutions, to the jurisdiction of an international court.

4.26.2. In fact, the position is exactly the opposite. International courts can only exercise jurisdiction over states if they consent to it.[104] As Aust points out "*a state can be made subject to the jurisdiction of an international court or tribunal only if it consents*".[105]

4.26.3. Even where states agree to create international courts, they are not obligated to allow individuals to approach these bodies. The pre-eminent international court of the international community, the International Court of Justice, can only hear complaints brought by states.[106] And the International Court of Justice can only exercise jurisdiction if those states have consented to that jurisdiction.[107] Similarly, both the African Court on Human and People's Rights,[108] and the Inter-American Court of Human Rights[109], only have jurisdiction to hear individual complaints if the states parties have specifically given consent for this.

4.27. ***Fourth***, South Africa's international law obligations that flow from the SADC

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[104] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) para 78.
[105] Aust *Modern Treaty Law* p 256.
[106] UN Charter, Articles 92 and 93, and the Statute of the ICJ, Article 34(1).
[107] Article 36 of the Statute of the ICJ.
[108] Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
[109] Articles 61 and 62 of the American Convention on Human Rights.

Treaty and the 2000 Protocol are owed to SADC and its member states.[110] It is SADC and those member states that drafted, recommended and adopted the 2014 Protocol. It could hardly then be in violation of South Africa's international obligations to SADC and its member states, merely to sign (while not ratifying) a protocol which SADC and its member states adopted. And, of course, "*parties, acting collectively through their concordant practice, are the masters of their treaty*".[111]

4.28. As made clear above, since 2012, the procedure adopted by SADC, its member states, and institutions (in particular, the Summit, the Council of Minister, and the Committee of Ministers of Justice) was to negotiate and adopt a new Protocol. The Protocol would only come into force and replace the 2000 Protocol when the required number of ratifications had been received, after each state had complied with its own constitutional processes.

4.29. In the circumstances, it is clear that President Zuma's mere signature of the 2014 Protocol as drafted and approved by the SADC Committee of Ministers of Justice and then adopted by the SADC Summit, on the recommendation of the SADC Council of Ministers, does not bind South Africa and does not bring the Protocol into force, and does not violate the SADC Treaty or the 2000 Protocol.

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[110] This is the fundamental rule of treaty law: a treaty applies only between the state parties to it. See *Brownlie's Principles of International Law* p 384.

[111] Dörr & Schmalenbach *Vienna Convention on the Law of Treaties: A commentary* (2012), p 523. It should be noted that in terms of Article 31(3)(b) of the Vienna Convention, when interpreting treaties regard should be had to subsequent practice by the parties in the application of the treaty.

President Zuma's reasons for signature were explained, it was not purposeless, irrational or in bad faith

4.30. In finding that President Zuma's signature was substantively irrational, the High Court made the following inter-related findings:

4.30.1. "*Furthering diplomatic relations, **is not** a constitutionally-authorised purpose to be fulfilled through signing treaties under s 231(1) of the Constitution*";[112]

4.30.2. "*[T]here [wa]s* no *explanation why the Protocol was signed by the President if, as is now contended, it was not intended to bind South Africa*";[113]

4.30.3. That if the signature was not legally significant then it was effectively purposeless, and therefore irrational;[114] and

4.30.4. That the signature "*was at the instance of the violator of the Tribunal's orders (the Zimbabwe Government) [and]…contrary to the advice of the [Committee of] Ministers of Justice and Attorneys-General*".[115]

4.31. These findings are factually and legally incorrect.

4.32. ***First***, the conducting of diplomatic relations (usually referred to as international relations or foreign affairs) is precisely the purpose for which section 231(1) authorises the executive to negotiate and sign international agreements with

[112] Judgment para 70, Record v1 p 89 (emphasis added).
[113] Judgment para 69, Record v1 p 88.
[114] Judgment para 70, Record v1 p 88-89.
[115] Judgment para 68, Record v1, p 87-88.

other foreign states:

4.32.1. As the Court held in *ICC Withdrawal*, section 231(1) empowers the executive to do exploratory work with other states before entering into a binding agreement.[116]

4.32.2. In *Kaunda*, O'Regan J held that the fact that "*foreign affairs is primarily the responsibility of the Executive*" is signified *inter alia* by the fact that the Constitution provides "*that the national executive is responsible for negotiating and signing international agreements*."[117]

4.33. ***Second***, section 231(1) only gives the executive a preliminary power to undertake the "*exploratory work*" of negotiating and signing international agreements, but this does not bind South Africa to such international agreements.[118] That is why, as the court held in *ICC Withdrawal*, the signature of an international agreement which is subject to ratification "*has no direct legal consequences*".[119]

4.34. Thus, the signature of an international agreement subject to ratification is a formality. It does not bind the State, and it provides the State with the opportunity to then consider whether South Africa should ratify the treaty, and allows the State to comply with its constitutional obligations. Should the executive decide that the treaty should be ratified, it would need to seek parliamentary approval.

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[116] *ICC Withdrawal* para 55.
[117] *Kaunda* para 243.
[118] *ICC Withdrawal* para 55.
[119] *ICC Withdrawal* para 47.

Thus the fact that the signature is a formality and does not bind South Africa, does not mean it is purposeless. Rather, as held in *ICC Withdrawal*, and provided for in section 231, the (non-binding) signature of international agreements is part of the executive's exploratory work of treaty negotiation.

4.35. Not only is this clearly the purpose of signature set by section 231(1). This is also in accordance with international authority discussed above.[120]

4.36. ***Third***, given the proper constitutional context, and the terms of the 2014 Protocol that was signed, President Zuma clearly sets out the reasons for his signature of the 2014 Protocol. In particular:[121]

4.36.1. President Zuma took into account that the signature would not bind South Africa to the 2014 Protocol or bring it into force, since the Protocol requires ratification to bind member states. In other words, his signature would have no effect on the jurisdiction of the Tribunal. The Protocol that was negotiated, and which President Zuma signed, does not seek summarily to change the jurisdiction of the Tribunal. Rather it intentionally and explicitly ensures that such a change could only occur if the super-majority of member states ratify the Protocol after compliance with their own constitutional procedures. Thus, the Protocol specifically ensured that South Africa's constitutional procedures (in particular parliamentary approval, and concomitant public participation) would have to be observed before South Africa could be bound by the Protocol.

[120] See above paras 3.20 to 3.22.
[121] State's Further AA para 27, Record v10 p 961-4.

4.36.2. The decision to sign the Protocol was taken as part of and in furtherance of South Africa's engagement with SADC, given that the SADC Summit (SADC's highest policy-making body) had since 2012 approved the negotiation of a Protocol that would change the jurisdiction of the Tribunal to only receive state complaints.

4.36.3. Therefore, President Zuma's signature was intended to demonstrate no more than that South Africa was willing to consider whether to ratify the Protocol, in accordance with its constitutional obligations, on the basis that the Protocol was the outcome of the collective, multilateral, negotiations by SADC member states and its institutions (over two years).

4.36.4. It was in that context that President Zuma decided that it was in South Africa's interests as a member of SADC to sign the Protocol, knowing that his signature would not bind South Africa to the Protocol.

4.36.5. The signature was therefore not an action that would signal South Africa's consent to be bound; it merely acknowledged the outcome of collective negotiation and drafting, and allowed for a careful, substantive determination as to whether South Africa should seek ratification of the Protocol in accordance with its constitutional procedures.

4.37. Of course, when considering the rationality of President Zuma's conduct, this Court must bear in mind that in conducting international relations the executive effectively engages in making policy decisions, and this is an area in which the

courts will accord the executive significant deference.[122] These decisions make clear that often policy decisions in relation to foreign affairs are not based only on the underlying merits, but on issues in relation to comity and the relationship between states.[123] The executive "*must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs***"**, in particular, comity.[124] This is particularly so when the international relations conduct, such as non-binding signature, does not have any direct legal consequences, and does not create or take away rights.

4.38. Given that context, it certainly was neither irrational nor in bad faith for President Zuma to sign the Protocol. The whole purpose of requiring ratification as a matter of international and constitutional law, is so that when multi-lateral treaties are negotiated and signed, states have time (a) to make a substantive determination of whether they wish to consent to be bound by the treaty, and (b) so they can comply with their constitutional obligations, such as seeking parliamentary approval.

4.39. ***Fourth***, the facts are clear:

4.39.1. There was an extensive process of negotiation within SADC and its various institutions to prepare and adopt a new Protocol for the Tribunal;[125]

4.39.2. The Committee of Ministers of Justice negotiated and approved the final

[122] See Section 3, Heading: The international relations competence of the national executive.
[123] See in particular *Geuking* para 26.
[124] *Geuking* para 27.
[125] State's AA para 73, Record v8 p 756-7.

draft of the Protocol (the 2014 Protocol);[126]

4.39.3. The Committee of Ministers of Justice recommended the 2014 Protocol to the Council of Ministers and the Summit for consideration;[127]

4.39.4. The Council of Ministers considered and approved the 2014 Protocol and recommended to the Summit that it adopt the 2014 Protocol;[128]

4.39.5. The Summit, on the recommendation of the Committee of Ministers, adopted the 2014 Protocol;[129]

4.39.6. Thus, the 2014 Protocol that President Zuma signed:

4.39.6.1. was adopted by the Summit, recommended by the Council of Ministers, and drafted and approved by the Committee of Ministers of Justice;

4.39.6.2. was the product of detailed negotiation and consensus building, and was not the product of or at the instance of any one member state; and

4.39.6.3. provides for entry into force only if it is ratified by members states in

[126] State's AA para 73, Record v8 p 756-7.
[127] State's AA para 73, Record v8 p 756-7; Law Society's FA para 14, Record v1, p 169.
[128] State's AA para 74, Record v8 p 756-7.
[129] State's AA para 74, Record v8 p 757.

accordance with their own constitutional procedures.[130]

4.40. In the circumstances, given the non-binding nature of the signature it was clearly rational and not in bad faith, to sign the Protocol:

4.40.1. based on considerations of comity and as part of the exploratory work undertaken during a multilateral treaty-making process (given that the Protocol represented the outcome of over two years of negotiation and drafting by the various SADC institutions and member states, and was adopted and recommended by the Summit, the Council of Ministers, and the Committee of Ministers of Justice); and

4.40.2. so as to allow the State to then undertake a substantive consideration of whether South Africa should consent to be bound by the Protocol, in accordance with the State's constitutional obligations.

There was no duty on President Zuma to consult the public prior to signature of the 2014 Protocol

4.41. The Court erred in determining that the signature was irrational since there was no consultation with affected persons (including, in particular, those with vested rights before the Tribunal).[131]

[130] State's AA para 73, Record v8 p 756-7; State's AA paras 76 and 77, Record v8 p 757-8.
[131] Judgment para 69, Record v1 p 88.

4.42. The Law Society appears to support this argument.[132]

4.43. However, the High Court's finding fails to take account of the fact that President Zuma's signature of the 2014 Protocol did not bind South Africa to the agreement, nor did it have any effect on bringing the Protocol into force. Therefore, it could have no effect on any rights under the 2000 Protocol.

4.44. Since President Zuma's signature did not and could not affect any rights under the 2000 Protocol, a rational decision did not require him to consult with the public or any particular members of the public prior to signature.

4.45. The Constitution's structure and provisions envisage and support precisely this procedural approach. Section 231 empowers and mandates the executive to do the exploratory work of negotiating and signing international agreements, but it then requires the executive to go to Parliament, the people's representatives, to obtain authority and approval for South Africa to be bound by the international agreement.[133]

4.46. The Constitution then appropriately places a duty on Parliament to conduct public participation in relation to Parliament's legislative and other processes (which includes approving international agreements). [134] This is the constitutionally appropriate time to conduct any necessary public participation since it is only when the Protocol is ratified that it may be made binding on South Africa.

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[132] Law Society's written submissions para 100.
[133] *ICC Withdrawal para 55.* See also *Glenister II*, para 95.
[134] See *Earthlife Africa* para 114.

4.47. The provisions of section 231 of the Constitution exist precisely because the signature of an international agreement that is subject to ratification, can neither take away or create rights domestically nor bind South Africa internationally.[135]

4.48. President Zuma's signature certainly did not violate or threaten section 34 of the Constitution (as the Law Society seems to suggest),[136] since:

4.48.1. the signature have no legal effect on the jurisdiction of the Tribunal; and

4.48.2. in any event, section 34 is a right of access to courts in South Africa, not an extra-territorial right to be given access to international courts.[137]

Parliamentary approval was not required prior to signature of the 2014 Protocol

4.49. The Court held President Zuma's signature was irrational and unconstitutional since he signed the Protocol "*without consultation and approval of the South African Parliament*".[138]

4.50. This demonstrates, with respect, the extent of the High Court's confusion in relation to how section 231 operates, and the legal effects of signature.

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[135] *ICC Withdrawal* para 47.

[136] Law Society written submissions para 100.

[137] *Kaunda* para 44; *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others* (Communication 409/12) (*Tembani* decision), para 139-145, Record v11 p 1032-34. The African Commission also emphasised that its view was supported by the European Court of Human Rights, which also held that the right of access to courts and to an effective remedy guaranteed in the European Convention on Human Rights was a right of access to national courts. The African Commission relied in this regard on the cases of *Maksimov v Russia* (2010) ECtHR (Application No. 43233/02) and *Golha v The Czech Republic* (2011) ECtHR (Application No. 7051/06) para 71. Similarly, there is clearly no customary international law right of individuals to access international courts (see F Francioni, "Access of Individuals to International Tribunals and International Human Rights Complaints Procedures", in F Francioni, *Access to Justice as a Human Right* (2007) p 58).

[138] Judgment para 69, Record v1 p 88.

4.51. The Constitution, and the case law (as discussed above),[139] is clear. In terms of section 231(1), negotiation and signature of international agreements does not require parliamentary approval. Rather, in terms of section 231(2), it is ratification of an international agreement, which binds South Africa, which requires parliamentary approval.

4.52. The State has not ratified the 2014 Protocol.

4.53. The State has confirmed that if it decides that South Africa should ratify the 2014 Protocol to make it binding, the State would first table the 2014 Protocol before Parliament, in terms of section 231(2), to seek Parliament's approval.

5. CONCLUSION AND RELIEF

5.1. For the reasons set out above, the declaration that President Zuma's signature of the 2014 Protocol was unconstitutional should not be confirmed.

5.2. The State accepts that the *Biowatch* principle applies in this matter, and therefore costs should be governed thereby.[140] If the Court does not confirm the invalidity of President Zuma's signature, then all parties should bear their own costs.

5.3. However, the Court should set aside the costs order in the High Court granted in favour of the *amici*. As this Court has held, an *amicus* "*is neither a loser nor a*

[139] See for example *Glenister II* and *ICC Withdrawal*.
[140] *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) 232 (CC) paras 23-24.

winner and is generally not entitled to be awarded costs."[141] The High Court gave no reasons for awarding costs to the *amici*. Nor could there be any reasons, since the amici's arguments were not the basis for either declaration of invalidity.

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GILBERT MARCUS SC
ANDREAS COUTSOUDIS
HEPHZIBAH RAJAH

Chambers, Sandton and Durban

2 August 2018

[141] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 63.

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2 *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) 232 (CC)
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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no 20382/2015

In the application between:

LAW SOCIETY OF SOUTH AFRICA	First applicant
LUKE MUNYANDU TEMBANI	Second applicant
BENJAMIN JOHN FREETH	Third applicant
RICHARD THOMAS ETHEREDGE	Fourth applicant
CHRISTOPHER MELLISH JARRET	Fifth applicant
TENGWE ESTATE (PVT) LTD	Sixth applicant
FRANCE FARM (PVT) LTD	Seventh applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent

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SECOND TO SEVENTH APPLICANTS' HEADS OF ARGUMENT
(Enrolled for hearing on 30 August 2018)

TABLE OF CONTENTS

A. Introduction

1. Was the High Court correct in declaring unconstitutional the conduct of then-President Zuma in collaborating in the termination of the SADC Tribunal's human rights jurisdiction? This is the question arising in these confirmation proceedings.

2. Together with the first applicant, the Law Society of South Africa ("the LSSA"), the second to seventh applicants (collectively "the Tembani applicants") successfully attacked President Zuma's conduct's constitutionality in the court *a quo*. The LSSA contended primarily that the impugned conduct violated *inter alia* the constitutional right of access to justice.[1] The Tembani applicants' attack relied on the rule of law (*inter alia* because the abridgement of the Tribunal's jurisdiction violated the SADC Treaty, and interfered retrospectively with vested rights), and invoked irrationality, arbitrariness and *mala fides* on the part of the President in perpetrating the impugned conduct.[2]

3. In a unanimous judgment by Mlambo DP, Mngqibisa-Thusi J and Fabricius J, the High Court declared President Zuma's conduct unconstitutional. It adopted as its departure point this Court's judgment in *Government of the Republic of Zimbabwe v Fick*.[3] The court *a quo* extensively quoted from this Court's *Zimbabwe* judgment,

[1] Record vol 2 p 163 para 13.
[2] Record vol 4 p 393 para 3; Record vol 4 p 400 para 20.
[3] 2013 (5) SA 325 (CC).

and applied it.[4] The *Zimbabwe* judgment clearly confirms a principle of SADC law under the SADC Treaty which renders the impugned conduct inconsistent with the SADC Treaty and the South African Constitution; and also otherwise unlawful, irrational and unsustainable. The common cause facts also demonstrate that the President's impugned conduct was *mala fide*. The High Court therefore correctly, with respect, found that President Zuma had participated in a conspiracy initiated by the Mugabe regime to undermine the SADC Tribunal,[5] and that the Tribunal's human rights jurisdiction was signed away at the instance of the violator of human rights – the Mugabe regime.[6]

4. The respondents oppose the confirmation of the High Court's order, but only on a limited basis. They attack only two aspects of the High Court's order.[7] The first is part of the declarator relating to President Zuma's impugned conduct. The respondents only oppose the part of the order which reads "signing of the 2014 Protocol on the SADC Tribunal is declared unlawful, irrational and thus unconstitutional." Thus the High Court's order declaring *the President's participation in suspending the SADC Tribunal* unlawful, irrational and unconstitutional is conceded by the respondents. Yet it is common cause that the

[4] Para 2 of the High Court's judgment (Record vol 1 p 15), quoting paras 5-11 and 27-31 of this Court's *Zimbabwe* judgment. Para 3 of the High Court's judgment quotes para 48 of this Court's *Zimbabwe* judgment (Record vol 1 p 22). Para 4 of the High Court's judgment refers to para 69 of this Court's *Zimbabwe* judgment (Record vol 1 p 23).
[5] Para 64 of the High Court's judgment (Record vol 1 p 83).
[6] Para 69 of the High Court's judgment (Record vol 1 p 87).
[7] The second aspect in which the High Court's order is attacked relates purely to costs. But this concerns only the costs award in favour of the *amici curiae*. The costs order in favour of the LSSA and the Tembani applicants is correctly conceded by the respondents.

signing of the 2017 Protocol was the culmination[8] of "the long process" which included President Zuma's participation in the suspension of the Tribunal.[9] Thus conceding the declaration of unconstitutionality in relation of the suspension actually also acknowledges a vitiating unconstitutionality in the process to which the impugned signature signals South Africa's imprimatur.

5. As we shall show, the respondents' concessions, the common cause facts, and the dispositive High Court findings (which are not attacked by the respondents) render the purported part-appeal devoid of any merit. It should therefore be dismissed, and the High Court's order should be confirmed *in toto* – subject only to adding appropriate consequential relief.

B. Factual and procedural background

6. It is common cause that the abrogation of the SADC Tribunal's jurisdiction (which forms the subject-matter of this application) occurred at the instance of Zimbabwe, and in response to the Tribunal's decisions against Zimbabwe.[10] The Tribunal held that *inter alia* Zimbabwe's termination, restriction and interference with its own courts' jurisdiction constituted a human rights violation.[11] Zimbabwe's response

[8] Record vol 3 pp 392-393 para 3.
[9] Record vol 8 p 756 para 73.
[10] Cowell (2013) "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13(1) *Human Rights Law Review* 153 at 153-154.
[11] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 6 pp 509 and 513).

was to embark on a contempt offensive against the Tribunal.[12] Contempt of court proceedings against Zimbabwe therefore followed. The result was repeated findings by the Tribunal that Zimbabwe had persistently and repeatedly defied its orders. A number of those individuals whom the Tribunal's orders protected died, or were severely assaulted, and stripped of property.[13]

7. The remedy under the SADC Treaty for Zimbabwe's continued defiance was a referral to the SADC heads of state for the imposition of sanctions against Zimbabwe.[14] On application by *inter alios* the Tembani applicants the Tribunal repeatedly ordered such referrals.[15] In response to those referrals, instead of sanctioning Zimbabwe, the SADC heads of state sanctioned the Tribunal.[16] This they did by effectively terminating the Tribunal's human rights jurisdiction. Thus human rights, access to court and the rule of law itself was abrogated.

8. That deed required unanimous consent by all heads of state.[17] President Zuma signified his consent by signing the 2014 Protocol on the SADC Tribunal. It is this Protocol which terminates the Tribunal's human rights jurisdiction at the instance of individuals, like the Tembani applicants. Their circumstances not only demonstrate

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[12] Record vol 4 p 397 para 14.
[13] Record vol 4 p 398 para 14; Record vol 11 p 1107 para 91.
[14] Article 33 of the SADC Treaty.
[15] Record vol 4 pp 392-393 para 3.
[16] Record vol 4 p 398 para 14.
[17] Record vol 4 p 394 para 6. This the respondents themselves repeatedly proclaim: Record vol 8 p 731 para 4.1; Record vol 8 p 733 para 8; Record vol 8 p 751 para 59; Record vol 8 p 752 para 63; Record vol 8 p 753 para 64; Record vol 8 p 754 para 68; Record vol 8 p 757 para 75; Record vol 8 p 758 para 77; Record vol 8 p 762 para 88.2; Record vol 8 p 762 para 90.2.1; Record vol 8 p 768 para 102.2.

the need for individual access to the Tribunal, but also the irrationality, arbitrariness and *mala fides* of terminating such access.[18] The retaliation culminated in the signing of the 2014 Protocol by nine of the fifteen SADC heads of State.[19] While President Zuma's signature is the subject-matter of this application, similar applications have been lodged in domestic courts throughout the SADC region.[20] Only in this application have the Tembani applicants (lacking the resources to do so elsewhere)[21] intervened, both to ensure relief which addresses their predicament and that of others similarly situated, and to place important factual material of which only they have knowledge before Court.[22]

9. On the merits before the High Court then-President Zuma and his co-respondents only opposed the Tembani applicants' case on two bases. The first is prematurity. In short, the President contended that his signing of the Protocol which terminates

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[18] Record vol 4 pp 396-398 paras 10-14: the Tembani applicants are the farmers whose successful litigation against Zimbabwe before the Tribunal resulted in Zimbabwe's retaliation against the Tribunal.
[19] Record vol 8 p 742 para 34; Record vol 13 pp 1239-1240 para 20.
[20] Record vol 2 p 164 para 19: law societies across the region have stepped to the fore to do so.
[21] Record vol 11 p 1113 para 108.
[22] The Tembani applicants' intervention in the High Court was initially strenuously opposed by the respondents on a range of spurious grounds. (It was even suggested that the Tembani applicants were feigning their plight (Record vol 11 p 1113 para 108, referring to para 76.3 of the respondents' answering affidavit in the intervention application). This when they have lost their livelihoods, and some their lives (while many others have suffered but survived physical assault), through Zimbabwe's contempt for the Tribunal (Record vol 5 p 420 para 33). Another one of the respondents' bases of opposition was a specious appeal construct, and a contrived "holistic reading" to attribute to them a case which is inconsistent with the Tembani applicants' founding papers. Not only the Tembani applicants' replying affidavit but also the respondents' subsequent answering affidavit demonstrate that these grounds of opposition were never genuine (see e.g. Record vol 10 p 971 para 44.2 and Record vol 10 p 980 para 55.3, which recognise the correct target of the Tembani applicants' attack; and Record vol 10 p 972 para 45.2, which shows that the appeal construct was always without foundation). The *amici*'s papers already confirmed the same (Record vol 12 p 1123 para 18; Record vol 12 p 1131 para 3).) Eventually Government capitulated. But it still sought costs against the Tembani applicants. Also this stance has now been jettisoned before this Court.

the SADC Tribunal's human rights jurisdiction is an act without legal consequences,[23] and therefore not ripe for judicial scrutiny.[24] Yet the President revealed in his own papers that the court's pronouncement on this matter was actually awaited to inform Government's next step.[25] The second ground of opposition constitutes a sweeping denial of irrationality, arbitrariness and *mala fides*.[26] In short, the respondents contend that the President signed the Protocol as a sign of his respect for "certain Member States".[27] This is an obvious euphemism for Zimbabwe (it can apply to no other SADC state) – and the Mugabe regime's insistence on terminating the SADC Tribunal's jurisdiction in respect of individual citizens.[28] This confirms, rather than contradicts, the Tembani applicants' case.

10. Their case concerns the history of the SADC Tribunal, and the concerted effort to frustrate and oust its human rights jurisdiction. The history of the SADC Tribunal largely coincides with the surviving Tembani applicants' litigation history.[29] (Their case before it was one of the very first to be heard.) The history is set out in the annexure to their supporting affidavit in their intervention application, which by consent stands as their founding papers.[30] In what follows we provide an overview

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[23] Yet he inconsistently pleads that the intention with the signature was to demonstrate respect for what SADC Member States have "concluded" (Record vol 10 p 962 para 27.4.1), namely negotiations resulting in human rights being sacrificed in favour of "respect" for Zimbabwe's wishes (Record vol 13 p 1250 para 51).
[24] Record vol 10 p 955 para 17.1.
[25] Record vol 10 p 959 para 20.8.
[26] Record vol 10 p 955 para 17.2.
[27] Record vol 8 p 753 para 64.
[28] Record vol 13 pp 1240-1241 para 23.
[29] Record vol 4 pp 396-400 paras 10-19.
[30] Record vol 10 p 951 para 3; Record vol 10 p 952 para 6.

of those papers. We invite the respondents to ease the Court's task by confirming they accept its accuracy.

(1) The SADC litigation commencing with *Campbell*

11. The *Campbell* case commenced the SADC Tribunal's caseload. It also triggered Zimbabwe's retaliation against the Tribunal.[31] The case concerned commercial agricultural land in Zimbabwe, and involved some of the Tembani applicants. *Campbell* culminated in a declaration by the SADC Tribunal that Zimbabwe's ouster of its national court's jurisdiction violated the SADC Treaty, international human rights law and the right of access to justice – which forms an important component of the rule of law.[32]

12. The judgment articulated important principles of SADC law. They have been confirmed in subsequent cases by the Tribunal,[33] whose pronouncement on these principles are conclusive.[34] They are also consistent with international law and South African law.[35] They include the well-established principle (recognised by

[31] Record vol 4 pp 397-398 para 14.
[32] The judgment is at Record vol 5 p 473*ff*.
[33] *Inter alia* in *Tembani v Republic of Zimbabwe* SADCT 07/2008 (Record vol 5 pp 436, 439-440); *Gondo v Republic of Zimbabwe* SADCT 05/2008 (Record vol 5 p 450).
[34] Article 16(5) of the SADC Treaty.
[35] South African caselaw cited by the Tribunal in its judgments include *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) and *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC); and international caselaw cited includes judgments by the International Criminal Court; the European Court of Human Rights; the Inter-American Court of Human Rights.

inter alia this Court)[36] that the rule of law embraces the right to an effective remedy; the right of access to court; and the right to equal treatment before and protection by the law.[37]

13. The Tribunal also confirmed a principle previously articulated by the African Commission in litigation concerning Zimbabwe.[38] It is that the rule of law is a necessary condition for human rights, and that it requires the existence of courts and tribunals to resolve disputes.[39] It also found as a fact that Zimbabwe "persistently flouted the orders of its own High Court".[40]

14. Importantly, the SADC Tribunal also confirmed a legal principle of particular application to the current case, especially in the light of one of then-President

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[36] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 82: "The right of access to courts is an aspect of the rule of law."

[37] *Gondo v Republic of Zimbabwe* SADCT 05/2008 (Record vol 5 p 450); *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 5 p 498).

[38] *Gondo v Republic of Zimbabwe* SADCT 05/2008 (Record vol 5 p 454).

[39] *Ibid*, citing *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) Zimbabwe* 294/04, in which the African Commission held that Zimbabwe had violated Article 26 of the African Charter and held (at paras 118-120)

> "It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.
> It is a vital requirement in a state governed by law that court decisions be respected by the State, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure.
> Thus, by refusing to comply with the High Court orders, staying the deportation of Mr Meldrum and requiring the Respondent State to produce him before the Court, the Respondent State undermined the independence of the Courts. This was a violation of Article 26 of the African Charter."

[40] *Gondo v Republic of Zimbabwe* SADCT 05/2008 (Record vol 5 p 463).

Zuma's pleaded points.[41] The principle is that the SADC Treaty itself (through Article 4, which entrenches human rights and the rule of law) imposes "a legal obligation" on SADC "as a collectivity and as individual member States".[42] The Tribunal subsequently reiterated that Article 6(1) of the Treaty similarly imposes an obligation on member States of SADC to respect, protect and promote the "twin fundamental rights", being "the right of access to the courts and the right to a fair hearing".[43] Thus also this obligation rests on members States and their functionaries, and is not only exigible collectively against heads of State acting collectively *qua* SADC Summit.

15. In relation to its own legal status, the SADC Tribunal held that it is "one of the institutions of the organisation [*viz* the Southern African Development Community] which are established by Article 9 of the Treaty". The Treaty, in turn, is SADC's constitutive document (in other words, its *constitution*). The functions of the Tribunal are also entrenched in the Treaty itself: "to ensure adherence to, and the proper interpretation of, the provisions of the Treaty and the subsidiary instruments made thereunder, and to adjudicate on such disputes as may be referred to it."[44]

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[41] It does not appear to be repeated in the respondents' notice of appeal, and is therefore not addressed more fully in these heads of argument.
[42] *Campbell v Republic of Zimbabwe* SADCT 02/07 (Record vol 5 p 467), emphasis added.
[43] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 5 p 499).
[44] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 5 p 489).

16. The Tribunal also determined *which* disputes may be referred to it: "any dispute concerning human rights, democracy and the rule of law".[45] Not only disputes between States. As was the case with 80% of its caseload,[46] the dispute in which the Tribunal answered the crucial question as regards its own jurisdiction was indeed one between individuals and a State.

17. The source of the Tribunal's jurisdiction to determine disputes between individuals and States is, the Tribunal confirmed, Article 4(c) of the SADC Treaty itself.[47] This is reinforced by Article 6(1) of the Treaty, and by comparative authorities confirmed and applied by the Tribunal. These *inter alia* confirm that depriving citizens of judicial protection is "inimical to the principle of the rule of law";[48] that the rule of law indeed requires "having access to the courts";[49] and that the rule of law precludes limitations on the international human right to have any claim brought before a court or tribunal restricting or reducing "the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."[50]

18. Equally significant in the current context is the SADC Tribunal's adoption in SADC law of the observation by Baroness Hale (now President of the Supreme Court of the

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[45] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 5 p 497), emphasis added.
[46] Record vol 7 p 706 line 5.
[47] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 5 pp 496-497).
[48] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 5 p 499), citing Woolf *et al De Smith's Judicial Review* 6th ed (Sweet & Maxwell, London 2007) at para 4–015.
[49] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 5 p 500), citing *Golder v UK* (1975) 1 EHRR 524 at para 34.
[50] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 5 pp 500-501), citing *Philis v Greece* [1991] ECHR 38 at para 59.

United Kingdom) in *Jackson v Attorney-General*.[51] It is that courts treat with "particular suspicion … any *attempt* to subvert the rule of law by removing government action affecting the rights of individuals from all judicial scrutiny."[52]

19. This refutes another of the President's pleaded points: ripeness. As we shall show, the then-President's deponent contended that the impugned signature does not constitute a choate removal of the SADC Tribunal's individual jurisdiction. The signature, so it was suggested, is "simply a preliminary step".[53] Therefore the application is premature, the respondents pleaded. The short answer under SADC law is that not only conclusive and concluded subversions of the rule of law attract courts' scrutiny. Any type of conduct, even only an inchoate attempt, is justiciable. The reason is obvious, as *Campbell*'s sequelae shows: if an attempt becomes justiciable only after it is choate, then the attempt would have already destroyed an individual's ability to initiate judicial scrutiny.

(2) The *Campbell* case's sequelae

20. The *Campbell* judgment and the rest of the SADC Tribunal's caselaw were received by the South African, African and international legal community with acclaim.[54]

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[51] UKHL (2006) 1 A.C. 262.
[52] *Id* at para 159.
[53] Record vol 8 p 758 para 79.3.
[54] See *inter alia* Ndlovu "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal" 2011(1) *SADC Law Journal* 63 at 79; Gathii "The Under-appreciated Jurisprudence of Africa's Regional Trade Judiciaries" 2010(12) *Oregon Review of International Law* 245 at 282; and Shay "Fast Track to Collapse: How Zimbabwe's Fast-Track Land Reform Program Violates International Human Rights Protections to Property, Due Process, and Compensation" 2012(27) *American University International Review* 133 at 136).

Singular in its contempt, legal and verbal, was Zimbabwe, whose self-contradicting stance was transparent.[55] This was roundly condemned.[56] Even its own High Court was obliged to "openly rebuke"[57] Zimbabwe's "*ex post facto* official pronouncements repudiating the Tribunal's jurisdiction", describing these as "essentially erroneous and misconceived".[58]

21. Zimbabwe nonetheless continued to wage a campaign of publicised contempt and demonstrable defiance against the Tribunal.[59] This resulted in the repeated contempt proceedings to which reference has already been made.[60] The outcome of the contempt proceedings, in turn, was two separate referrals of Zimbabwe's recidivism to the SADC heads of State, comprising the SADC Summit.[61] The Summit was, however, beguiled by Zimbabwe to procure a "review" of the SADC Tribunal.[62] The purported review was a stratagem through which the Tribunal was frustrated, disabled, suspended and ultimately "dismantled".[63] It was in order to justify the

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[55] As the High Court held in *Government of the Republic of Zimbabwe v Fick* case nos. 47954/2010; 72184/2010; 77881/2009 at para 14 (High Court Record vol 6 p 572 para 14).
[56] Record vol 5 p 412 para 11.
[57] De Wet (2013) "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 28(1) *ICSID Review* 45 at 46.
[58] *Gramara (Pvt) Ltd v Government of the Republic of Zimbabwe* case no. HH169-2009; HC 33/09 (High Court Record vol 6 p 594).
[59] Record vol 6 p 556 para 26; Record vol 6 p 557 para 27, recording the public statements by Zimbabwe's President, Mr Mugabe, and its Minister of Lands, Mr Didimus Mutasa, its then-Minister of Justice, Mr Patrick Chinamasa, and even its then-Deputy Chief Justice, Mr Justice Malaba.
[60] See also Record vol 4 p 316 fn 99, citing three examples: *Campbell v Zimbabwe* SADCT 11/2008; *Campbell v Zimbabwe* SADCT 03/2009; and *Fick v Zimbabwe* SADCT 01/2010.
[61] Record vol 6 p 556 para 26.
[62] Record vol 6 p 556 para 26.
[63] As Zimbabwe's efforts were described by the SADC Lawyers' Association, the Western African Bar Association, the Pan-African Lawyers' Union, the Coalition for an Effective African Court on Human and Peoples' Rights, the African Regional Forum on the International Bar Association and the International Commission of Jurists in a joint statement (Record vol 7 p 677 para 1).

suspension that Summit procured, at the instance of Zimbabwe,[64] that a consultant was appointed to conduct a review of the SADC Tribunal.

22. The respondents themselves concede that the Summit instructed the review precisely because of Zimbabwe's non-compliance with the SADC Tribunal's orders.[65] The Summit thus purported to "review" the Tribunal, but without instituting any authorised legal recourse.[66] The parallels in South African domestic law, and consequences for the legality of this approach, are self-evident.[67]

23. The attempted review backfired spectacularly: the independent expert (a leading Cambridge authority) commended the Tribunal and recommended that its jurisdiction be retained.[68] This nonetheless did not inhibit Zimbabwe or any head of State from signing the 2014 Protocol at Zimbabwe's instance. Instead of justifying any interference with the Tribunal, the consultant confirmed that the SADC Tribunal had correctly applied the law. The consultant also recommended that the Tribunal be *strengthened*. Yet, instead of following the recommendation, the SADC Summit

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[64] Record vol 6 p 557 para 27.
[65] Record vol 8 p 751 para 58.
[66] Article 26 of the 2000 Protocol on the SADC Tribunal authorises a review of SADC Tribunal decisions by the SADC Tribunal itself. Neither Zimbabwe nor the SADC Summit (nor any other entity or individual, for that matter) sought to invoke this provision.
[67] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 98: the "rule of law is dead against" this type of executive "self-help", this Court held. This was in the context of the President previously attempting to conduct a parallel review of findings by the Public Protector against the President in respect of public expenditure of hundreds of millions of Rand on his personal property. A pre-constitutional example of the executive government creating a review body to determine the validity of adverse court judgments is provided by the *Harris v Minister of the Interior* 1952 (2) SA 428 (A) and *Minister of the Interior v Harris* 1952 (4) SA 769 (A).
[68] Record vol 5 p 411 para 8.

summarily suspended and thereafter materially terminated the Tribunal's jurisdiction.

24. This without any amendment to the SADC Treaty itself. And despite the SADC Tribunal having previously held, and the consultant's report confirming, that it is Article 4(c) of the SADC Treaty itself which is the source of the Tribunal's jurisdiction. This provision, furthermore, imposes a "binding obligation" not only on SADC, but also on its member States.[69]

25. The consultant confirmed that "there is no reason to doubt the correctness of the rulings in *Campbell* and *Gondo* that Article 4(c) of the SADC Treaty constitutes an obligation binding on the SADC Member States."[70] The report recommended that the SADC Tribunal's jurisdiction to hear disputes between individuals and member States be retained.[71] This is because, contrary to those comparable systems which do not provide for individual access, the SADC system provides no mechanism for individuals to request enforcement action of their complaints.[72] Without an enforcement mechanism, the report records, "the absence of an individual right of access to the SADC Tribunal would leave individuals with no recourse against their member States beyond national courts."[73] This could not be permitted, because

[69] Record vol 3 p 282.
[70] Record vol 3 p 284.
[71] Record vol 3 p 301. See also Record vol 3 p 307 concerning the 2000 Protocol, in respect of which the expert report records "no need for any reform" of the relevant provisions – *viz* Articles 17 and 18, which govern "cases between persons and the Community (with any of these bringing the complaint)".
[72] Record vol 3 pp 300-301.
[73] Record vol 3 p 301.

"should national remedies be insufficient, individuals would be left without effective protection", the report observed.[74]

26. Thus, as a matter of law, both the right of access to court and the right to an effective remedy (each integral to the rule of law, as mentioned) are infringed if no individual access exists. The SADC Tribunal found conclusively that Zimbabwe is, as a matter of fact, a national jurisdiction within SADC where national remedies are indeed insufficient.[75] Yet the SADC Summit effectively terminated the SADC Tribunal's individual jurisdiction without providing an alternative mechanism.

27. In doing so, the SADC Summit acted contrary to the advice by the SADC Ministers of Justice and Attorneys-General.[76] The latter adopted the consultant's report and supported its recommendations.[77] That report also addresses a further aspect of SADC law bearing on this matter: consensus decision-making. This principle was invoked by the Tembani applicants in their intervention application before the High Court. Surprisingly it is this self-same principle which the respondents then sought to hide behind. This attempt is self-destructive. As the expert report records, what the principle of consensus decision-making actually means is that "any SADC Member State is able to veto a Summit decision unless the Treaty provides

[74] Record vol 3 p 301.
[75] As we shall show, a previous Chief Justice of Zimbabwe has confirmed the same. It is, in any event, established on the papers.
[76] Record vol 5 p 412 para 10. See, too, Record vol 7 p 682, referring to the unanimous approval of the expert report by the senior legal officers, whose meeting preceded that of the Ministers of Justice/Attorneys General.
[77] Record vol 7 pp 669-674.

otherwise."[78] Thus Mr Zuma was not a victim of a consensus decision. The roles were reversed. He *created* consensus by not exercising his veto powers.

28. Apart from the SADC Ministers of Justice and Attorneys-General (who are the highest officials in SADC responsible for the administration of justice), also the SADC Lawyers and Judges supported the Tribunal's exercise of its human rights jurisdiction in respect of disputes between individuals and member States. They in fact recommended steps to "increase access to justice by SADC citizens and/or residents"[79] and the strengthening of the-then "existing normative and institutional framework for human rights in the SADC legal structure".[80]

29. Also the SADC Tribunal's own judges eventually had occasion to comment on the Summit's actions against the Tribunal, describing them as "illegal and arbitrary", and "taken in bad faith".[81] This was after the SADC Tribunal was approached by some of the Tembani applicants to review and set aside the purported suspension of the Tribunal's jurisdiction.[82] But by the time the application could be lodged, the Tribunal was already disabled by the SADC Summit.[83] It therefore could not sit to

[78] Record vol 4 p 319.
[79] Record vol 7 p 675 para 1, first bullet point.
[80] Record vol 7 p 675 para 2, first bullet point.
[81] Record vol 7 p 681; Record vol 7 p 684; Record vol 7 p 696. Record vol 7 p 687 records that "a stratagem has always been devised to defer" considering Zimbabwe's contemptuous disregard of the Tribunal's orders, and notes the reference by the Minister of Foreign Affairs of Zimbabwe at the close of a Summit meeting to the "complete dissolution of the Tribunal in its present form".
[82] This application comprises Record vol 6 pp 534-574. We have already referred to some of the facts summarised in the founding affidavit filed in that matter.
[83] Record vol 4 p 396 para 11; Record vol 5 p 410 para 5.

rule on the legality of the executive arm of SADC's marginalisation of SADC's judicial arm. The *coup* was accomplished.

30. Having been unable to gain access to the Tribunal to rule on the interference with its jurisdiction, the Tembani applicants thereupon lodged a case before the African Commission.[84] This, too, resulted in a judgment which defeats the President's previous defence based on collective conduct.[85] South Africa did not oppose the African Commission case.[86] It was based on substantially the same causes of action which the Tembani applicants invoke in this case.[87] The African Commission case was initially instituted not only against South Africa and other individual SADC member states, but primarily against the SADC Summit itself.[88] However, the African Commission ruled that it only has jurisdiction over member States, and not also over international organisations (like SADC) and their organs (like the SADC Summit).[89] As a result the Tembani applicants' communication proceeded only against the SADC member States. At the conclusion of the proceedings, the African Commission held that it only had jurisdiction to decide whether there has been a violation of Articles 7 and 26 of the African Charter.[90] Thus the causes of action based on the rule of law, rationality, arbitrariness and *mala fides* (invoked before the court *a quo* and this Court by the Tembani applicants) were beyond its jurisdiction,

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[84] The founding affidavit supporting the communication is at Record vol 5 pp 405-421.
[85] The judgment is at Record vols 10-11 pp 987-1034.
[86] Record vol 10 p 995 para 32.
[87] Record vol 10 pp 989-990 paras 8-9.
[88] Record vol 10 p 987 para 1.
[89] Record vol 10 p 992 para 15.
[90] Record vol 11 pp 1028-1029 paras 131-132.

the African Commission concluded. The Commission interpreted the aforesaid provisions of the African Charter as entrenching only the right of access to justice before national courts. Because the SADC Tribunal is a sub-regional international court, the Commission considered that these provisions were not violated.

31. What the procedural history culminating African Commission proceedings demonstrates is that the SADC heads of State cannot be held accountable collectively *qua* SADC Summit before any international forum. Therefore individual accountability of each head of State must necessarily exist at the national level. Otherwise there can be no accountability at all, contrary to this Court caselaw.[91]

32. In fact, the African Commission itself confirmed in its judgment on the Tembani communication that

> "the correct position of contemporary international law is that in appropriate cases, Member States of and international organisation could bear direct responsibility for wrongful acts and omissions of that international organisation especially where the rights of third parties are involved."[92]

33. Thus one of the main defences invoked by the respondents before the High Court is clearly incorrect. They contended for exclusive collective accountability on the part of all heads of State. But this the SADC Tribunal held, and the African Commission

[91] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 1.
[92] Record vol 11 p 1029 para 132.

confirmed, is *not* the only basis on which obligations are imposed on member States. The African Commission, in turn, held that collective responsibility of heads of State (*qua* SADC Summit) does not exist in proceedings before it. But by that time the SADC Summit had long since succeeded in its aim: placing its own conduct effectively beyond judicial scrutiny by the SADC Tribunal. Thus the self-same conduct by the SADC Summit forming the cause of action before the SADC Tribunal rendered it impossible for the SADC Tribunal to adjudicate the cause of action. Because no right can be derived from a wrong, especially not in order to defeat the ends of justice, the prematurity point and the collective accountability points are defeated already by the procedural history.

34. They are in any event without merit. So, too, the other bases of opposition, as we shall now turn to show.

C. Causes of action and bases of opposition

35. As mentioned, the Tembani applicants' causes of action are that the President's signature is contrary to the SADC Treaty itself; retrospectively affects vested rights; and is irrational, arbitrary and *mala fide*.[93] The procedural history set out above demonstrates the factual basis for these review grounds. They are established in the previous proceedings' pleadings, which – by consent order – stand as the Tembani applicants' founding papers.

[93] Record vol 4 pp 392-393 para 3.

36. The respondents filed a comprehensive main answering affidavit in response to the LSSA;[94] a full answering affidavit in response to the Tembani applicants' intervention application;[95] a substantive answering affidavit in response to the Tembani applicants' founding papers;[96] and an equally extensive affidavit dealing with the *amici curiae*'s papers.[97] Yet none of these adequately addresses any of the issues invoked by the Tembani applicants.

(1) Violation of the SADC Treaty

37. The very first issue raised in the Tembani applicants' founding affidavit is not addressed at all by the respondents.[98] It involves the violation of the SADC Treaty itself.

38. The SADC Treaty establishes the SADC Tribunal as an integral organ of SADC.[99] The Treaty provides that it is the function of the SADC Tribunal to ensure adherence and the proper interpretation of the Treaty.[100] Decisions by the SADC Tribunal are

[94] Record vol 8 pp 729-774.
[95] Not included in the record.
[96] Record vol 10 pp 949-984.
[97] Record vol 12 pp 1157-1191.
[98] It is raised *inter alia* at Record vol 4 pp 392-394 paras 3 and 5; and Record vol 5 pp 414-415 paras 17-21. The latter is not traversed at all; and the former is traversed at Record vol 10 pp 971-974 paras 45 and 47. The respondents do not attempt to dispute that the Tribunal is an essential SADC organ. They only contend that Mr Zuma's "signature does not bring [the 2014 Protocol] into force" (Record vol 10 pp 973-974 para 47.2). This misses the point. As we shall show in the body of the text which follows, the President is precluded by the SADC Treaty from taking any act which undermines the Tribunal and is obliged to take positive action to support the Tribunal.
[99] Article 9(1)(g) of the SADC Treaty.
[100] Article 16(1) of the SADC Treaty.

"final and binding", the Treaty provides.[101] The Treaty also provides that "human rights, democracy and the rule of law" are founding principles, and that SADC and its Member States "shall act in accordance with" them.[102] Member States are precluded from "taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty."[103] Member States are, moreover, obliged to "cooperate with and assist institutions of SADC in the performance of their duties."[104]

39. Therefore any act which detracts from the SADC Tribunal's exercise of its human rights jurisdiction at the instance of individuals is inconsistent with the SADC Treaty itself, and violates the rule of law.[105] The President's signature of the 2014 Protocol is such an act.

40. Any protocol to the SADC Treaty is a subordinate legal instrument. It may not emasculate a SADC organ established by the SADC Treaty itself. Even a purported amendment to the Treaty to achieve the SADC Member States' ambition to shrug off judicial scrutiny would have been legally repugnant.[106] But in this case it is not

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[101] Article 16(5) of the SADC Treaty.
[102] Article 4(c) of the SADC Treaty.
[103] Article 6(1) of the SADC Treaty.
[104] Article 6(6) of the SADC Treaty.
[105] Record vol 5 p 412 para 9.
[106] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461, and the line of cases applying it. In *Kesavananda Bharati* the Supreme Court of India adopted the basic structures doctrine to deal with situations similar to the current one. The Court held that even though the Indian parliament had wide powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution. It accordingly declared the attempt to do so unlawful. Applied to the current context, it is clear that the Tribunal is a fundamental feature of the SADC Treaty, which (as mentioned) serves as the constitution for SADC. Interfering with the Tribunal's jurisdiction is therefore contrary to the SADC Treaty.

the SADC Treaty itself which was purportedly amended.[107] The desired result was illegally contrived through an attempt to repeal and replace the 2000 Protocol on the Tribunal by the 2014 Protocol.[108]

41. The President's signature, so the answering affidavit states, was "intended to demonstrate that South Africa was open to considering the ratification of a Protocol"[109] which terminates the human rights jurisdiction which the Tribunal conclusively held the SADC Treaty vested in it. Thus, at the very least, the signature – on the President's own papers – signals South Africa's participation in an "alarming" conspiracy initiated by "the Mugabe regime in Zimbabwe" to undermine an essential SADC institution's ability to enforce a fundamental SADC objective: compliance with the rule of law and human rights.[110]

42. Thus the first cause of action is clearly established – even on the President's own papers. They do not even attempt to refute the founding papers on this issue.

(2) <u>Retrospective interference with vested rights</u>

43. Similarly the second issue is entirely unaddressed by the President's papers. It is common cause that the Tembani applicants and those whom they represent have

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[107] Record vol 5 p 417 para 26.
[108] Cowell (2013) "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13(1) *Human Rights Law Review* 153 at 162.
[109] Record vol 10 p 963 para 27.5.
[110] Cowell (2013) "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13(1) *Human Rights Law Review* 153 at 164.

vested interests in the SADC Tribunal's awards.[111] The enforcement of these awards is provided for in the Treaty itself,[112] and in the 2000 Protocol.[113] By frustrating and terminating access to the Tribunal, vested rights have been interfered with retrospectively. In all of this the President participated, as his papers essay.[114] Appending his signature to the 2014 Protocol was what the President "elected" to do,[115] thus contributing to the culmination[116] of "the long process".[117]

44. Thus also this review ground is clearly established, and nothing in the President's papers meets it. Nor even anything in the respondents' written or oral argument *a quo* – even had any such belated attempt been permissible.

(3) **Irrationality and arbitrariness**

45. Irrationality (and perhaps with it arbitrariness) is the only review ground which the President's papers purported to meet – apart from, fleetingly, *mala fides*.

46. As a matter of law, the situation is simple: if the President's signature cannot rationally be related to a legitimate government purpose authorised by section 231(1) of the Constitution and the SADC Treaty, then the President acted

[111] Record vol 4 pp 399-400 paras 18-19; traversed at Record vol 10 pp 977-978 para 52, not denying the Tembani applicants' vested interests.
[112] Article 33 of the SADC Treaty.
[113] Article 32(4) and (5) of the 2000 Protocol on the SADC Tribunal.
[114] Record vol 8 pp 752-758 paras 63-78.
[115] Record vol 8 p 758 para 78.
[116] Record vol 3 pp 392-393 para 3.
[117] Record vol 8 p 756 para 73.

irrationally.[118] In this Court's *Zimbabwe* judgment on the SADC Tribunal it held that what the "Constitution promotes" is "democracy, human rights and the rule of law".[119] The SADC Treaty similarly entrenches these principles, and also imposes an obligation on Member States to promote them.[120]

47. The President's signature cannot be connected to the promotion of any of these principles. In none of the answering affidavits filed on behalf of the President has any of these principles been invoked. Nowhere has it been suggested that signing the 2014 Protocol can conceivably be connected to any of these principles.

48. Factually, the irrationality of the signature is therefore self-evident.[121] What is more, instead of supporting the Tribunal, and at the instance of the violator of the Tribunal's orders, the Tribunal's jurisdiction was indeed signed away. This was done contrary to the advice of the Ministers of Justice and Attorneys-General, and contrary to the recommendation by the independent expert appointed to conduct a review on the Tribunal.[122]

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[118] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 51, holding that where a "decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved"; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85, applied in the context of the rationality of withdrawal from an international treaty in *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP) at para 64; and *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at paras 79-80, holding that rationality is an entry-level requirement for any exercise of public power – also the power to engage in foreign relations.

[119] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 39.

[120] Articles 4 and 6 of the SADC Treaty, to which we have already referred.

[121] Record vol 4 p 403 para 26.

[122] These and other common-cause facts establishing irrationality are summarised at Record vol 13 pp 1258-1259 para 72, which reads

49. This is clearly arbitrary and irrational. As academic commentators observed, "*the SADC member States lacked the political will to take action against Zimbabwe. In fact, not only did the Summit refrain from public criticism or sanctions, but it also effectively rewarded Zimbabwe's recalcitrant behaviour by giving in to its demand that the Tribunal be suspended and the SADC Treaty [sic] amended in a manner that will in future only provide for inter-State complaints.*"[123] The "clear illegality"[124] is in fact worse, because it is not the SADC *Treaty* which was purportedly amended, but merely the subordinate *Protocol* on the SADC Tribunal.

50. It is therefore indeed (at the very least) irrational even merely to append a signature to a protocol which impedes the SADC Tribunal's jurisdiction. Particularly in

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"It is thus common cause *inter alia* that SADC's decision culminating in the signing of the Protocol is

(a) contrary to the advice of an independent expert engaged by SADC;
(b) inconsistent with the recommendation by the Council of Ministers of Justice;
(c) contrary to statements by the SADC legal community;
(d) strongly criticised by the then-judges of the SADC Tribunal;
(e) inconsistent with the SADC Treaty itself;
(f) contrary to each SADC member state's duty to co-operate with, assist and strengthen SADC institutions like the Tribunal;
(g) a manifestation of member states like South Africa having sided with the violator (Zimbabwe) instead of enabling the Tribunal to give effect to its judgments violated by Zimbabwe; thus granting effective immunity from the Tribunal's orders, and allowing Zimbabwe to continue with impunity to implement measures held by the Tribunal to be in violation of international law;
(h) intended to sanction the Tribunal for its rulings against Zimbabwe, instead of sanctioning Zimbabwe for its contempt of the Tribunal's orders;
(i) the sequelae of Zimbabwe's President's and other Cabinet members' public attacks on the Tribunal; and
(j) obstructive to achieving the objectives of SADC."

[123] De Wet (2013) "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 28(1) *ICSID Review* 45 at 58.
[124] *Ibid.*

circumstances where no alternative has been provided to people with vested rights before the Tribunal, and without consulting them. Nor can there be any rational justification for ousting access to the Tribunal by the bearers of human rights. How is this fundamental element of the Treaty to be enforced? Exclusively in domestic courts? Firstly, that would be entirely contrary to the SADC Treaty – and indeed the dual obligation of South Africa under international *as well as* domestic law. Secondly, on the facts it has proved impossible. Zimbabwe, the procurer of the Tribunal's demise, has already ousted its domestic courts' jurisdiction to entertain certain human rights violations.[125] The 2014 Protocol completes the ouster of human rights jurisdiction. This is a matter which was either entirely absent from the President's mind, or which he condoned. His answering papers do not explain which

[125]Record vol 13 pp 1253-1254 para 59. For a summary of the situation by a former Chief Justice of Zimbabwe, see Gubbay "The Progressive Erosion of the Rule of Law in Independent Zimbabwe" *Third International Rule of Law Lecture: Bar of England and Wales* (delivered on 9 December 2009) at 25:

> "The persistent onslaught suffered by the rule of law and democracy in Zimbabwe cannot be underestimated. Legality and constitutionality have been cast aside. Forces of violence, intimidation and disorder have been unleashed, and allowed to prevail, particularly, but certainly not exclusively, in the implementation of the fast-track land reform programme. A programme that has all to do with power politics; and nothing to do with the professed continuation of the liberation struggle to bring about economic emancipation for the landless majority. The timing of its introduction, after a delay of two decades since independence, proves the point. The law enforcement agencies have either actively collaborated in these lawless activities, or simply declined to afford protection, sanctuary and good order, in the fulfilment of their fundamental duties.
>
> There is urgent need to witness real progress on the part of the inclusive government on critical issues like restoring the rule of law, adhering to international treaty obligations, respecting human rights and guaranteeing freedom of speech, and freedom of assembly and association. Law enforcement agencies will have to be overhauled so that they may become professional, politically neutral forces that acknowledge the human rights of all Zimbabweans, and enforce the law on a fair and impartial basis. Sham politically motivated prosecutions must cease. So must the unlawful detentions, arrests, torture, intimidation and harassment, of human rights defenders and independent journalists. New private media should be licensed and international journalists allowed to practice openly."

of the scenarios apply. They fail to address it altogether. Such "rationale" as the President's answering papers now contrive does no more than evade.

(a) *Respondents' answering affidavit against the LSSA*

51. The respondents' main answering affidavit provided no rationale for the President's signature. All it did was to provide the "context" in which "the President *elected* to sign the Protocol".[126] What this "context" shows is that the SADC executive reached "consensus" on the termination of the Tribunal's jurisdiction to hold the executive to account for human rights violations at the instance of individuals. This is not a legitimate rationale. Yet consensus decision-making is the refrain echoed throughout the respondents' papers.[127]

52. There is only one instance where the initial answering affidavit provides any disclosure of the "reason" for South Africa "not object[ing] to the consensus position".[128] It is advanced in respect of the antecedent 20 May 2011 decision, which "was also made by consensus".[129] The reason is, the answering affidavit records, "the same" as "set out above in relation to the August 2010 meeting".[130] The

[126] Record vol 8 p 758 para 78.
[127] Record vol 8 p 731 para 4.1; Record vol 8 p 733 para 8; Record vol 8 p 751 para 59; Record vol 8 p 752-753 para 63; Record vol 8 p 753 para 64; Record vol 8 p 754 para 68; Record vol 8 p 757 para 75; Record vol 8 p 758 para 77; Record vol 8 p 762 para 88.2; Record vol 8 p 762-763 para 90.2.1; Record vol 8 p 768 para 102.2.
[128] Record vol 8 p 754 para 68.
[129] Record vol 8 p 754 para 68.
[130] Record vol 8 p 754 para 68. This paragraph goes on to aver, but without providing any factual basis for the bald assertion, that the "consensus decision of the Summit took into account the interests of the majority of Member States on this issue." It is meaningless to assert that "interests … on this issue" was taken into

August 2010 meeting, in turn, is described as reaching a "compromise" interim position, whereby a "partial moratorium for a limited duration" was imposed.[131] The suggested rationale for this executive imposition was "the challenges being faced in relation to the SADC Tribunal and its powers and the concerns raised by certain Member States, including in relation to the jurisdiction of the Tribunal."[132]

53. More accurately, what was raised was a single concern and it was raised by a single state. The concern was "jurisdiction" and the State was Zimbabwe. Zimbabwe's own High Court was constrained to find that the jurisdictional "concern" was an *ex post facto* executive construct devoid of any merit. It was a ruse. Thus the only rationale advanced in the main answering affidavit is vitiated.[133]

54. The lack of any objectively justifiable rationale for Mr Zuma's signature is, however, yet further revealed by the main founding affidavit. It contends that "the signature of the President does not limit the mandate of the SADC Tribunal".[134] "Rather",[135] so the answering affidavit emphatically states, "[t]he Summit decided by consensus that a new Protocol should be drafted and adopted to replace the current 2000

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account. What is meaningful, however, is the implied concession that human rights, accountability and the rule of law were *not* taken into account. Nowhere does any of the respondents' answering affidavits assert that these considerations were taken into account – whether by Summit or by the President or those acting on his behalf.

[131] Record vol 8 p 753 para 64.

[132] Record vol 8 p 753 para 64.

[133] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) at para 34; *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd* 2016 (3) SA 1 (SCA) at para 40; *Patel v Witbank Town Council* 1931 TPD 284 at 290: a single bad reason vitiates.

[134] Record vol 8 pp 762-763 para 90.2.

[135] Record vol 8 pp 762-763 para 90.2.

Protocol that would limit the jurisdiction of the Tribunal to only entertain state complaints".[136] This is irrational for being circular. Consensus exists *because* the-then President agreed. He therefore could not rationally agree because agreement exists. His acquiescence actually *precedes* the consensus which is invoked as the basis for his acquiescence. Conversely, had the-then President exercised his veto power, there would *not* have been consensus. Thus Mr Zuma's support was a *conditio sine qua non* for consensus. Yet the respondents raise consensus as rationale.

55. The main answering affidavit also concedes the absence of any public participation process.[137] Thus, despite the answering affidavit itself referring to the SADC litigation identified above, and some of the cases by name,[138] none of the named litigants has been permitted to make representations to the President on his proposed signature. Mr Fick, for instance, is a South African citizen. It is his case which the answering affidavit itself expressly cites as trigger for the Summit's decisions.[139] And, so the respondents say, it is because of the Summit's "consensus" that Mr Zuma signed.

[136] Record vol 8 pp 762-763 para 90.2.1.
[137] Record vol 8 p 772 para 112.3.
[138] Record vol 8 p 735 para 14.9.5.
[139] Record vol 8 p 735 para 14.9.5.

56. Circularity (and therefore *substantive* irrationality) apart, this also establishes *procedural* irrationality – on the respondents' own papers.[140] Procedural irrationality is an aspect identified by other parties as their main focus. It also forms part of the rationality review ground, invoked by the Tembani applicants.

57. The Tembani applicants' papers demonstrate that even if it is correct that the President was not required to obtain the "consent" of "all the citizens in the country" (as the main answering affidavit unjustifiably and inaccurately attempts to parody the LSSA's case),[141] then a confined group of individuals with vested rights existed. These individuals and their circumstances were either known or readily ascertainable. Yet not even they were approached by the President or anyone on his behalf at any stage during "the long process".[142] Instead, the President relied on "[t]he consensus decision of the Summit", which in turn "took into account the interests of the majority of Member States on this issue".[143] The interests of right-

[140] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at para 34 ("It follows that both the process by which the decision is made and the decision itself must be rational") and para 36 ("The means for achieving the purpose for which the power was conferred must include everything that is done to achieve that purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred"); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at paras 50-51; *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) at para 69 (not only the merits of executive action, but also the process by which it was taken may be "impeached for want of rationality"); *eTV (Pty) Ltd v Minister of Communications* 2016 (6) SA 356 (SCA) at paras 38-42, citing comparative authority on the importance of consultation (*R (on the application of Moseley) v Haringey London Borough Council* [2014] UKSC 56); *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP) at paras 64-71; Murcott (2013) "Procedural fairness as a component of legality: is a reconciliation between Albutt and Masetlha possible?" 130(2) *South African Law Journal* 260-274.

[141] Record vol 8 p 749 para 51.

[142] Record vol 8 p 756 para 73.

[143] Record vol 8 p 754 para 68.

bearers under the Treaty and the Tribunal's orders who were the victims of human rights abuses were *not* taken into account – nor the rule of law, the South African Constitution, or this Court's judgment in *Fick v Zimbabwe*.[144]

(b) *Answering affidavit filed against the Tembani applicants*

58. The answering affidavit filed in response to the Tembani applicants' application, who specifically challenge the President's signature on the basis of a lack of rationality, provides no better rationale.

59. It again resorts (as did the answering affidavit in response to the LSSA) to attempts at "contextualis[ing] the President's decision to sign the Protocol within the context" of policy "more broadly".[145] Nowhere is it stated, however, that this "context" was as much as considered by Mr Zuma. His confirmatory affidavit does not say so. What the President is said to have taken "into account" is only the fact that the SADC Summit has since 2012 approved the negotiation of a Protocol that would change the nature of the SADC Tribunal to only receive state complaints."[146]

60. Only two considerations are identified as grounds on which "the President's decision to sign the Protocol was based".[147] The first is "[t]he recognition that the

[144] Record vol 13 p 1240 para 22.
[145] Record vol 10 pp 960-961 para 26.
[146] Record vol 10 p 962 para 27.3.
[147] Record vol 10 p 962 para 27.4.

negotiations for the Protocol had been concluded".[148] Therefore, "out of comity and mutual respect for SADC and the member states of SADC",[149] the President signed. As mentioned, human rights, constitutional constraints, the rule of law and the SADC Treaty itself were not considered.[150] Nor this Court's judgment on them.

61. The second consideration on which the President's decision to sign the Protocol was "based" is another "fact" repeated from the main answering affidavit. It is that the Protocol was subject to ratification.[151] Therefore, so the respondents argue, "the President's signature would not bind South Africa".[152] It was, the answering affidavit argued, "not intended to bind South Africa".[153] There are two problems with this construct.

62. The first is the respondents' tacit concession that Mr Zuma indeed participated in a conspiracy with his Zimbabwean counterpart to terminate the Tribunal's jurisdiction. The High Court so held,[154] and the respondents do not challenge this finding. Thus a bad motive taints the signature. It is not purged by the argument that Mr Zuma did not intend to bind South Africa. Even if his signature did not bind South Africa or was not intended to bind South Africa, the signature resulted – on the respondents' own showing – in the adoption of a treaty text. If this text is –

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[148] Record vol 10 pp 962-963 para 27.4.1.
[149] *Ibid.*
[150] Record vol 13 p 1240 para 22.
[151] Record vol 10 p 963 para 27.4.2.
[152] *Ibid.*
[153] *Ibid.*
[154] Record vol 1 p 83 para 64.

again, on the respondents' own version – ratified by ten other states, then South Africa will be bound by it. Thus the respondents' reliance on what Mr Zuma is said to have intended is self-destructive. It demonstrates the danger of the approach for which the respondents contend. Their approach is that a president may sign treaties, and courts may not hold them to the constitution, because signature cannot have any consequences. This is mistaken, as the current Protocol confirms.

63. Secondly, the respondents' approach also inconsistent with their own papers. The respondents' papers plead that the signature constitutes a formal act conveying to the world that South Africa was willing to participate actively in Mr Mugabe's campaign to terminate the Tribunal's human rights jurisdiction. Thus the signature had the very converse effect identified by this Court in its *Zimbabwe* judgment. Whereas the establishment of the Tribunal was intended to convey to the word Southern Africa's "regard for human rights, the rule of law and good governance",[155] South Africa's signing of a Protocol intended to terminate the Tribunal's jurisdiction to uphold the rule of law and human rights sent the opposite message.

64. Furthermore, for the respondents' no-consequence argument to succeed, they must establish that the Protocol is indeed a treaty as intended in section 231(1), and not section 231(3) of the Constitution.[156] If the Protocol is a section 231(3) treaty, then

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[155] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 1.

[156] Section 231(3) reads

"An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds

it indeed binds South Africa on its mere signature. In that event the rationale now advanced for the signature is another own goal. It created an effect which the respondents' deponent averred in the answering affidavit the then-President did not intend. If the Protocol is a section 213(3) treaty, then the signature is irrational and arbitrary also for creating the opposite effect than the one intended.[157]

65. There is in any event no connection between the intention (allegedly expressing comity and respect for SADC and its member states) and the empowering provision (section 231(1) of the Constitution, which authorises the President to sign international instruments). It is section 84(2)(h) and (i) of the Constitution which confer on the President the responsibility for diplomatic recognition, comity, respect or graces. These provisions authorise the President to receive and recognise foreign diplomatic and consular representatives, and appointing ambassadors, plenipotentiaries and diplomatic and consular representatives. Furthering diplomatic relations is *not* a constitutionally-authorised purpose to be fulfilled through signing treaties under section 231(1) of the Constitution.

66. It follows that the conclusion which the respondents' deponent sought to draw from the two above grounds (namely that "therefore" the "President's signature was intended to demonstrate that South Africa was open to considering the ratification

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the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time" (emphasis added). It clearly covers even treaties which may in their own terms require ratification, but which are of a technical, administrative or executive nature.

[157] *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) at paras 49-50.

of a Protocol that represented the outcome of the collective, multilateral, negotiations of the SADC members state [sic]") does not follow.[158] But even were it otherwise, the conclusory rationale begs the question. The question is *why was South Africa open to considering the ratification of the Protocol?* If the answer is because signature is insignificant, then no rationale exists for executing it. If it is purposeless, no purpose is served by the act of signing the Protocol. If the answer is that signature confers "respect" on the process (of terminating the SADC Tribunal's individual jurisdiction) and those initiating it (Zimbabwe, whose own High Court held that the rationale for the process was contrived), then it is unauthorised by section 231(1) of the Constitution and contrary to the rule of law – for being irrational, unauthorised, and repugnant to an essential element of the rule of law: access to justice.[159]

67. It further follows that the equally conclusory denial of *mala fides* on the aforegoing bases is also unavailing.[160] Mr Zuma's signature did *not* "ensure respect for an institution", as the respondents argue.[161] It "severely undermined" a crucial SADC institution, the Tribunal.[162] In doing so it detracted from SADC's own stature and institutional accountability, and violated the SADC Treaty itself. Nor is it suggested

[158] Record vol 10 p 963 para 27.5.
[159] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 21. At para 60 the Chief Justice held that "[t]he rule of law is a foundational value of our Constitution and an integral part of the Amended Treaty. And it is settled law that the rule of law embraces the fundamental right of access to courts in s 34 of the Constitution" (footnotes omitted).
[160] Record vol 10 p 964 para 27.8.
[161] *Ibid.*
[162] De Wet (2013) "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 28(1) *ICSID Review* 45 at 58.

that any of the six states which did not sign the Protocol undermined "the ongoing political and economic integration" of SADC or conveyed their disrespect for SADC or a SADC Member State by not signing the 2014 Protocol.[163] Therefore the contention that Mr Zuma's signature "furthered" these considerations is unsubstantiated and unfounded.[164] It is of a piece with the Presidency's previous unsuccessful attempt to invoke diplomatic, political and policy jargon in an attempt to assist the Mugabe regime.[165] And it is inconsistent with this Court's recognition in its *Zimbabwe* judgment of the objectives of SADC.

68. The answering affidavit's reference to this Court's *Zimbabwe* judgment[166] is yet another spectacular own goal and *volte face*.[167] This Court's judgment had been invoked by the Tembani applicants already in their founding affidavit precisely because the judgment defeats the respondents' attempt to defend the President's participation in terminating the Tribunal's individual access. The judgment in fact demonstrates the rationale for individual access to the SADC Tribunal. The Chief Justice identified the objectives of SADC.[168] It is in order to "ensure that no SADC

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[163] Record vol 13 p 1249 para 49.
[164] Such considerations as are legitimate "has to be achieved *through* the guarantee of human rights, democracy and the rule of law" (De Wet (2013) "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 28(1) *ICSID Review* 45 at 46, emphasis added).
[165] *President of the RSA v M & G Media Ltd* 2015 (1) SA 92 (SCA) at paras 29-30.
[166] Record vol 10 p 962 para 27.3.
[167] As the Tembani applicants pointed out in their replying affidavit in the intervention application, the respondents pleaded that "the Constitutional Court's judgment in *Fick* … [is] irrelevant to the constitutionality of the President's actions" (Record vol 11 p 1105 para 85, quoting para 60.1 of the answering affidavit in the intervention application). See, too, Record vol 13 p 1246 para 40.
[168] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 1.

Member State is able to undermine the regional development agenda by betraying [the] noble objectives [of SADC] with impunity" that individual access to the Tribunal exists.[169] Indeed, the Tribunal "was created to entertain, among other issues, human-rights related complaints *particularly by citizens against their states*", this Court confirmed.[170] Thus the Tribunal's human rights jurisdiction at the instance of individuals is an integral part of its *raison d'être*.

69. The Tribunal, in turn, forms an integral part of the SADC objectives and their realisation. It is an essential SADC organ. It is also the only overseer of certain founding principles of the SADC Treaty: the rule of law and human rights. The bearers of human rights are human beings. Hence individual access (i.e. access by individual human beings) to the Tribunal is inherent in and imperative to the SADC regime.

70. Finally, the spurious suggestion that the Tembani applicants have "failed to set out the necessary allegations in order to demonstrate a case that the President's signature of the Protocol was irrational or in bad faith"[171] is not supported by the papers.[172] The papers show that the termination of the Tribunal's jurisdiction in respect of

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[169] *Id* at para 2.
[170] *Ibid*, emphasis added.
[171] Record vol 10 p 964 para 28.
[172] The formulation is itself curious. Do the appellants mean that it was not clearly *pleaded*? (It was, explicitly). That it was pleaded but not *established*? (It was: applying the test for drawing inferences in civil cases, it was plainly the more plausible or natural inference, and consistent with the proven facts: *Smit v Arthur* 1976 (3) SA 378 (A) at 386, approving and applying the rule in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734.

individual is the culmination of Zimbabwe's retaliation against the Tribunal.[173] It was accomplished during Zimbabwe's chairmanship of the SADC Summit.[174] All of this is common cause.[175] It is indeed irrational, arbitrary and *mala fide* to respond to the Tribunal's referral of Zimbabwe's repeated contemptuous disregards for the Tribunal's orders by taking no steps against Zimbabwe, but instead acceding to Zimbabwe's initiative to dismantle the Tribunal. Mr Zuma had every opportunity to veto this. Instead he actively signified his respect for the process and the SADC member which showed no respect for SADC principles, human rights or the SADC Tribunal's orders. Thus, the fact that "the Protocol was adopted by SADC, an international organisation of which South Africa is a member"[176] does not demonstrate *bona fides* or rationality. It confirms *mala fides* and irrationality. SADC adopted the Protocol, because Mr Zuma gave his consent. Without it, SADC could not adopt the Protocol. That "the Protocol is in line with the prior determination by the SADC Summit"[177] only serves, in turn, to confirm premeditation.

71. Moreover, that the signature is now contended to be "simply a formal, preliminary step that did not bind South Africa" misses the point. It is indeed a formal act, it conveys (as it was intended) a *formal* message, and it constitutes the completed

[173] Record vol 11 pp 1087-1089 paras 38-41, Record vol 11 p 1096 para 60; Record vol 11 p 1103 para 80; Record vol 11 p 1106 para 88.
[174] Record vol 4 pp 387-388 para 3; Record vol 11 p 1106 para 88.
[175] Record vol 11 p 1096 para 60; Record vol 11 p 1107 paras 91-92; Record vol 11 p 1110 para 99.
[176] Record vol 10 p 965 para 28.1.
[177] Record vol 10 p 965 para 28.2.

exercise of public power conferred by the Constitution. Therefore it is reviewable *inter alia* on the basis of irrationality, arbitrariness and *mala fides*.

(4) *Mala fides*

72. The Tembani applicants' founding papers establish the absence of any rational basis for the "consensus" decision-making culminating in the impugned signature. Absent any legitimate rationale, the repudiation of the expert report and the Ministers of Justice and Attorneys-General's advice strongly suggest *mala fides*, as the founding papers expressly plead.[178] This was not even properly traversed, let alone adequately addressed – notwithstanding the purported reservation of a "right to deal more fully with any allegations of bad faith" in the respondents' answering affidavit filed in the intervention application.[179]

73. In the subsequent attempt at an answering affidavit, the new deponent had to resort to the "context"[180] and generalities regarding (unidentified and undisclosed)[181] "policies of the Presidency".[182] The Tembani applicants' replying affidavit demonstrates the fallaciousness of this attempt.[183]

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[178] Record vol 5 p 417 paras 25-26.
[179] As mentioned, the answering affidavit filed in the intervention application does not form part of the record. This is by the respondents' election: Record vol 10 p 953 para 9.
[180] Record vol 8 p 758 para 78.
[181] Record vol 13 p 1239 para 19.
[182] Record vol 11 p 1048 para 6.
[183] Record vol 13 pp 1236-1237 paras 11-13; Record vol 13 p 1240 para 21; Record vol 13 pp 1240-1241 para 23; Record vol 13 pp 1245-1252 paras 38-55; Record vol 13 pp 1256-1259 paras 68-73.

74. The "axing" of the Tribunal has correctly been described as "duplicitous" action on the part of "SADC leaders",[184] and "collusion amongst the SADC Heads of Government to ignore the rule of law."[185] It has been decried by *inter alios* Emeritus Archbishop Desmond Tutu,[186] and accurately labelled "malevolent".[187]

75. *Mala fides* have thus been sufficiently established, insufficiently refuted, and constitutes a separate and self-standing review ground of Mr Zuma's "election" to sign the 2014 Protocol.[188]

(5) <u>The Prematurity Point</u>

76. The prematurity point was first taken in the respondents' main answering affidavit filed in response to the LSSA's founding affidavit,[189] and repeated (by incorporation by reference) in the answering affidavit addressed to the Tembani applicants.[190]

77. The respondents' main answering affidavit raises four[191] factors that they say "should inform this Court's decision *whether* to entertain the [LSSA's] premature

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[184] Fritz "SADC Leaders Duplicitous in Axing Tribunal" *Mail & Guardian* (7 September 2012).
[185] Cowell (2013) "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13(1) *Human Rights Law Review* 153 at 154.
[186] *Ibid*; Christie "Killed off by 'kings and potentates'" *Mail & Guardian* (19 August 2011).
[187] Wasiński (2013) "The Campbell Case: A New Chapter of the Saga" 2013(4) *Slovak Yearbook of International Law* 1.
[188] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at paras 80.
[189] Record vol 8 pp 741-747 paras 30-45.
[190] Record vol 10 p 956 para 19.
[191] They are, in fact, three. The third and fourth points are one and the same. The third contends that exceptional circumstances operate as criterion (Record vol 8 pp 746-747 para 44.3), and the fourth contends that this criterion has not been satisfied by the LSSA (Record vol 8 p 747 para 44.4).

challenge."[192] Thus the respondents correctly conceded that the court *a quo* had a discretion. Yet, nowhere in the respondents' notice of appeal is it contended that the court *a quo* failed to exercise a discretion, or exercised its discretion in a manner which warrants interference on appeal.[193]

78. This Court has repeatedly confirmed the exercise of a discretion is not lightly to be interfered with on appeal.[194] It held that "even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations."[195] Applicable policy considerations include, this Court confirmed, "judicial comity", which "fosters certainty in the application of the law and favours finality in judicial decision-making."[196] In circumstances where none of the factors initially identified by the respondents themselves has been shown to have been misapplied by the court *a quo*, no basis for interfering with the discretion to entertain the application despite its contended prematurity exists. It is the respondents' reliance on ripeness which departs from the correct legal principles,[197] and the factors they invoke operate against upholding their prematurity point.

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[192] Record vol 8 p 746 para 44, emphasis added.
[193] Paras 4 and 4.3 (Record vol 1 pp 145-146) simply state that the High Court "erred".
[194] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) at para 47; *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at para 92; *Mphela v Haakdoornbult Boerdery CC* 2008 (4) SA 488 (CC) at para 26; and *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC).
[195] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) at para 87.
[196] *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) at para 113.
[197] In *Ferreira v Levin NO* 1996 (1) SA 984 (CC) at para 199 this Court explained the correct function and purpose of the doctrine of ripeness. It held that the doctrine *"serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already*

79. The first factor invoked by the respondents in their answering affidavits is that section 231 of the Constitution requires executive action first and legislative action later. This contention is flawed for at least two reasons. It firstly fails to give effect to this Court's finding that section 231(1) confers an exclusive power on the national executive.[198] It is the legality of the concluded executive action under section 231(1) which is in issue, not legislative conduct by a different arm of government under a different constitutional provision.[199] In any event, parliamentary approval may not even be required in terms of section 231(2) of the Constitution.[200] Furthermore, the

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ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ... The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered." This case is not concerned with prospective, hypothetical or abstract events. It is concerned with the President's signing of the 2014 Protocol. This has happened, and the President himself now contends that the outcome of this case is awaited to inform his decision whether or not to seek parliamentary approval. Therefore the doctrine of prematurity or ripeness simply finds no application.

[198] As Ngcobo CJ held in *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 89, the separate, executive conduct of signing an international agreement under section 231(1) of the Constitution creates its own, "different legal consequences."

[199] See *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) 212 (GP). In that matter a similar situation and argument arose. The respondents pleaded prematurity on the basis of an imminent parliamentary process. A Full Bench of the High Court (Mojapelo DJP, Makgoka and Mothle JJ) rejected the argument. It held that a court was not concerned with what Parliament "might or might not do in future" (*id* at para 15). Instead, a court concerns itself with the question whether another arm of Government, the Executive, had "already acted unconstitutionally" (*ibid*). On this basis alone the court was not only entitled, but constitutionally enjoined to enquire into the conduct of the Executive (*ibid*). Seeking to "oust" the Court's jurisdiction by invoking prematurity was "not permissible", the Full Bench held (*id* at para 16). The same applies *a fortiori* in this case, because there is no imminent parliamentary process; instead, the outcome of this case is awaited by Government itself before the initiation of any parliamentary process by the respondents will even be considered.

[200] As mentioned, the Protocol is of a technical, administrative or executive nature. It therefore does not require parliamentary approval. See, again, section 231(3) of the Constitution (whose text has been quoted above). That the Protocol itself refers to ratification in accordance with each member states' constitution begs the question. Whether parliamentary approval is required depends on each member state's constitution. As the text of section 231(3) clearly contemplates, even a treaty which in its own terms requires "ratification" may not require parliamentary approval. This applies to treaties of a technical, administrative or executive nature.

exercise of executive public power which is vitiated by serious constitutional breaches requires courts' correction, and cannot be permitted to hobble on indefinitely depending on the executive's election whether or not to subject their conduct to parliamentary scrutiny in the form of approval (or "ratification") proceedings.[201] Particularly not where the executive conduct is intended to constitute a formal notification to the world that South Africa is prepared to jettison its commitment to human rights. If it is unconstitutional and requires to be declared thus, then it does not lie in the mouth of the executive to contend for prematurity. Least of all on the basis of the separation of powers. Secondly (as the aforegoing demonstrates), the first factor is flawed for conflating the respondents' prematurity point with their major defence on the merits. It is that ratification is still required, and therefore Mr Zuma could sign with impunity. Hence the respondents are driven in their notice of appeal to an attack on the merits first, and only secondarily invoke the prematurity point (which would have been a preliminary issue had it truly enjoyed any independent existence).[202] The same stance was adopted already in the respondents' answering affidavits *a quo*.[203]

80. The second factor is "the real risk of prejudging and pre-empting the constitutional competence entrusted to Parliament to consider whether to approve this international

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[201] Where constitutional rights are threatened, it is not necessary to await the implementation of the measure before approaching a court (*Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at para 14).

[202] Para 1.1 of the notice of appeal (Record vol 2 p 141), which raises (a) unlawfulness and irrationality; and (b) prematurity, in that sequence.

[203] None of the respondents' multiple answering affidavits raises prematurity as preliminary issue: Record vol 8 pp 741-747 paras 30-45; Record vol 10 p 956 para 19.

agreement".[204] For the reasons stated above, this is an incorrect legal supposition. Because of the nature of the Protocol, the Constitution "entrusts" the "competence" to the executive. No constitutional responsibility on the part of Parliament exists. The respondents' legal supposition is, in any event, entirely eclipsed by the common cause facts correctly recorded in the court *a quo*'s judgment. It is that "the President, Cabinet and other Government respondents await the outcome of this application to decide whether to seek Parliament's ratification".[205] Therefore, as a matter of simple fact, the entirely tentative resort to "risk" of pre-emption or prejudging has been confirmed to have been misplaced speculation (if not, in fact, calculated obstructiveness). Having initially relied in their pleadings on a "risk" of pre-emption, the respondents' subsequent answering affidavit revealed that Parliament will *not* be considering whether or not to approve the Protocol prior to the courts' determination of the matter.[206]

81. The third factor rests on the suggestion that "exceptional circumstances" had to be established before pre-empting "any consideration by Parliament".[207] This, too, has been overtaken by the actual factual situation belatedly disclosed. It is that the Executive did not actually intend to present the Protocol to Parliament for its

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[204] Record vol 8 p 746 para 44.2.
[205] Para 7.4 of the High Court's judgment, which records the joint statement of facts filed in the High Court by consent between the parties.
[206] Record vol 10 pp 958-959 para 20.8, revealing that "[t]he President, in consultation with the Cabinet and the other Government respondents, is awaiting the outcome of this case before taking a final decision whether or not to table the 2014 Protocol before Parliament".
[207] Record vol 8 pp 746-747 para 44.3.

approval. This is why it had not happened in the many months since signature.[208] Although the respondents' answering affidavits attempt – contrary to the Constitution's text[209] – to retrofit a defence on the basis that parliamentary approval was required, the truth is that "no decision has been taken to do so [i.e. 'to … place [the Protocol] before Parliament for approval']".[210] The respondents have now confirmed that they have no intention of obtaining any parliamentary approval before this Court's determination of the matter.[211]

82. This revelation apart, contrary to the so-called fourth factor invoked against the LSSA,[212] the Tembani applicants have clearly demonstrated that "exceptional circumstances" do indeed exist. The Tembani applicants' papers demonstrate *inter alia mala fides*. This justifies judicial intervention.[213] As the respondents themselves point out, nine of the required ten signatures have already been provided. It is therefore critical that the legality of signing the Protocol be established and Mr Zuma's signature be removed.

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[208] Record vol 11 p 1104 para 84.

[209] See e.g. Record vol 10 p 958 para 20.5, which argues that whereas section 231(3) provides that international agreements of technical, administrative or executive nature, or agreements which do not require either ratification or accession, entered into by the national executive, bind South Africa without approval, "agreements requiring ratification or access, as is the case with the 2014 Protocol, will need to be approved by both Houses of Parliament in order to become binding on South Africa." This is wrong, because section 231(3) of the Constitution expressly provides that international agreements of technical, administrative or executive nature do *not* require parliamentary approval. That they might require ratification or accession is a different issue. Ratification or accession is an executive act. It is not to be confused with approval by Parliament, as the respondents' argument does.

[210] Record vol 10 p 955 para 17.1.

[211] Record vol 10 pp 958-959 para 20.8.

[212] Record vol 8 p 747 para 44.4.

[213] As this Court's cases like *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at para 168 confirm, bad faith is a basis for entertaining a case despite undue delay. The same logic equally applies to the converse situation: prematurity, as this Court cases on standing confirms.

83. Therefore each of the "four" issues which the respondents invoke actually militates in favour of determining the merits, even had the application been "premature". The attempt to invoke "important constitutional and separation of powers issues" based on these "four" contentions are therefore and own goal. It is also legally misconceived. As this Court held, the correct application of this principle is that courts should not interfere with extant processes of other branches of government, unless authorised by the Constitution; hence it is not for this court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it; but "courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved."[214]

84. As the respondents concede, there is no extant parliamentary process. Nor does this application seek to prescribe anything at all to Parliament. Parliament is not even cited and no relief is sought against Parliament. This is therefore a case where the doctrine of separation of powers requires this Court to fulfil the authority entrusted exclusively to the judiciary: determining issues of legality.[215]

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[214] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 93.

[215] The parallels with this Court's judgment *Jordaan v City of Tshwane Metropolitan Municipality* 2017 (11) BCLR 1370 (CC) is apparent. In that matter the government respondents strenuously contended that the constitutional question should not be countenanced by the court, because it was not reached (*id* at para 6). Writing for a unanimous Court, Cameron J held that that "[t]he constitutional dispute was large and pressing" (*id* at para 9). The Court concluded that "[t]he High Court's decision to decide it despite the factual and other considerations the municipalities sought to strew in its path was clearly right" (*id* at para 16).

D. High Court judgment and the respondents' grounds of appeal against it

85. The High Court upheld the Tembani applicants' arguments summarised above.[216] Some of the most material findings include the following

(i) The only issue which apparently triggered the review of the SADC Tribunal's jurisdiction was Zimbabwe's patent non-compliance the Tribunal's judgments.[217] This finding is not attacked by the respondents in their notice of appeal. It conclusively confirms ulterior motive (indeed, *mala fides*).

(ii) It was "critical" that the legality of the signing of the Protocol be established and that the President's signature be removed.[218] This finding, too, is not attacked by the respondents. It confirms the need for the consequential relief sought by the Tembani applicants.

(iii) The case was not concerned with prospective, hypothetical or abstract events; it concerns an event which had already occurred, and government itself awaits the outcome of the courts' conclusion of the constitutionality of the previous President's conduct.[219] Also this finding is not attacked. Thus the prematurity point is out of court. Especially in the absence of any criticism of the High Court's further finding that "overwhelming national and international public interest, and the compelling interests of justice warrant exercising this Court's discretion in favour of hearing the matter, even were there to have been any

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[216] Space limitations prevent a full analysis of the High Court judgment. See, however, the short analysis in the Tembani applicants' founding affidavit filed in this Court (Record vol 2 pp 123-129 paras 34-46).
[217] Para 15 of the High Court's judgment (Record vol 1 p 39).
[218] Para 43 of the High Court's judgment (Record vol 1 p 65).
[219] Para 45 of the High Court's judgment (Record vol 1 p 67).

degree of prematurity";[220] and in the light of the court *a quo*'s accurate recordal that the respondents indeed conceded that the impugned signature was *not* without legal significance.[221]

(iv) The respondents conceded that if the SADC Treaty itself had been breached, then "that would be the end of the matter, and the applicants would have to succeed."[222] The notice of appeal correctly does not contend otherwise.

(v) The impugned signature cannot be related to the objects of the Treaty identified by this Court in its *Zimbabwe* judgment:[223] the establishment of a human rights culture enforceable by the Tribunal.[224] Instead, "the signature signalled South Africa's participation in a conspiracy initiated by the President Mugabe regime in Zimbabwe to undermine an essential SADC institution's ability to enforce a fundamental SADC objective: compliance with the rule of law and human rights."[225] None of this is contested in the respondents' notice of appeal.

(vi) The irrationality of the impugned signature is self-evident, *inter alia* because it occurred "at the instance of the violator of the Tribunal's orders (the Zimbabwe Government)"; contrary to the advice of the Ministers of Justice and Attorneys-General, and the recommendation of the independent expert appointed to conduct a review on the Tribunal; without even affording

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[220] Para 45 of the High Court's judgment (Record vol 1 p 67).
[221] Para 56 of the High Court's judgment (Record vol 1 p 76).
[222] Para 57 of the High Court's judgment (Record vol 1 pp 77-78).
[223] Para 68 of the High Court's judgment (Record vol 1 p 87).
[224] Para 61 of the High Court's judgment (Record vol 1 pp 80-81).
[225] Para 64 of the High Court's judgment (Record vol 1 pp 83-84).

individuals with vested rights before the Tribunal an opportunity to comment; and without any consideration of this Court's all-important judgment on the SADC Tribunal.[226] None of this is disputed by the respondents.

86. The respondents' only actual point in their notice of appeal is that the signature itself did not yet terminate the Tribunal's human rights jurisdiction, and is therefore innocuous. It is not. The signature constitutes a conclusive exercise of section 231(1) constitutional power. The power was exercised as part of a concluded conspiracy. Even if South Africa does not itself ratify the new Protocol, then ten other SADC member states may do so. If they do, then South Africa does indeed become bound to the new Protocol. Then the conspired termination of the Tribunal's human rights jurisdiction will transpire. Hence the importance of removing South Africa's signature from the Protocol. It serves as South Africa's imprimatur of an intention to render the Southern African Development Community precisely such place as this Court held in its *Zimbabwe* judgment it was perceived to be (prior to vesting the Tribunal with human rights jurisdiction).

E. Conclusion and appropriate relief

87. For the reasons set out above, we submit that the High Court correctly applied this Court's caselaw to the facts; that none of the grounds of appeal raised by the respondents is tenable; that a proper case is made out for the confirmation of the

[226] Para 69 of the High Court's judgment (Record vol 1 pp 87-88).

High Court's order of unconstitutionality; and that appropriate consequential relief should be granted, directing the President to withdraw his predecessor's signature.[227]

88. As regards costs, the respondents have now acknowledged (in conceding the High Court's costs order in favour of the applicants) that the ordinary principles governing costs apply. They should apply particularly in the light of the respondents' election to contest this confirmation application.[228] The Tembani applicants ask for costs of two counsel, whose engagement we respectfully submit the importance and complexity of the matter warranted.

pp J.J. GAUNTLETT SC QC
F.B. PELSER
Counsel for the second to seventh applicants

Chambers
Cape Town

18 July 2018

[227] Record vol 2 p 127 paras 42-43; Record vol 2 p 129-131 paras 48-50. The consequential relief sought is set out at Record vol 2 pp 137-138 paras 1-2.
[228] Record vol 2 p 131 para 52.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no 20382/2015

In the application between:

LAW SOCIETY OF SOUTH AFRICA	First applicant
LUKE MUNYANDU TEMBANI	Second applicant
BENJAMIN JOHN FREETH	Third applicant
RICHARD THOMAS ETHEREDGE	Fourth applicant
CHRISTOPHER MELLISH JARRET	Fifth applicant
TENGWE ESTATE (PVT) LTD	Sixth applicant
FRANCE FARM (PVT) LTD	Seventh applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent

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SECOND TO SEVENTH APPLICANTS' LIST OF AUTHORITIES

Caselaw

1. Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC).

2. Abahlali baseMjondolo Movement SA v Premier of the Province of Kwazulu-Natal 2010 (2) BCLR 99 (CC).

3. Campbell v Republic of Zimbabwe SADCT 03/07.

4. Chief Lesapo v North West Agricultural Bank 2000 (1) SA 409 (CC).

5. Democratic Alliance v President of the Republic of South Africa 2013 (1) SA 248 (CC).

6. Democratic Alliance v Minister of International Relations and Cooperation 2017 (3) SA 212 (GP).

7. Department of Transport v Tasima (Pty) Ltd 2017 (2) SA 622 (CC).

8. Economic Freedom Fighters v Speaker, National Assembly 2016 (3) SA 580 (CC).

9. eTV (Pty) Ltd v Minister of Communications 2016 96) SA 356 (SCA).

10. Fick v Zimbabwe SADCT 01/2010.

11. Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC).

12. Ferreira v Levin NO 1996 (1) SA 984 (CC).

13. Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 (CC).

14. Gondo v Republic of Zimbabwe SADCT 05/2008.

15. Gramara (Pty) Ltd v Government of the Republic of Zimbabwe Case No. HH169-2009, HC 33/09.

16. Gubbay "The Progressive Erosion of the Rule of Law in Independent Zimbabwe" Third International Rule of Law Lecture: Bar of England and Wales (delivered on 9 December 2009).

17. Govan v Skidmore 1952 (1) SA 732 (N).

18. Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC).

19. Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC).

20. Harris v Minister of the Interior 1952 (2) SA 428 (A).

21. Jackson v Attorney-General UKHL (2006) 1 A.C. 262.

22. Jordaan v City of Tshwane Metropolitan Municipality 2017 (11) BCLR 1370 (CC).

23. Kesavananda Bharati v State of Kerala AIR 1973 SC 1461.

24. Kruger v President of the Republic of South Africa 2009 (1) SA 417 (CC).

25. Kaunda v President of the Republic of South Africa 2005 (4) SA 2135 (CC).

26. Minister of the Interior v Harris 1952 (4) SA 769 (A).

27. Minister of Home Affairs v Scalabrini Centre 2013 (6) SA 421 (SCA).

28. Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC).

29. Mphela v Haakdoornbult Boerdery CC 2008 (4) SA 488 (CC).

30. Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

31. Patel v Witbank Town Council 1931 TPD 284.

32. President of the RSA v M & G Media Ltd 2015 (1) SA 92 (SCA).

33. Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA).

34. Smit v Arthur 1976 (3) SA 378 (A).

35. Tembani v Republic of Zimbabwe SADCT 07/2008.

36. Thint (Pty) Ltd v National Director of Public Prosecutions 2009 (1) SA 1 (CC).

37. Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd 2015 (5) SA 245 (CC).

38. Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd 2016 (3) SA 1 (SCA).

39. Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC).

Journal and other articles

40. Cowell (2013) "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13(1) Human Rights Law Review 153.

41. Christie "Killed off by 'kings and potentates'" Mail & Guardian (19 August 2011).

42. De Wet (2013) "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 28(1) ICSID Review 45.

43. Fritz "SADC Leaders Duplicitous in Axing Tribunal" Mail & Guardian (7 September 2012).

44. Gathii "The Under-appreciated Jurisprudence of Africa's Regional Trade Judiciaries" 2010(12) Oregon Review of International Law 245 at 282.

45. Ndlovu "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal" 2011(1) SADC Law Journal 63 at 79.

46. Shay "Fast Track to Collapse: How Zimbabwe's Fast-Track Land Reform Program Violates International Human Rights Protections to Property, Due Process, and Compensation" 2012(27) American University International Review 133 at 136).

47. Wasinski (2013) "The Campbell Case: A New Chapter of the Saga" 2013 (4) Slovak Yearbook of International Law 1.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 67/18

In the matter between:

LAW SOCIETY OF SOUTH AFRICA	First Applicant
LUKE MUNYANDU TEMBANI	Second Applicant
BENJAMIN JOHN FREETH	Third Applicant
RICHARD THOMAS ETHEREDGE	Fourth Applicant
CHRISTOPHER MELLISH JARRET	Fifth Applicant
TENGWE ESTATE (PVT) LIMITED	Sixth Applicant
FRANCE FARM (PVT) LIMITED	Seventh Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	Third Respondent
SOUTHERN AFRICA LITIGATION CENTRE	*Amicus curiae*

SOUTHERN AFRICA LITIGATION CENTRE'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. This case raises worrisome issues about the legality and constitutionality of executive conduct and the impact of that conduct on the application of regional and international human rights law.

2. It reminds us that South Africa is not an island and that the President's conduct abroad may have a detrimental effect on South Africans within the Republic. South Africa has international obligations and these obligations prescribe how its citizens realise their fundamental right to access a regional court, and the promotion and protection of the rule of law at a regional and international level.

3. Regrettably, this reminder arrives within the context of a deprivation of fundamental rights previously enjoyed by all South Africans. At the centre of the controversy is the first respondent, the President of the Republic of South Africa. As the first citizen of this country whose position is indispensable for the effective governance of our democracy, he bears the exclusive constitutional obligations to uphold, defend and respect the Constitution as the supreme law.

4. This Court is now called upon to scrutinise the President's conduct.

OVERVIEW

5. SALC is a regional non-governmental organisation that seeks to promote and advance human rights and the rule of law in Southern

Africa. In these proceedings, SALC supports the relief sought by the applicants.

6. The applicants apply for an order in terms of section 167(5) of the Constitution to confirm the High Court's finding that the President's conduct was unlawful, irrational, and unconstitutional.

7. The conduct in question is the President's role in dismantling the Southern African Development Tribunal. The Tribunal was a fully functioning court that provided access to justice in the SADC region by adjudicating disputes between member states and between individuals and member states. In 2011, the SADC Summit effectively suspended the Tribunal's operations ("**the 2011 Suspension**").

8. Since its suspension, the SADC Tribunal ceased all operations. In 2014, the SADC Summit adopted a new Protocol on the Tribunal ("**the 2014 Protocol**"). The President participated in this process and signed the Protocol.

9. Article 33 of the 2014 Protocol would effectively strip the Tribunal's power to adjudicate disputes between individuals and member states. It limits the Tribunal's jurisdiction to decide disputes between member states only.

10. The Tribunal originally operated in terms of the 2000 Protocol, which guaranteed citizens of countries in the SADC region access to the Tribunal to seek legal redress for disputes between themselves and member states.

11. The President's conduct: first, by participating in the 2011 suspension of the Tribunal; and, second, by signing the 2014 Protocol ("**the President's conduct**") that attempts to negate such access is unconstitutional.

12. SALC's submissions focus on the application of regional and international human rights law to the interpretation of the constitutionally guaranteed right of access to courts, as entrenched in section 34 of the Constitution.

13. The structure of these submissions is as follows:

    12.1. First, a brief history of the Tribunal.

    12.2. Second, the procedural irregularities in suspending the Tribunal in 2011 and adopting the 2014 Protocol.

    12.3. Third, the President's conduct unjustifiably infringes the fundamental right of South African citizens to seek legal redress before a regional and international tribunal in the form of the Tribunal.

    12.4. Fourth, the basis for awarding costs to an *amicus curiae* in constitutional litigation.

    12.5. Finally, closing submissions and concluding remarks.

THE SADC TRIBUNAL: A BRIEF HISTORY

13. In *Fick*,[1] the Chief Justice set out the concise history of the Tribunal.

14. On 17 August 1992, the Tribunal was established in terms of the Treaty signed by ten States in Windhoek, Namibia.

15. On 29 August 1994, South Africa joined SADC by acceding to the SADC Treaty.

16. On 13 and 14 September 1995, the South African Senate and National Assembly approved the Treaty. Article 16 of the Treaty established the Tribunal.

17. On 7 August 2000, the composition, powers, functions, and procedures and other related matters were provided for in a Protocol pertaining to the Tribunal ("**the 2000 Protocol**").

18. The 2000 Protocol was brought into effect through an amendment of the Treaty by the Summit, which had the power to amend the Treaty if three-quarters of its members adopted the amendment.

19. The amendment to the Treaty was validly effected by way of an agreement that amended article 16(2) of the Treaty to provide that the 2000 Protocol was an integral part of the Treaty.

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1 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) paras 5-11.

20. The amending agreement accordingly came into force on the date of its adoption by three-quarters of all members of the Summit on 14 August 2001. South Africa is accordingly bound by the amended version of the Treaty that incorporates the 2000 Protocol.

21. The relevance of this is that this Court has found that South Africa is bound by the Treaty, as amended to incorporate the 2000 Protocol.

THE PRESIDENT'S CONDUCT IS UNLAWFUL, IRRATIONAL AND UNCONSTITUTIONAL

22. SALC supports the Applicants and contends that the President's conduct in supporting and participating in the 2011 Suspension and, thereafter, the adoption of the 2014 Protocol:

    22.1. first, violated the Treaty as it was procedurally impermissible and unlawful;

    22.2. second, unjustifiably infringed the fundamental right of South African citizens to access an international court contained in *inter alia* section 34 of the Constitution; and

    22.3. in consequence and on either of these bases, was unlawful, irrational, and unconstitutional.

Procedural Failure

23. As explained in *Fick*, the Tribunal's composition, powers, functions, and procedures were conferred by the Summit by amending the Treaty to incorporate the 2000 Protocol.

24. This Court made clear that the 2000 Protocol "*is in terms of the Amending Agreement, to be treated as a part of the original Treaty*".[2] Accordingly, at the time of the President's conduct, the *status quo ante* was that the Tribunal was a lawfully comprised and functioning body that formed an integral part of SADC, as one of its organs, established in accordance with the provisions of the Treaty.

25. Once the 2000 Protocol became part of the Treaty, its provisions could only be amended in accordance with:

    25.1. article 36 of the Treaty, which allowed for amendment of the Treaty itself; and

    25.2. article 37 of the 2000 Protocol, which allowed for amendment of the 2000 Protocol.

26. Both article 36 and article 37 provide for the same procedure for amendment; namely, a decision of three-quarters of all the members of the Summit.

27. When the Summit effected the 2011 Suspension and adopted the 2014 Protocol, it ignored the procedure prescribed in article 36 and article 37. Rather, it apparently followed the provisions of article 22 of the Treaty, which prescribes the procedure for concluding Protocols in general. In contrast to articles 36 and 37, article 22 requires signature and ratification by only two-thirds of Member States before entry into force of a Protocol.

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2 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 34.

28. The Supreme Court of Appeal in *Fick* confirmed that the 2000 Protocol is not subject to article 22 procedures at all. It is governed by article 16 of the Treaty.[3] This Court did not specifically address this finding when it upheld the Supreme Court of Appeal's decision.

29. It is accordingly submitted that the Summit's attempt to change the Tribunal's jurisdiction via provision of a new Protocol (and thus using the procedure in article 22, rather than article 36 and article 37) is incorrect. The Protocol is subordinate to the Treaty. It cannot 'repeal' a Protocol that has been integrated into the Treaty.

30. In its judgment, the High Court arrived at this conclusion as follows:

> *"Any Protocol to the SADC Treaty is a subordinate legal instrument and it is not permissible to emasculate a SADC organ established by the SADC Treaty itself, in this manner. The SADC Treaty itself was not amended and the desired result was illegally contrived through an attempt to repeal and replace the 2000 Protocol on the Tribunal by the 2014 Protocol."*[4]

31. The Summit had amended the Treaty five times before: in 2001, 2007, 2008, and twice in 2009.[5] Each amendment was effected by way of an Amending Agreement signed by the requisite number of Members of the Summit. In fact, in the preamble of four of the five

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3 *Government of the Republic of Zimbabwe v Fick* [2012] ZASCA 122 paras 38-9 upheld on appeal in *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC).

4 *Law Society of South Africa v President of the Republic of South Africa* 2018 (6) BCLR 695 (GP).

5 "SADC Treaty" *Southern African Development Community* available at http://www.sadc.int/documents-publications/sadc-treaty/ (last accessed on 25 July 2018).

Amending Agreements reflects that the amendments were effected in terms of article 36 of the Protocol. These amendments are reflected in the updated, consolidated version of the Treaty text.[6] Additionally, the 2000 Protocol had been amended before using the provisions of article 37 of the Protocol.[7]

32. It is, therefore, difficult to comprehend why, after using the correct procedure on amendments several times before, the Summit decided to use a completely different and illegal procedure in adopting the 2014 Protocol.

33. The other legitimate procedure for changing the operations of the Tribunal is to rely on the provisions of article 35 of the Treaty which allows the Summit through "*a resolution supported by three-quarters of all members to dissolve…any of its institutions…*". This is not the State's case and the State conceded in oral argument before the High Court that these procedures were not followed.

The Unlawful Procedures Used by the SADC Summit

34. Instead of using any of the appropriate, prescribed procedures, the Summit instead adopted a number of illegal initiatives which culminated in the suspension, dissolution of the operations of the Tribunal and adoption of a new Protocol:

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6 The Consolidated version of the SADC Treaty was published by the SADC Secretariat in 2015 and can be found here: http://www.sadc.int/documents-publications/sadc-treaty/ (last accessed on 25 July 2018).

7 *Gramara (Pvt) Ltd v Government of the Republic of Zimbabwe* (HC33/09) [2010] ZWHHC 1, at par 12 (26 January 2010).

34.1. In August 2010, the Summit ordered a review of the Tribunal and thereafter appointed an independent consultant, Dr Bartels[8], to write a report on the Role, Responsibilities and Terms of Reference of the Tribunal. The Summit also decided that the Tribunal should not take any more cases until its status was reviewed.[9]

34.2. In May 2011, the Summit decided not to reappoint any members of the SADC Tribunal whose terms expired in 2010 and 2011; and that the Committee of Ministers of Justice/Attorneys-General were to "*initiate the process aimed at reviewing and amending SADC legal instruments of immediate relevance to the SADC Tribunal*".[10]

34.3. In 2012, the Summit, after reviewing the Report of the Ministers of Justice/Attorneys-General, resolved to negotiate a new Protocol whose mandate should be "*confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States*".[11]

35. South Africa has a positive duty to create the Tribunal and allow it to run.[12] In *Fick*, the Constitutional Court found a positive obligation based on article 32 of the Tribunal Protocol and the Constitution to ensure that the SADC Tribunal is not undermined:

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8 Record Vol 5 pp 421 – 489.

9 Record Vol 6 p 557 at par 14; Record Vol 5 p 419. See also Communique of the 30th Jubilee Summit of SADC Heads of State and Government (17 August 2010), available online at http://www.thepresidency.gov.za/content/communique-30th-jubilee-summit-sadc-heads-state-and-government (last accessed on 25 July 2018).

10 Record Vol 6 p 557 at par 15; Record Vol 5 p 418 at par 7.

11 Record Vol 6 p 559 at par 18.

12 See, for example, articles 6(1), 9, 16(1) of the Treaty.

> *"South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as obligations under the Amended Treaty.*"[13]

36. The above exposition reiterates the high standard that South Africa has to adhere to under the Treaty, as amended by the 2000 Protocol. It cannot subvert the authority of the Tribunal. Much as Member States have the freedom to amend the Protocol or the Treaty in general, this can only be done in accordance with the terms of the Treaty.

37. The State has argued that since the 2014 Protocol has not yet entered into force, the President's action has no consequential effect to the rights of the citizens of South Africa. SALC submits that this does not absolve the President of wrongdoing as his actions remain unlawful in totality.

38. This is because neither the 2000 Protocol nor the Treaty have been amended and the Tribunal has not been dissolved; it still remains law, as such, the President is under an obligation to comply with its provisions, including the procedure for its amendment or dissolution. This cannot be done by the Summit adopting a new Protocol to dissolve the Tribunal as they did in 2014.

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13 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

The law

39. As has been confirmed many times by South African courts, the exercise of all public power, including discretionary executive action taken by the President, is constrained by the limits of the Constitution.[14]

40. It is an unexpressed or implied provision in the Constitution that the State operates through three separate branches: the executive; the legislature; and the judiciary.[15]

41. Within our constitutional conception of the separation of powers exists a system of checks and balances. Checks and balances ensure that the various arms of government control and counter each other's conduct to ensure accountability and that public power is exercised within constitutional bounds.[16] It is the role of our courts to make certain that all branches of government are acting within the limits of the Constitution.[17]

42. The President's actions in relation to the suspension of the Tribunal and signing of the 2014 Protocol are exercises of public power (as

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[14] See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) paras 49-50; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras 17-20, 85; *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 78; *Mansigh v General Council of the Bar* 2014 (2) SA 26 (CC) para 16; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 38.

[15] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) paras 19-22.

[16] *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) para 133.

[17] Courts are required by the Constitution "*to ensure that all branches of government act within the law' and fulfil their constitutional obligations*". *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 38.

executive actions) and implicate important rights protected under the Bill of Rights. They are, therefore, subject to Constitutional limits.

43. Section 7(2) of the Constitution imposes a positive obligation on the state to uphold the Bill of Rights. Section 8(1) of the Constitution explicitly binds every organ of the State, including the executive, to uphold the Bill of Rights.

44. The Constitutional Court has described the interaction between sections 8(1) and 7(2) in relation to the President as follows:

> *"And since in terms of section 8(1), the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state", it follows that the executive, when exercising the powers granted to it under the Constitution, including the power to prepare and initiate legislation, and in some circumstances Parliament, when enacting legislation, must give effect to the obligations section 7(2) imposes on the state.*"[18]

45. The executive has the prerogative to decide how to implement its obligation to take positive measures in respect of fundamental rights, provided these measures "*fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt*".[19]

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[18] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 190.

[19] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 191.

46. Executive decisions are also subject to the principle of legality, located in section 1(c) of the Constitution.[20] Section 1(c) entrenches constitutional supremacy and the rule of law as foundational values upon which our State is founded. This Court has expressed this as:

> *"[T]he 'executive' is 'constrained by the principle that [it] may exercise no power and perform no function beyond that conferred… by law' and that the power must not be misconstrued.*"

47. Taking these Constitutional limits into account, courts have stated that, at *a minimum*, executive action must meet the requirement of rationality:

> *"It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement.*"[21]

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20 *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) para 124.

21 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85. See also *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) paras 30-2.

48. Even when the President is exercising completely discretionary powers under the Constitution,[22] his actions must be: "*rationally related to the purpose for which the power was given*"[23] or, put differently, "*rationally related to the objective sought to be achieved*" (the rationality test).[24] This is an objective test.[25]

49. Procedural irrationality is also part of the inquiry for a discretionary executive action. The test for procedural rationality was explained by this Court in *Democratic Alliance*:

> *"[T]he decision of the President as Head of the National Executive can be successfully challenged only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality. We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.*"[26]

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22 This Court has held that this test applies to decisions taken by the President in the role as both the head of the National Executive and the head of State. See *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) para 35.

23 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85.

24 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51.

25 *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) paras 32-4; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 86.

26 *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) para 37.

50. This specific test for procedural rationality was used by the High Court to evaluate the procedural rationality of the President's action in the context of international treaties in *Democratic Alliance v Minister of International Relations and Cooperation*.[27] Even in an area where the executive has great power, such as international relations and international treaties, procedural impropriety has been a basis of finding executive action unlawful.

51. Finally, the President is also required to act in good faith in executive decision-making.[28]

Analysis

52. When these principles are applied to the President's conduct, it is clear that the President acted unlawfully. First, the President's procedural error is extensive, irrational and in bad faith. The President participated in several different actions that directly contradict the text of the Treaty:

    52.1. issuing a decision to stop the referral of cases to the Tribunal;

    52.2. non-renewal of sitting judges;

    52.3. not nominating new judges; and

    52.4. commissioning a review of the Tribunal and acting against the Tribunal's expert's recommendation.[29]

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27 *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP) para 64.

28 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148; *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 80.

29 Record Vol 5 pp 447 – 448 states that:

53. Despite the Constitution empowering and enjoining the President to take positive measures in respect of fundamental rights, the President agreed with the Summit to avoid and did avoid following the proper procedure to amend the Treaty. In doing so, when the President acted in terms of section 231 of the Constitution, he did so both *ultra vires* the Treaty (by acting outside of the prescribed amendment procedure) and irrationally, and thus unconstitutionally. This obligation is not only located in section 231, but comprises a general constitutional obligation articulated by this Court as follows:

> *"South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as the obligations under the Amended Treaty. Added to this, are our own constitutional obligations to honour our international agreements and give practical expression to them, particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated. We are also enjoined by our Constitution to develop the common law in line with the spirit, purport and objects of the Bill of Rights.*"[30]

"*At present, individuals may bring cases against Member States. The view was expressed by one Member State at the Senior Officials meeting that this is inappropriate, and it is also worth noting that such a jurisdiction is not always found in legal systems similar to the SADC legal system. …In the absence of…an individual right of access to the SADC Tribunal would leave individuals with no recourse against their Member States beyond national courts. Should national remedies be insufficient, individuals would be left without effective protection. In view of this, no recommendations are made in this report to change the status quo*." (Emphasis added).

30 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

54. When promulgating the 2014 Protocol, there was no rational basis to bypass article 36 in favour of article 22 procedures. In fact, sticking to the Treaty's amendment procedure would have alleviated the Summit's stated concerns related to the Tribunal's individual jurisdiction[31] without an extensive signature and ratification process.

55. The Tribunal could have been immediately reformed by agreement by three-quarters of the Members of the Summit. Instead, the President chose not to adopt this prescribed process, but rather stepped outside the authority granted to him under the Treaty's amendment scheme and acted in concert with the Summit.

56. The Summit's decisions in which the President took part also violated substantive SADC law specified in the 2000 Protocol that mandated the Tribunal to exist, enabled it to take cases, and to be staffed with judges. While the Summit is the main policy director of SADC, the Treaty does not permit the heads of state that comprise the Summit to violate the mandates of the Treaty or dismantle a vital organ of the Treaty. If the Summit wished to take such action it could and should have proposed an amendment to the Treaty, but this step was never taken.

57. It stands to reason that the article 22 procedure was used for the 2014 Protocol precisely because it requires fewer states to support the decision. The 2014 Protocol was signed by only nine (9) heads

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[31] See for example, Record Vol 6 p 558 at par 18 with reference to Annexure JS2 of the affidavit: Record of Meeting of the SADC Summit for Heads of State and Government (17-18 August 2012) (Annexure JS2 was not included in the record before this Court).

of State,[32] below the ten (10) needed under article 22, and far from the twelve (12) required for the proper article 36 procedure. It is more likely that article 22 ratification – ostensibly the process to amend protocols – allows the SADC states to avoid reconstituting the Tribunal indefinitely. This is a further sign that the decision to participate in the article 22 process was taken in bad faith and is consistent with the repeated procedural and substantive actions taken by the President individually and collectively within the Summit to fetter the Tribunal.

58. The President, as a member of the Summit, was empowered to amend the Treaty. This power and the procedure to be followed when exercising it are set out in articles 36 and 37 of the Treaty. The President did not follow this procedure. Rather, he joined the Summit in arbitrarily and irrationally bypassing this procedure. In doing so, he violated the rule of law and principle of legality by circumventing the explicit instructions of the binding Treaty approved by Parliament.

59. However, this was not the only illegality that arose as a result of the President's conduct. The President's conduct amounted to an unjustifiable infringement of the fundamental right of South African citizens of access to justice that is expressly protected in the Bill of Rights.

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[32] Record Vol 6 p 564 at para 34.

Unjustifiable Infringement of the Fundamental Right to Access the Tribunal

60. The established approach to determining whether a fundamental right has been unjustifiably limited was described by this Court in *Ferreira* as a two-stage process, with the first entailing "*an enquiry into whether there has been an infringement of the … guaranteed right*" and that "*it is for the applicants to prove the facts upon which they rely for the claim of infringement of the particular right in question*".[33]

61. The *onus* first lies with the party alleging the violation, who must demonstrate that a right has been infringed. That party must show that the conduct falls within the ambit of the particular constitutional right and must *prima facie* prove that the conduct impedes or limits that right.

62. Accordingly, we address this section in three parts:

    62.1. First, we address the substantive content of the right in section 34 of the Constitution and submit that it includes the right of South African citizens to access an international court in the form of the SADC Tribunal.

    62.2. Second, we demonstrate why the President's conduct, in participating in the 2011 Suspension and, later, the 2014 Protocol infringed the right in section 34 of the Constitution.

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[33] *Ferreira v Levin NO* 1996 (1) SA (CC) para 44.

62.3. Third, we explain why the President's conduct, in infringing the right in section 34 of the Constitution, is incapable of being justified in terms of section 36 of the Constitution in that the President's conduct does not amount to a "*law of general application*".

The right

63. In *Fick*, this Court explicitly found that SADC Treaty gives rise to constitutional obligations:

> *"The Amended Treaty, incorporating the Tribunal Protocol, places an international obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced. Section 34 of the Constitution must therefore be interpreted, and the common law developed, so as to grant the right of access to our courts to facilitate the enforcement of the decisions of the Tribunal in this country.*"[34]

64. Under the Constitution, the state is obligated to give "*practical expression*" to international agreements binding on South Africa.[35] This obligation to give practical expression of international obligations stems from several provisions of the Constitution including articles 7(2) and 8(1).[36]

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34 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 69.

35 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

36 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 189-190.

65. This Court has noted that the obligation to give practical expression to international agreements is heightened when those international agreements are seeking to vindicate rights protected in the Bill of Rights.[37] This Court specifically recognised, in *Fick,* that the SADC Treaty was such a treaty.[38]

66. As set out in *Fick*, the version of the Treaty that currently binds South Africa is that version that incorporates the 2000 Protocol "*as a part of the original Treaty*".[39] The Tribunal was a fully functioning court that provided access to justice in the SADC region by adjudicating disputes between member states and between individuals and member states. Accordingly, the Tribunal permitted South African citizens to approach the Tribunal to resolve disputes arising from human rights violations. Not only does this provide South Africans access to an impartial forum as protected under section 34 of the Constitution, but accessing this forum allows them to vindicate and protect other rights.

67. Further, section 39(1)(b) of the Constitution requires that when interpreting the Bill of Rights, a court must take international law into account. In fact, the measure of the State's reasonableness in protecting the rights articulated in the Constitution is international law:

> *"[O]ur Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the*

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37 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

38 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

39 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 34.

> *Republic in international law, and makes them the measure of the State's conduct in fulfilling its obligations in relation to the Bill of Rights."*[40]

68. Using this reasoning, this Court in *Glenister II* held that because corruption implicated numerous rights protected in the Bill of Rights, there was a constitutional obligation to establish an independent, anti-corruption unit.[41] This duty must be interpreted in line with South Africa's international obligations, which were also a source of responsibility.[42] In discussing the international agreements, the Court stated:

> *"The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere."*[43]

69. In fact, one of the international agreements that this Court relied on in *Glenister II* was a SADC Protocol signed and ratified by South Africa: the SADC Protocol against Corruption.[44]

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40 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 178.

41 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 175-7.

42 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 192-193.

43 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 189.

44 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 169.

70. There are in fact a number of SADC Protocols that were signed and ratified by South Africa which impose similar obligations on the country and explicitly grant access to the Tribunal.

70.1. One such Protocol is the Protocol on Gender and Development. [45] Article 36 of the Protocol provides that "*[a]ny dispute arising from the application, interpretation or implementation of this Protocol, which cannot be settled amicably, shall be referred to the SADC Tribunal, in accordance with Article 16 of the Treaty*".

70.2. A second is the Protocol on Finance and Investment which explicitly grants access to individuals to access justice at the Tribunal.[46] Annex 1 to the Protocol provides for dispute resolution between individual investors and State Parties which includes: "*Where the dispute is referred to international arbitration, the investor and the State Party concerned in the dispute may agree to refer the dispute either to: (a) The SADC Tribunal*".[47]

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45 South Africa ratified the protocol on October 29, 2012 and it entered into force on February 22, 2013. "Protocol on Gender and Development" *Department of International Relations and Cooperation South African Treaty Register.* The Protocol entered into force on 22 February 2013. On 15 April 2009 Cabinet approved the Protocol on Gender and Development for submission to Parliament. Minutes of the Cabinet meeting are available online at https://pmg. org. za/briefing/18695/ (last accessed on 28 July 2018). The Portfolio Committee on Women, Children, Youth and People with Disabilities, considered the SADC Protocol on Gender and Development and on 24 August 2011 recommended that the National Assembly in terms of section 231(2) of the Constitution approve the Protocol. Minutes of the Portfolio Committee meeting are available online at https://pmg. org. za/tabled-committee-report/644/ (last accessed on 28 July 2018). The Protocol was considered and ratified by the National Assembly on 30 August 2011. Minutes of the National Assembly debate are available at https://pmg. org. za/hansard/18177/ (last accessed on 28 July 2018).

46 South Africa ratified the Protocol on June 19, 2008 and it entered into force on April 16, 2010. "Protocol on Finance and Investment" *Department of International Relations and Cooperation South African Treaty Register*.

47 Protocol on Finance and Investment, Annex 1, art. 28.

71. In ratifying these respective Protocols, Parliament's legislative intent is to ensure that the Tribunal is available for the resolution of disputes between not only Member States, but that individuals are also allowed to access the Tribunal. As we will show, the actions of the President of depriving citizens of this right have created absurd results. Without the existence of the Tribunal, *Parliament-approved laws* cannot be applied to give effect to their original intent.

72. Parliament's ratification of international agreements under section 231(2) of the Constitution confers South African citizens with rights on a domestic level.

73. Following the logic of *Glenister II* and *Fick* that international obligations are the measure of interpreting how the State protects and fulfils the Bill of Rights, a right to access justice under section 34 of the Constitution should, accordingly, be interpreted as including individuals' access to the SADC Tribunal. There is a binding legal obligation that extends the right of access to justice to the SADC Tribunal for citizens of South Africa.

International and Regional Law Practice

74. This interpretation is consistent with the predominant international practice regarding access to regional or international tribunals. As a starting point, it should be noted that a bulk of the decisions handed down by the SADC Tribunal before 2010 were initiated by private actors. Of the Tribunal's nineteen (19) judgments, five (5) of the matters were instituted by SADC employees, only one (1) by a state party, and the remaining thirteen (13) were instituted by private

actors.[48] This is an indication of how the Tribunal's primary function to date has been to address the individual concerns of SADC citizens.

75. In *Mike Campbell v Zimbabwe*,[49] the Tribunal decided that it had jurisdiction to hear human rights cases based on Articles 4(c) and 6(1) of the Treaty. Article 4(c) requires States to respect the principles of human rights and rules of law. Article 6(1) requires States to refrain from taking any measures likely to jeopardise the sustenance of the principles of the SADC Treaty; and the achievement and implementation of its objectives. The effect was that the Tribunal, before its suspension, provided an additional layer of protection through its jurisprudence on human rights.

76. The East African Court of Justice;[50] the Common Market for Eastern and Southern Africa's (COMESA) Court of Justice;[51] the ECOWAS Court;[52] the African Commission on Human and Peoples' Rights;[53]

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48 E de Wet "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" (2013) 28 *ICSID Review* 45, 48.

49 Case No. SADC (T) 2/2007 available at http://www.saflii.org/sa/cases/SADCT/2008/2.html (last accessed on 28 July 2018).

50 Article 30 of that treaty provides:

"*1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty*."

51 Under Article 26 of the COMESA Treaty any legal or natural person resident in a member state may refer for determination the legality of any act, regulation, directive or decision of the Council or of a member state on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the COMESA Treaty, subject to the exhaustion of local remedies.

52 The Supplementary Protocol Amending the Protocol relating to the Community Court of Justice (2005) clearly outlined and increased the jurisdiction of the court and improved its access provisions. According to Article 4(c) of the Supplementary Protocol:

the European Court of Human Rights;[54] the European Court of Justice;[55] and the Inter-American Commission on Human Rights[56] all allow individual persons to approach the international tribunal.

77. The reason so many of these regional and international systems have made provisions for individual access to international tribunals is that they complement domestic courts in the enforcement of international human rights obligations. Without these international tribunals, the various regional mechanisms protecting human rights simply would not work as states failing to comply with their international obligations could continue to operate with impunity.

78. In the case of *Malawi Mobile Mobile Ltd. v the Republic of Malawi,*[57] the COMESA Court took the view that access to the international tribunal established by treaty was an issue of access to justice. It stated as follows:

"*(c) Access to the Court is open to the following: Individuals and corporate bodies in proceedings from the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies."*

53 Article 55 of the African Charter on Human and Peoples' Rights.

54 Article 34 of the European Convention.

55 The parties that have access to the ECJ are EU states, the EU Commission, other EU institutions, employees of EU institutions as well as private individuals, companies and other organisations. Art 263 of the Treaty on the Functioning of the European Union, available at http://eur-lex. europa. eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT (last accessed on 28 July 2018). European citizens may also bring an action for damages before the General Court against the EU Community or an EU state which infringes an EU Community rule. Art 268 of Treaty on the Functioning of the European Union. Other actions that may be taken to the ECJ include appeals from the General Court against decisions of the EU Civil Service Tribunal, and actions for failure of EU institutions to act. Art 265 of Treaty on the Functioning of the European Union.

56 Article 44 of Inter-American Convention on Human Rights.

57 *Malawi Mobile Mobile Ltd. v the Republic of Malawi* (Ruling) no. 1 of 2015 (2015) available at http://comesacourt. org/wp-content/uploads/2017/04/Ruling-Malawi-Mobile-Limited-Vs-Government-of-the-Republic-of-Malawi-Malawi-communication-Regulatory-Authority-reference-No. -1-of-2015-Part-2. pdf (last accessed on 28 July 2018).

> *"If such claims come within the ambits of Article 19 and 23 of the Treaty, this Court will have jurisdiction to entertain such matters. The drafter of the Treaty and the Member States must have intended to improve residents' access to justice when they enacted the Treaty in the format that it is in and in so doing granting all persons (both natural and legal persons) the right to file a Reference before the COMESA Court of Justice."*[58]

79. The Court reasoned that it was not limited to hearing disputes related to acts, directives, decisions or regulations of the Organs established by the Treaty, but instead it had jurisdiction over acts of Member States.[59] To do otherwise would be contrary to the fundamental principles and goals of the Treaty including "*economic justice and popular participation of development; the recognition and observance of the rule of law; and the promotion and sustenance of a democratic system of governance in each Member State*".[60] In this way, the existence of and access to an international tribunal promotes the rule of law, access to courts, and justice.

80. In the Separate Opinion of Judge A. A. Cançado Trindade in the Inter-American Case *Pueblo Bello Massacre v Colombia,*[61] the judge remarked on the incredibly broad right of access to justice under international law:

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58 *Malawi Mobile Mobile Ltd. v the Republic of Malawi* para 81.

59 *Malawi Mobile Mobile Ltd. v the Republic of Malawi* paras 42-4.

60 *Malawi Mobile Mobile Ltd. v the Republic of Malawi* paras 42-4.

61 (Judgment (Merits, Reparations, and Costs)) Amer. Ct. of H. R. (25 November 2006).

> *"This right is not reduced to formal access, stricto sensu, to the judicial instance (both* ***domestic and international****), but also includes the right to a fair trial and underlies interrelated provisions of the American Convention (such as Articles 25 and 8), in addition to permeating the domestic law of the States Parties. The right of access to justice, with its own juridical content, means, lato sensu, the right to obtain justice. In brief, it becomes the right that justice should be done. … One of the main components of this right is precisely direct access to a competent court, by means of an effective, prompt recourse, and the right to be heard promptly by this independent, impartial court, at* ***both the national and international*** *levels (Articles 25 and 8 of the American Convention). As I indicated in a recent publication, here we can visualize a true right to law; that is, the right to a national and international legal system that effectively safeguards the fundamental rights of the individual."*[62] (bolded emphasis added)

81. In its jurisprudence, the East African Court of Justice has also affirmed the importance of individual access to regional courts and its necessity for the safeguarding of human rights. In *Honorable Sitenda Sebalu v Secretary General of the EAC*, it stated:

> *"This Court wishes to draw attention to Article 6(d) of the East African Community Treaty which urges the Partner States, inter alia, to recognize, promote and protect human and people's rights in accordance with the provisions of*

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[62] *Pueblo Bello Massacre v Colombia* (Separate Opinion of Judge A. A. Cançado Trindade) Amer. Ct. of H. R. (25 November 2006) para 61.

> *the African Charter on Human and People's Rights. National courts have the primary obligation to promote and protect human rights. But supposing human rights abuses are perpetrated on citizens and the State in question shows reluctance, unwillingness or inability to redress the abuse, wouldn't regional integration be threatened? We think it would. Wouldn't the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the Community Partner State concerned to access their own regional court, to wit, the EACJ, for redress? We think they would."*[63]

82. The right of access to courts, domestically—as recognised by the Constitutional Court in many cases including in *Fick,*[64] and internationally,[65] encompasses the right to an effective remedy. In *Fick* this Court held that enforcement of the SADC Tribunal's

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63 *Honorable Sitenda Sebalu v Secretary General of the EAC, Attorney General of the Republic of Uganda, Honorable Sam K. Njuba and the Electoral Commission of Uganda*, REF NO 1. of 2010, 40 available at http://eacj. org/?cases=honorable-sitenda-sebalu-vs-secretary-general-of-the-eac-attorney-general-of-the-republic-of-uganda-honorable-sam-k-njuba-and-the-electoral-commission-of-uganda (last accessed on 28 July 2018).

64 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) paras 60-62.

65 *Jeličić v Bosnia and Herzegovina* Application no. 41183/02 (Judgment) E. Ct. of H. R. (31 October 2006) at para 38. The European Court stated in respect of article 6(1) that:

"*Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail the procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions. To construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would indeed be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6.*"

See also *Hornsby v Greece* Application No. 18357/91 (Judgment) E. Ct. of H. R. (19 March 1997).

judgment implicated rights under section 34 of the Constitution stating that:

> *"[S]ection 34 of the Constitution must be interpreted generously to grant successful litigants access to our court for the enforcement of orders, particularly those stemming from human rights or rule of law violations provided for in treaties that bind South Africa."*[66]

83. The Court in *Fick* in deciding to enforce the judgment of the Tribunal was fulfilling the very purpose of international tribunals: providing access to a court that could grant a remedy when another member state, Zimbabwe, refused.

84. It is accordingly submitted that the jurisdiction of the Tribunal both with the 2011 Suspension and the adoption of the 2014 Protocol goes against the jurisdictional trend that is prevailing on the African continent and elsewhere with regard to regional and continental courts. These jurisdictions demonstrate that access to regional and international courts is an integral aspect of access to justice.

85. In interpreting section 34 of the Constitution, this Court must consider international law and may consider foreign law. In our submission, the prevailing foreign practice and law demonstrates that section 34 undoubtedly extends to the right of South Africans to access an international court in the form of the Tribunal.

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66 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 62.

86. Conduct that runs contrary to this prevailing trend, we submit, is contrary to our Constitution contemplating that South Africa "*play a full role as an accepted member of the international community*". In *Southern African Litigation Centre*, the Supreme Court of Appeal articulated this interpretation as follows:

> *"The Constitution incorporated [international law] provisions pursuant to the goal stated in the Preamble that its purpose is to '[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. From being an international pariah South Africa has sought in our democratic state to play a full role as an accepted member of the international community."*[67]

87. Indeed, cases like *Fick* have shown that an international court in the form of the Tribunal is sometimes the only effective remedy to vindicate the violation of rights. Interpreting section 34 to encompass the right to access an international court will facilitate access to justice and provide further protection against rights violations and, in our submission, would "*promote the values that underlie an open and democratic society based on human dignity, equality and freedom*" as required by section 39(1)(a) of the Constitution.

<u>The infringement</u>

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[67] *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA) para 63.

88. In this section, we proceed to set out why the President's conduct, in participating in the 2011 Suspension and the 2014 Protocol amounts to an infringement of the right in section 34 of the Constitution.

89. This case concerns two presidential actions that had a regressive effect on the rights of individuals in the SADC region to access an international court for attaining an effective remedy against the violation of their human rights.

    89.1. First, the 2011 Suspension caused the Tribunal to cease all operations. The 2011 Suspension led to the de facto closure of the Tribunal. It can no longer function as it is no longer staffed by judges or taking cases. There is simply no way for South Africans to approach the Tribunal.

    89.2. Second, the 2014 Protocol stripped the Tribunal's power to adjudicate disputes between individuals and member states. It limits the Tribunal's jurisdiction to decide disputes between member states only. The 2014 Protocol is attempting to finish off the work of the 2011 Suspension, forever closing the door for South African citizens and others in the SADC region from accessing the Tribunal to adjudicate human rights claims.

90. Prior to these actions, South African citizens could approach the Tribunal to resolve any dispute relating to human rights violations between themselves and any of the member States in the SADC region. The right to access an international court in the form of the Tribunal had accordingly vested prior to the 2011 Suspension and the 2014 Protocol.

91. By participating in the 2011 Suspension and the 2014 Protocol, the President's conduct was diametrically opposed to the right of South African citizens in section 34 of the Constitution to access a court, including an international court in the form of the Tribunal. Instead of facilitating access to justice, the President's conduct was regressive. It infringed the right to access a court by completely depriving South African citizens of their vested right to access an international court in the form of the Tribunal. The President did so without public consultation or Parliamentary consent and only in the name of comity.

92. Section 7(2) of the Constitution imposes a positive duty on the executive to give effect to fundamental rights.[68] Regardless of whether an organ of State was empowered to act as it did, it must act consistently with section 7(2).[69] It is therefore impermissible for the national executive to exercise its powers, even those provided for under section 231(1) of the Constitution, in a manner that limits or infringes fundamental rights, such as in the present case. Where the Constitution requires that rights be progressively realised, our courts have consistently held that retrogressive steps to fundamental rights are unconstitutional unless properly justified.[70]

<u>The infringement is unjustifiable</u>

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68 Section 7(2) of the Constitution states: "*The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*" *See* also *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 189.

69 *Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC) para 208.

70 *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 34; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 32; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 138.

93. After a rights limitation has been established, the State bears the *onus* of justifying the limitation in terms of section 36(1) of the Constitution.[71]

94. Limitations of rights enshrined in the Bill of Rights must meet the threshold test enshrined in Section 36 of the Constitution. The President's action must qualify as a "*law of general application*"; must be "*reasonable and justifiable*"; must be "*based on human dignity, equality and freedom*" taking into account "*the importance of the limitation*"; "*the nature and extent of the limitation*"; the "*relation between the limitation and its purpose*".

95. In the present case, SALC submits that the President's conduct which limited constitutional rights under section 34 cannot be justified in terms of section 36 of the Constitution. This is because the President's conduct does not amount to a "*law of general application*" as contemplated in section 36. This is a jurisdictional pre-condition that must be established before an assessment as to whether a rights infringement is reasonable and justifiable may be conducted. In *Dladla,* this Court confirmed this principle thus:

> *"Now that it has been established that the applicants' rights have been limited, the next question is whether the limitations of these rights can be justified under section 36(1) of the Constitution. For the limitations to be justified under section 36, they must first and foremost be authorised by a 'law of general application'. This is a*

[71] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* 2001 (4) SA 491 (CC) para 18. *S v Zuma* 1995 (2) SA 642 (CC) para 21.

> *threshold test which must be met before a justification analysis may begin. …. Absent that law, the City may not invoke section 36 in an attempt to justify the limitations created by the rules in question.*"[72]

96. Similarly, in *Magidiwana,*[73] Legal Aid denied certain people state funded representation in front of a Commission on the basis of a policy decision. This Court approved the finding of the High Court that: "*Legal Aid could not justify its infringement of the miners' constitutional rights because it was not pursuant to a law of general application but merely the exercise of discretion*".[74]

97. International and comparative law also imposes similar requirements. For example, the African Charter allows for limitations of rights in certain circumstances (the so-called "claw back clauses"). Notably in relation to this case, the African Commission has found that "*the limitation of the right cannot be used to subvert rights already enjoyed*"[75] and that any limitations must be consistent with international law.[76]

98. The limitations test under the European Convention uses the terms "*prescribed by law*" or "*in accordance with the law*" rather than law of general application. The European Court has also provided that to constitute a "*law*" for the purposes of limitation, the law must, similar

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72 *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 52.

73 *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC).

74 *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC) para 87.

75 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) at para 70.

76 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 92; *Constitutional Rights Project v Nigeria* (2000) AHRLR 191 (ACHPR 1998) at para 57.

to the South African jurisprudence, be adequately accessible and foreseeable, allow individuals to regulate their conduct, and to protect people from arbitrary exercises of state power.[77] And similarly, unfettered discretion in the hands of the executive branch is dangerous and "*not prescribed by law*" for limitations purposes.[78] In the case *Hasan and Chaush v Bulgaria*, the European Court of Human Rights held that:

> *"In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power.*"[79]

99. In our submission, in order for fundamental rights to be limited the limitation must be by way of a "*law of general application*", as contemplated in section 36 of the Constitution. The President's conduct does not amount to a "*law of general application*". Accordingly, any limitation of fundamental rights occasioned by the President's conduct can never amount to a justifiable limitation for purposes of section 36 of the Constitution.

100. Authority for this proposition is the minority judgment of Justice Kriegler in *Hugo*.[80] In that case, the President exercised his power to pardon women in prison with children under the age of 12. While

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77 *Hasan and Chaush v Bulgaria* Application No. 30985/96 (Judgment) E. Ct. of H. R. (26 October 2000) para 84.

78 *Hasan and Chaush v Bulgaria* Application No. 30985/96 (Judgment) E. Ct. of H. R. (26 October 2000) para 84.

79 *Hasan and Chaush v Bulgaria* Application No. 30985/96 (Judgment) E. Ct. of H. R. (26 October 2000) para 84.

80 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

the majority did not make a finding on the issue of whether the President's action could amount to a law of general application, Kreigler J, in dissent, addressed the issue, stating:

> *"The exercise by the President of the powers afforded by s 82(1)(k) - even in the general manner he chose in this instance - does not make 'law', nor can it be said to be 'of general application'. The exercise of such power is non-recurrent and specific, intended to benefit particular persons or classes of persons, to do so once only, and is given effect by an executive order directed to specific state officials. I respectfully suggest that one cannot by a process of linguistic interpretation fit such an executive/presidential/administrative decision and order into the purview of s 33(1). That savings clause is not there for the preservation of executive acts of government but to allow certain rules of law to be saved."*[81]

101. In our submission, the learned Justice is undoubtedly correct. A constitutional democracy is founded on the principle of social contract. As of birth-right, human beings are entitled to certain fundamental rights, which in South Africa are entrenched in the Bill of Rights.

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[81] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) paras 70-1 Dissent Kriegler J, fn 7). This was a judgment under the interim Constitution, where the limitations clause was found in section 33. However, limitations in that clause were still subject to the same requirements.

102. These citizens then participate in government through a system a representative democracy,[82] where citizens elect representatives to serve on their behalf in the legislative branch of government. These representatives in the legislature may then, by way of majority vote, limit citizens' fundamental rights by passage of legislation. The executive sphere of government administers the legislation and the judicial sphere of government assesses whether it has unjustifiably infringed fundamental rights against the principles in section 36. The President comprises part of the executive sphere of government; he is not a law maker, nor can he exercise plenary legislative power. As this Court held in *Shuttleworth*:

> *"The second main plank of the dissent is about delegation of legislative power. It is that Parliament may only delegate subordinate regulatory authority to the Executive and may not assign plenary legislative power to another body. The regulation-making power granted to the President in section 9(1) of the Act effectively assigns plenary legislative power to the President. That is constitutionally impermissible."*[83]

103. Indeed, in *Democratic Alliance*, the Full Bench of the Gauteng High Court held that the social contract is the reason why section 231(2) of the Constitution contemplates legislative approval before international agreements become domesticated:

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82 Our Constitutional scheme also contemplates participatory democracy in certain instances which are not relevant for present purposes. See *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 115.

83 *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) para 65.

> *"[T]he approval of an international agreement in terms of s 231(2) creates a social contract between the people of South Africa, through their elected representatives in the legislature, and the national executive. That social contract gives rise to the rights and obligations expressed in such international agreement. The anomaly that the national executive can, without first seeking the approval of the people of South Africa, terminate those rights and obligations, is self-evident and manifest."*[84]

104. The purpose of ensuring that rights are limited via a law of general application is to protect the rule of law including protecting people from arbitrary violations into their rights[85] and allowing people to have access to such laws so they conform their behaviour to them.[86]

105. In order to protect these fundamental rights, this Court has regularly found laws that provide unfettered discretion to the executive branch do not qualifying as laws of general application in that they undermine the requirement that is law is "*stated in a clear and accessible manner*". For example, in *Dawood*, this Court found immigration rules giving immigration officials the discretion to refuse certain permits without any criteria. The Court stated:

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84 *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP) para 52.

85 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras 85-6; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 101.

86 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 44. *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (8) BCLR 837 (CC), 2000 (3) SA 936 (CC) para 47.

> *"It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."*[87]

106. We further submit that, on a proper construction, the interpretation that the reference to "*law of general application*" in section 36 only contemplates having legal authorization, or only requires that rights be limited "*in terms of*" conduct empowered by "*law of general application*", with respect, incorrect.[88] We say this because such an interpretation is tautologous. Section 1(c) of the Constitution, which entrenches the rule of law as a founding principle, immediately renders any exercise of public power taken without the necessary authorization *ultra vires* and, accordingly, unlawful.

107. Accordingly, section 36 requires heightened scrutiny in that it implicates the limitation of constitutionally entrenched, fundamental rights.[89] Moreover, section 39(1)(a) of the Constitution requires that

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87 *Dawood and Another v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 para 47.

88 *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 98.

89 Section 74(2) of the Constitution provides that:

"(2) *Chapter 2 may be amended by a Bill passed by—*

a court, when interpreting the Bill of Rights, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. An interpretation that section 36 only requires legal authorization is impermissibly tautologous,[90] whereas an interpretation that only the legislative passed law may limit rights accords with the notion of the social contract, representative democracy and the system of checks and balances implicit in our constitutional conception of the separation of powers.[91]

108. In light of the above, we submit that our constitutional conception of the separation of powers is such that vested fundamental rights and freedoms of citizens (especially where vested by way of legislative approval in terms of section 231(2) of the Constitution) may only be limited by a majority of their delegated representatives in the legislature by way of passage of a law of general application. That fundamental rights may only be limited in this way accords with the principle of the rule of law, which the executive arm of government must adhere to.

109. In the present case, the President unilaterally acted in a way that divests South Africans of fundamental rights. While the President's conduct applied generally in that divested all South Africans of their fundamental right, it was not "*law*". The President is empowered by

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(a) the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) the National Council of Province, with a supporting vote of at least six provinces."

90 *Keyter v Minister of Agriculture* 1908 NLR 522; *Commission for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A).

91 *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) para 133.

the Constitution to wield executive power and by the SADC Protocol to make policy for SADC. This general power does not authorise the limitation of rights and is too general to be considered a "*law*" for the purposes of limitation. This falls within the power and purview of the legislative branch of government, not the executive. Accordingly, the President's conduct is incapable of justification in terms of section 36 of the Constitution.

110. In our submission, the President's conduct was the arbitrary type of action section 36 is trying to protect against. The President's participation in the suspension of the Tribunal was one of pure discretion. It was admitted by the State that the decision was driven by thoughts of comity, but clearly not by thoughts of access to justice or the human rights of South African citizens he is constitutional bound to protect.

111. It is an affront to the principle of the rule of law, explicitly enshrined in the Constitution, to allow the President to unilaterally deprive South African citizens of vested rights protected under the Constitution. The President should not be able to simply make a decision under the umbrella of his general executive power (as opposed to say having been delegated a specific power by Parliament) to divest citizens of their fundamental rights without the consent or approval of the citizens delegated Parliamentary representatives.

112. In our submission, the President could not grant South Africans the right to approach the Tribunal without the agreement of Parliament as Parliament had to ratify the Treaty originally. It makes little sense

that the President could unilaterally remove the rights vested by Parliament without the approval of Parliament. This is particularly important in the case of divestment of rights because the Constitution explicitly recognises that limitation of rights is subject to strict requirements.

113. The President has broad powers under the Constitution especially when acting as Head of State at the international level. However, because the President's conduct limited fundamental rights other constitutional requirements needed to be complied with. Accordingly, by limiting the rights provided for in section 34 of the Constitution and not complying with section 36 of the Constitution, the President's conduct amounted to an unjustifiable infringement of constitutional rights. Accordingly, this Court should confirm the High Court's declaration of such.

COSTS IN CONSTITUTIONAL LITIGATION

114. At the outset, it must be stated that SALC did not pray for costs either in the High Court or in this Court. That being said, and as is demonstrated below, the High Court exercised a true discretion when awarding SALC and the Centre for Applied Legal Studies (CALS) costs. What we seek to illustrate hereunder is not why SALC is entitled to costs, but instead, to detail the instances in which a court may exercise its discretion in awarding costs to an *amicus curiae* and to assist this Court in evaluating the State Respondents' appeal against the High Court's costs order.

115. In ordinary civil litigation, the purpose of a costs order is to indemnify the successful party and to refund expenses actually incurred.[92] However, ever since this Court's decision in *Biowatch*,[93] our courts have adopted a different approach to costs in constitutional litigation.

116. In *Biowatch*, the central question before this Court was "*whether the general principles developed by the courts with regard to costs awards need to be modified to meet the exigencies of constitutional litigation*".[94] In determining the proper approach to costs in these circumstances this Court went on to hold that:

116.1. "*The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice*."[95]

116.2. "*[W]hat matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it*."[96]

116.3. The rationale for costs being treated differently in constitutional litigation was that—

> *"constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar*

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92 *Minister of Police v Kunjana* [2016] ZACC 21 para 43 (citing *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488; *Payen Components South Africa Ltd v Bovic Gaskets CC* 1999 (2) SA 409 (W) at 417D).

93 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

94 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 12.

95 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 16.

96 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 20.

> *situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy… [I]t is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.*"[97]

117. Read together, these principles suggest that an *amicus* may be awarded costs in instances where its submissions:

117.1. promote the advancement of constitutional justice;

117.2. assist a court to come to a proper conclusion and thus enrich the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy;

117.3. ensures that the law and the State's conduct are in line with the Constitution.

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97 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 23.

118. The latter two reasons accord with the State's duty under section 165(4) of the Constitution to "*assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts*".

119. Even though an *amicus* in not "*generally entitled to be awarded costs*"[98] our courts have indeed awarded an *amicus* its costs where:

119.1. The *amicus'* arguments were "*of great value*" in dealing with a case and its legal submissions provided "*valuable insight*".[99]

119.2. A party has "*unreasonably*" opposed the admission of an *amicus*.[100]

120. This Court is empowered to make such a costs award in terms of its power in section 172 of the Constitution to "*make any order that is just and equitable*" in a constitutional matter.

121. When the High Court awarded costs in favour of SALC, it exercised a true discretion. Accordingly, this Court's enquiry is not whether the High Court's decision to award costs was correct, but rather has the State shown that the High Court did not exercise its discretion judicially or that it did so based on an incorrect appreciation of the facts or incorrect principles of law.[101] The High

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98 *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para 63.

99 *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA) para 111. See also *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) para 52; *South African Human Rights Commission v Qwelane* 2018 (2) SA 149 (GJ) para 69.

100 *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) para 52.

101 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 29, quoting *Giddy NO v JC Barnard and Partners* 2007 (5) SA 525 (CC).

Court must have "*committed some 'demonstrable blunder' or reached an 'unjustifiable conclusion'.*"[102] If this Court is satisfied that the State has done so, then only may this Court interfere with the High Court's discretion in awarding costs to SALC and CALS.

122. In awarding SALC and the CALS its costs, the High Court acted within its discretion. In light of the above principles, a costs order may be awarded to an *amicus*.

CONCLUSION

123. It is respectfully submitted that in view of the foregoing submission, the President acted unconstitutionally in, first, participating in the 2011 Suspension; and second, in participating in the adoption and signing of the 2014 Protocol. The president failed to follow the prescribed amendment procedure in the Treaty in doing so. The cumulative effect of these two executive actions is the unjustifiable infringement of South African citizens' constitutional right to access an international court in the form of the Tribunal. In SALC's submission, the High Court's order should be confirmed.

Jatheen Bhima
Thai Scott
Counsel for SALC
Chambers, Sandton
03 August 2018

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102 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 31.

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